

21ST CENTURY CONFLICT: CAN THE LAW SURVIVE?

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[This commentary explores the pressures placed on the jus ad bellum, governing the resort to force by states, and the jus in bello, norms addressing how force may be applied during hostilities, by 21st century conflict. As to the former, the rise of transnational terrorism forced a sea change in the way states perceive and apply this sparse body of law. In particular, the jus ad bellum has proven flexible and responsive in the face of non-state actors mounting attacks of unprecedented scale and scope. By contrast, the increasing prevalence of asymmetrical warfare, especially that characterised by the technological supremacy of one of the parties to a conflict, has resulted in the weaker side adopting tactics that fly in the face of an inflexible jus in bello (international humanitarian law). Parties facing such tactics understandably begin to view it as a one-sided constraint. Exacerbating this dynamic is the 'bully syndrome', a tendency by the media, non-governmental organisations and others to hold, sometimes unintentionally, the technologically advantaged side to higher standards. Ultimately, there is a danger that states will begin to view application of the jus in bello as dependent on an opponent's relative compliance with jus ad bellum norms, thereby breaking down the impenetrable wall between the two bodies of law that has preserved them for the past century. Such views must be resisted.]

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Twenty-first century conflict is subjecting international law to ever-growing pressure. Unless this pressure is somehow relieved, or the law fortified, the legal regimes governing armed conflict risk losing much of their prescriptive influence over states and armed forces. Some commentators claim the pressure has already caused the normative superstructure to collapse, while others assert that it remains largely unshaken.¹ As is usually the case, the truth lies between the two extremes.

The international law regarding the use of force can be subdivided into the *jus ad bellum* and the *jus in bello*. The *jus ad bellum* addresses when states may employ force as an instrument of their national policy. It treats war as a clash

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¹ For an interesting exchange on the continued viability of international law restraints on the use of force, see Michael Glennon, 'Why the Security Council Failed' (2003) 82(3) *Foreign Affairs* 16; Edward C Luck, Anne-Marie Slaughter and Iain Hurd, 'Stayin' Alive: The Rumors of the UN's Death Have Been Exaggerated' (2003) 82(4) *Foreign Affairs* 201. See also Michael Glennon, 'The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the *United Nations Charter*' (2002) 25 *Harvard Journal of Law and Public Policy* 539.

between states acting to safeguard their rights and enforce their obligations. For instance, the *jus ad bellum* governs such topics as self-defence, United Nations Security Council mandates to act forcefully, and humanitarian intervention. Reduced to basics, the *jus ad bellum* delineates *when* states may turn to their armed forces in their international relations.

By contrast, the *jus in bello* sets norms for the conduct of military operations during armed conflict, including the protection of civilians, civilian objects and other protected entities. It humanises war by speaking to such issues as who and what may be targeted, how targeting may be executed, the weapons that may be used, how prisoners of war and other detainees must be treated, and the rights and obligations of occupying forces. Also labelled international humanitarian law, the law of war, or the law of armed conflict, the *jus in bello* governs *how* military operations may take place.

Whereas the *jus ad bellum* serves the interests of states *qua* states, the *jus in bello* safeguards the well-being of individuals (usually civilians), their property, and those who are *hors de combat*.² However, the fact that international law depends on the assent of states — either through a treaty regime or in the form of the state practice from which customary international law emerges — tempers this humanising dynamic. Simply put, states will reject prescriptive norms that excessively fetter their discretion during hostilities. As a result, *jus in bello* norms reflect a delicate balance between humanitarian concerns and military necessity. As noted in the *St Petersburg Declaration*, they fix ‘the technical limits at which the necessities of war ought to yield to the requirements of humanity’.³

It has long been accepted as holy gospel among international lawyers that these bodies of law do not intersect.⁴ In other words, the *jus in bello* applies equally to belligerents, whether they be *jus ad bellum* aggressors or victims. The

² *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (*Additional Protocol I*). Article 41(2) defines a person as *hors de combat* if:

2. ...
- (a) He is in the power of the adverse Party;
 - (b) He clearly expresses an intention to surrender; or
 - (c) He has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself: provided that in any of these cases he abstains from any hostile act and does not attempt to escape.

³ *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grams Weight*, opened for signature 29 November 1868, [1901] ATS 125, [1] (entered into force 11 December 1868) (*St Petersburg Declaration*).

⁴ However, this has not always been the case. By the *bellum justum* (just war) doctrine, it was to some extent permissible to deny those conducting a *bellum injustum* (unjust war) certain protections on the battlefield. On the development of the law governing conflict, see Stephen C Neff, *War and the Law of Nations: A General History* (2005). The classic contemporary work on the just war doctrine is Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (4th ed, 2006).

preamble to the 1977 *Additional Protocol I* to the 1949 *Geneva Conventions*⁵ codifies this distinction:

the provisions of the *Geneva Conventions* of 12 August 1949 and of this *Protocol* must be fully 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 to the conflict ...⁶

The existence of a seemingly impenetrable wall between these two distinct entities derives from both humanitarianism and practicality. As to the former, the *jus in bello* seeks to protect those who lack specific culpability in the decision to conduct war in violation of the *jus ad bellum* — the civilians and common soldiers who are at the mercy of their nation's political and military decision-makers. It recognises that war is merely a Clausewitzian continuation of politics by other means,⁷ and thereby seeks to limit violence to that which is necessary to achieve the ends sought, whether they are legitimate in *jus ad bellum* terms or not. The distinction is equally practical. Although an aggressor and victim necessarily exist in theory, both sides usually claim that the other is the malfasant. Thus, if the *jus in bello* applied only to safeguard the interests of the 'just' state, it would seldom be applied, since each side would paint the other as 'unjust'.

This contribution honouring the 10th anniversary of the Australian Red Cross Chair, held by my friend and colleague Professor Timothy McCormack, explores how evolutionary, perhaps even revolutionary, transformations in the nature of warfare are influencing both the *jus ad bellum* and the *jus in bello*. The analysis conceives of law as dynamic and reactive, constantly responding to the changing context in which it applies. As conflict evolves, so too must the law governing it.

The process of normative adjustment transpires in a number of ways. Occasionally, law anticipates changes in warfare through the adoption of pre-emptive treaties. An early and abortive example was the attempt to prohibit aerial bombing through a Declaration adopted during the 1899 First Hague Peace

⁵ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) ('*Geneva Convention I*'); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) ('*Geneva Convention II*'); *Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) ('*Geneva Convention III*'); *Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) ('*Geneva Convention IV*') (collectively, '*Geneva Conventions*').

⁶ *Additional Protocol I*, above n 2, preamble.

⁷ Carl von Clausewitz, *On War* (Michael Howard and Peter Paret trans and eds, 1984 ed) 69–70, 87–8, 605–10 [trans of: *Vom Kriege*].

Conference.⁸ The 1995 *Protocol on Blinding Laser Weapons* serves as the most recent example of law addressing a means of warfare in advance of its general fielding on the battlefield.⁹

Much more common is a *post factum* normative reaction to shifts in the nature of conflict. This occurs when warfare reveals fault lines in the law that the international community agrees need to be addressed. Indeed, in 1863 Geneva merchant Henri Dunant co-founded the International Committee of the Red Cross ('ICRC'), which sponsored the first international humanitarian law treaty the following year, after observing the carnage of the Battle of Solferino in 1859.¹⁰ The *Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949* serves as the paradigmatic example of reactive law. Today, it seems hard to imagine that no treaty specifically designed to protect the civilian population was adopted until after World War II. But although civilian populations had suffered in prior conflicts, the scale and scope of civilian suffering during the conflagration dwarfed that of prior conflicts. Nearly 47 million civilians died during the conflict, twice the military losses; hence, there was international consensus on the need for new law.¹¹

On the other hand, treaty law may fall into desuetude when a change in the nature of conflict renders it ill-fitting in contemporary warfare. Former White House Counsel Alberto Gonzales drew precisely this conclusion in his iniquitous 2002 memo to President Bush seeking rejection of Secretary of State Colin Powell's request for reconsideration of the decision not to apply *Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949* to

⁸ The Declaration banned for a term of five years, the launching of projectiles and explosives from balloons, or by other new methods of a similar nature in conflicts between parties: *Declaration Prohibiting Launching of Projectiles and Explosives from Balloons (Hague IV)*, opened for signature 29 July 1900, 1 Bevans 270 (entered into force 4 September 1900). The 1907 Hague Peace Conference revived the Declaration by extending it to the 'close of the Third Peace Conference': *International Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons (Hague XIV)*, opened for signature 18 October 1907, [1907] ATS 14, [3] (entered into force 27 November 1909). As a result of the outbreak of World War I, the Third Conference never took place.

⁹ *Additional Protocol IV to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects*, adopted 13 October 1995, UN Doc CCW/CONF.I/16, Annex A (entered into force 30 July 1998) ('*Protocol on Blinding Laser Weapons*').

¹⁰ Dunant subsequently described the battle in *A Memory of Solferino* (first published 1862, 1986 ed). The book captured the attention of Europe and led to the formation of the ICRC. The first treaty was the *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*, opened for signature 22 August 1864, 129 Consol TS 362 (entered into force 22 June 1865).

¹¹ States signed and ratified *Geneva Convention III* at a theretofore unprecedented pace. Today there are 194 parties to the instrument. For dates of signature, ratification and accession, see ICRC, *State Parties to the Following International Humanitarian Law and Other Related Treaties as of 12-Oct-2007* (2007), available from <<http://www.icrc.org/ihl>> at 18 October 2007.

captured al Qaeda and Taliban prisoners.¹²

As you have said, the war against terrorism is a new kind of war. It is not the traditional clash between nations adhering to the laws of war that formed the backdrop for GPW [*Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949*]. The nature of the new war places a high premium on other factors, such as the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities against American civilians, and the need to try terrorists for war crimes, such as wantonly killing civilians. In my judgment, this new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions requiring that captured enemy be afforded such things as commissary privileges, scrip (ie, advances of monthly pay), athletic uniforms, and scientific instruments.¹³

The leaked memo created an international brouhaha, an understandable reaction to characterising interrogation restrictions as 'obsolete'. However, Gonzales' point was not entirely off-base. To some extent, certain provisions are out of step with modern realities of detention. Article 60, for instance, provides that captured soldiers shall receive eight Swiss francs (A\$13) monthly unless 'unduly high compared with the pay of the Detaining Power's armed forces or would, for any reason, seriously embarrass the Detaining Power'.¹⁴ The memo reflected the reality that calls for the demise of a norm naturally surface when it no longer neatly fits the context of warfare.

International law most commonly responds to conflict through state practice. Practice constitutes an 'operational code' that may belie a previously accepted interpretation, or even the plain text, of a treaty provision.¹⁵ Whatever the law might be on paper, it is the way states implement it that matters in international intercourse. One such 'reinterpretation' through state practice deals with the applicability of the law of self-defence to transnational terrorism, a subject explored below. In addition, state practice that has become 'general' and which

¹² Powell argued for a case-by-case determination mandated in cases of doubt by the *Geneva Convention III*, above n 5. See also Katherine Seelye, 'Powell Asks Bush to Review Stand on War Captives', *The New York Times* (New York City, US) 27 January 2002, 1; William Safire, 'Colin Powell Dissents', *The New York Times* (New York City, US) 28 January 2002, 15.

¹³ Draft Memorandum from Alberto Gonzales, White House Counsel, to George W Bush, US President, 'Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban' (25 January 2002), reprinted in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005) 118, 119 ('Draft Memorandum from Alberto Gonzales'). On the memorandum, see Sean Murphy, 'Executive Branch Memoranda on Status and Permissible Treatment of Detainees' (2004) 98 *American Journal of International Law* 820.

¹⁴ *Geneva Convention III*, above n 5, art 60.

¹⁵ The operational code is the unofficial but actual normative system governing international actions. It is discerned in part by observing the behaviour of international elites. An operational code contrasts with a 'myth system', that is, the law that according to such elites purportedly applies. On the distinction, see W Michael Reisman and James Baker, *Regulating Covert Action: Practices, Contexts and Policies of Covert Action Abroad in International and American Law* (1992) 23-4; W Michael Reisman, *Jurisprudence: Understanding and Shaping Law* (1987) 23-35; Michael N Schmitt, 'The Resort to Force in International Law: Reflections on Positivist and Contextual Approaches' (1994) 37 *Air Force Law Review* 105, 112-19.

evidences *opinio juris sive necessitatis* can cause previously established customary norms to evolve and new customary norms to materialise.¹⁶

This commentary explores how modern conflict has, and might further, impel the law governing the use of force to react in one of the aforementioned ways. With regard to the *jus ad bellum*, the major contemporary ‘stressor’ on the law is undoubtedly the phenomenon of transnational terrorism. The events of September 11 took terrorism to an unprecedented height of lethality, thereby shocking the international nervous system into embracing a new perspective on such events, one moving beyond the traditional law enforcement paradigm. As to the *jus in bello*, asymmetry appears to have placed the greatest stress on the relevant norms. Classically, states viewed international humanitarian law norms as neutral — in theory, they constrain and protect the belligerents equally. Asymmetry throws off this balance, for in an asymmetrical fight norms may augur in favour of one of the belligerents.

The impact of these two forces on the law has perniciously drawn the strict divide between the *jus ad bellum* and *jus in bello* into question. A collapse of the void between them would represent the most significant change in the law governing the use of force in well over a century.

I TRANSNATIONAL TERRORISM AND THE *JUS AD BELLUM*

The most fundamental right of a state is to defend itself from attack.¹⁷ Article 51 of the *Charter of the United Nations* codifies this customary international law norm:

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.

It is the *sine qua non* facet of the *jus ad bellum*.

Until recently, mainstream international law viewed the right as based in inter-state relations. Self-defence allowed one state to protect itself against armed attack by another. Violence directed by non-state actors against the state, its

¹⁶ *Statute of the International Court of Justice* art 38(1)(b) (*ICJ Statute*): ‘A belief that this practice is rendered obligatory by the existence of a rule of law requiring it’. In the words of the ICJ in the *North Sea Continental Shelf Case*:

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, ie, the existence of a subjective element, is implicit in the very notion of the *opinio iuris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.

North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v the Netherlands) (Judgment) [1969] ICJ Rep 3, 44. See also *Continental Shelf (Libyan Arab Jamahiriya v Malta) (Judgment)* [1985] ICJ Rep 13, 29: customary law is ‘looked for primarily in the actual practice and *opinio juris* of States’. For an excellent summary of the nature and sources of customary international humanitarian law, see Jean-Marie Henckaerts, ‘Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict’ (2005) 857 *International Review of the Red Cross* 175.

¹⁷ The ICJ labelled the right ‘fundamental’ in the *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 263 (*‘Nuclear Weapons’*).

citizens or their property fell within the purview of criminal law.¹⁸ Indeed, when states responded militarily against terrorists located outside their borders, criticism often followed. Consider Operation El Dorado Canyon, the 1986 US air strikes against Libyan-based terrorist targets in response to the bombing of a Berlin discothèque frequented by US military personnel. The UN General Assembly ‘condemned’ the operation as ‘a violation of the *Charter of the United Nations* and international law’, a view echoed by Secretary-General Javier Perez de Cueller.¹⁹ Far from an exercise of the right of self-defence pursuant to art 51, most of the international community deemed the operation a violation of art 2(4)’s prohibition on ‘the threat or use of force against the territorial integrity or political independence of any state’. In the then prevailing normative paradigm, terrorist attacks constituted criminal acts, not ‘armed attacks’. That paradigm would change radically in 2001.

To be lawful, defensive responses to armed attacks have traditionally had to comport with three criteria: necessity, proportionality and immediacy. The International Court of Justice has repeatedly recognised the first two as customary.²⁰ The third derives directly from the 19th century *Caroline* incident and the ensuing exchange of diplomatic notes between the US and the United Kingdom.²¹

¹⁸ See, eg, Antonio Cassese, *Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law*, European Journal of International Law Discussion Forum <http://www.ejil.org/forum_WTC/ny-cassese-01.html> at 18 October 2007. See also Giorgio Gaja, *In What Sense Was There an Armed Attack?*, European Journal of International Law Discussion Forum <http://www.ejil.org/forum_WTC/ny-gaja.html> at 18 October 2007. For a traditional view, see Oscar Schachter, ‘The Lawful Use of Force by a State against Terrorists in Another Country’ (1989) 19 *Israel Yearbook on Human Rights* 209, 216.

¹⁹ *Declaration of the Assembly of Heads of State and Government of the Organization of African Unity on the Aerial and Naval Military Attack against the Socialist People’s Libyan Arab Jamahiriya by the Present United States Administration*, GA Res 38, UN GAOR, 41st sess, 78th plen mtg, UN Doc A/RES/41/38 (20 November 1986); Elaine Sciolino, ‘Attack on Libya: The View from Capital Hill, US Defends Raid before UN Body’, *The New York Times* (New York City, US) 16 April 1986, 17. Note that the targets included Libyan Government facilities, a fact that no doubt added to international outrage.

²⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep 14, 103 (‘*Nicaragua*’); *Nuclear Weapons* [1996] ICJ Rep 226, 245; *Oil Platforms (Iran v US) (Merits)* [2003] ICJ Rep 161, 187. See also International Military Tribunal (Nuremberg), Judgment and Sentences, reprinted in Lawrence Egbert, ‘Judicial Decisions’ (1947) 41 *American Journal of International Law* 172, 219–23; *Restatement (Third) of the Foreign Relations Law of the United States* § 905 (1987).

²¹ The 1837 incident involved the *Caroline*, a vessel used to supply Canadian rebels fighting British rule during the Mackenzie Rebellion. British forces crossed into the US (after asking the US, without result, to put an end to rebel activities on its territory), captured the *Caroline*, set it ablaze and sent it over Niagara Falls. Two US citizens perished. In the subsequent diplomatic exchange, US Secretary of State, Daniel Webster, without objection from the UK, opined that the ‘necessity of self-defence’ must be ‘instant, overwhelming, leaving no moment for deliberation’: *Caroline Case (Exchange of Diplomatic Notes between the United Kingdom of Great Britain and Ireland and the United States of America)*, Letter from Mr Webster to Mr Fox (24 April 1841) (1841–42) 29 *British and Foreign State Papers* 1129, 1138. The *Caroline* incident is also accepted as the source of the necessity and proportionality criteria. For more on the *Caroline Case*, see Martin Rogoff and Edward Collins, ‘The *Caroline* Incident and the Development of International Law’ (1990) 16 *Brooklyn Journal of International Law* 493.

Necessity requires that there be no viable option other than force to deter or defeat an imminent armed attack. Proportionality, by contrast, limits the degree of defensive force employed to that reasonably required to foil an anticipated armed attack or defeat an ongoing one. Thus, necessity mandates the consideration of non-forceful measures as alternatives to forceful ones, whereas proportionality requires a reasonable relationship between the defensive measures actually used and those objectively required to defend against the armed attack.

An additional self-defence criterion is immediacy. Since an armed attack that is underway obviously merits a response, the criterion bears only on either anticipatory or *ex post facto* defensive actions. In the past, immediacy referred to temporal proximity to the anticipated armed attack, as reflected in the *Caroline* standard of an attack that is 'instant, overwhelming, leaving no moment for deliberation'.²² Such an approach made sense vis-à-vis classic warfare because it maximised the opportunity for diplomacy and other non-forceful measures to avert war. In a similar vein, immediacy precluded a defensive response that occurred long after an armed attack, for the hiatus since the last military action signalled an opportunity to turn back to diplomacy and other non-forceful options.

The locus of defensive action under traditional notions of self-defence was typically one's own territory, that of the state conducting the attack, or the high seas. Since states carried out armed attacks, the occasion to launch defensive operations into a third state's territory seldom presented itself, unless the third state opened the door, for instance, by allowing its territory to be used as a base of operations.

Even state sponsorship of an attack often did not merit an armed response against the sponsor. The law imposed an extremely high standard for treating a third state as having conducted an armed attack carried out by a group other than its armed forces. In 1986, the ICJ articulated this standard in its *Nicaragua* judgment:

the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. But the Court does not believe that the concept of 'armed attack' includes not only acts by armed bands where such acts occur on a *significant scale* but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States.²³

Essentially, the Court recognised two requirements for state sponsorship to constitute an 'armed attack': that the forces conducting the operation are acting as agents of the state against whom the defensive action is launched; and that it be sufficiently grave.

²² *Caroline Case (Exchange of Diplomatic Notes between the United Kingdom of Great Britain and Ireland and the United States of America)*, Letter from Mr Webster to Mr Fox (24 April 1841) (1841-42) 29 *British and Foreign State Papers* 1129, 1138.

²³ *Nicaragua* [1986] ICJ Rep 14, 103-4 (emphasis added).

The four attacks mounted by al Qaeda on September 11 2001 dramatically changed the context within which this well-settled law operated. Although the attacks were carried out by a non-state actor, it was difficult to fathom how a law enforcement response alone could suffice. The number of civilian deaths approximated the military losses during the 7 December 1941 Japanese attack on Pearl Harbor, etched in the US collective conscious as ‘a date which will live in infamy’.²⁴ The culprits operated from Afghanistan, then ruled by the Taliban, a government recognised by only three states.²⁵ Further, the Taliban had ignored repeated Security Council demands to eradicate the al Qaeda presence.²⁶ It would have been absurd to expect Taliban assistance in conducting law enforcement operations to bring the terrorists to trial. Finally, future attacks were a near certainty. Al Qaeda had struck at the US before (although never on US soil)²⁷ and Osama bin Laden had called ‘on every Muslim who believes in God and wishes to be rewarded to comply with God’s order to kill Americans’.²⁸ More fundamentally, as a terrorist organisation dedicated to striking at, inter alia, the US, the mere existence of al Qaeda attested to its intent to mount more attacks.

Although the ‘9/11’ attacks had targeted the US, the international community quickly recognised that transnational terrorism posed a threat that was universal and exceptionally deadly.²⁹ It likewise recognised that the normative architecture governing the use of force by non-state actors was ill-equipped to deal with the new threat.³⁰ A normative reassessment was inevitable.

²⁴ President Franklin D Roosevelt, ‘Day of Infamy’ (Speech delivered at the Joint Session of Congress, Washington DC, US, 8 December 1941).

²⁵ These were the United Arab Emirates, Saudi Arabia and Pakistan.

²⁶ *Resolution 1193*, SC Res 1193, UN SCOR, 53rd sess, 3921st mtg, UN Doc S/RES/1193 (28 August 1998); *Resolution 1214*, SC Res 1214, UN SCOR, 53rd sess, 3952nd mtg, UN Doc S/RES/1214 (8 December 1998); *Resolution 1267*, SC Res 1267, UN SCOR, 54th sess, 4051st mtg, UN Doc S/RES/1267 (15 October 1999); *Resolution 1333*, SC Res 1333, UN SCOR, 55th sess, 4251st mtg, UN Doc S/RES/1333 (19 December 2000); *Resolution 1363*, SC Res 1363, UN SCOR, 56th sess, 4352nd mtg, UN Doc S/RES/1363 (30 July 2001).

²⁷ The organisation was behind the 1998 bombings of the US embassies in Kenya and Tanzania (attacks for which Osama bin Laden has been indicted), and the attack on the *USS Cole* in 2000. The group had (falsely) claimed responsibility for the 1993 attack on US Special Forces in Somalia. They also claimed responsibility for three separate 1992 bombings intended to kill US military personnel in Yemen. Moreover, the US Department of State alleges the existence of al Qaeda ties to plots (not executed) to kill the Pope, attack tourists visiting Jordan during the millennium celebration, bomb US and Israeli embassies in various Asian capitals, blow up a dozen passenger aircraft while in flight and assassinate President Clinton: Indictment, *US v Hage et al* (Superseding Indictment) S(2) 98 Cr 1023 (LBS), US Attorney, Southern District of New York, 4 November 1998; US Department of State, *Patterns of Global Terrorism 2000 Appendix B: Background Information on Terrorist Groups* (2001) <<http://www.state.gov/s/ct/rls/crt/2000>> at 18 October 2007; US Department of State, *Country Reports on Terrorism 2005* (2006) <<http://www.state.gov/documents/organization/65463.pdf>> at 18 October 2007; Audrey Cronin et al, *Foreign Terrorist Organizations* (Congressional Research Service Report, 6 February 2004).

²⁸ UK Government, ‘Responsibility for the Terrorist Atrocities in the United States, 11 September 2001 — An Updated Account’ (Press Release, 4 October 2001) 21–2 <<http://www.number-10.gov.uk/output/page3682.asp>> at 18 October 2007.

²⁹ UN Secretary-General, *A More Secure World: Our Shared Responsibility*, UN GAOR, 59th sess, Agenda Item 55, UN Doc A/59/565 (2 December 2004) [146] (‘*A More Secure World*’).

³⁰ *Ibid* [159].

That reassessment began the very day after the attacks with the Security Council's adoption of *Resolution 1368*, which recognised the right of individual and collective self-defence in the matter.³¹ Two weeks later, the Security Council again recognised the right in a second resolution.³² This indicated that the characterisation of the attacks on 12 September as activating the right to self-defence amounted to more than merely an emotive response to the carnage of the previous day. Regional security organisations such as NATO and the Organization of American States likewise treated the attacks as meriting self-defence under art 51 of the *UN Charter*, which provides the legal basis for their collective security roles.³³ Australia cited art IV of the *ANZUS Treaty* in offering to deploy its armed forces.³⁴ On the bilateral level, scores of states, including Russia and China, offered practical support, while 46 issued declarations of support.³⁵

The US, UK and Australian forces responded on 7 October 2001 with Operation Enduring Freedom, striking against both al Qaeda and the Taliban targets. The international community unequivocally treated the response as based on the law of self-defence. For instance, the Security Council adopted multiple resolutions reaffirming *Resolutions 1368* and *1373* after 7 October.³⁶ Australia, Canada, the Czech Republic, Germany, Italy, Japan, the Netherlands, New Zealand, Turkey and the UK provided ground troops, whereas many other states, including Georgia, Oman, Pakistan, the Philippines, Qatar, Saudi Arabia, Tajikistan, Turkey and Uzbekistan, provided airspace and facilities. China, Egypt, Russia and the European Union publicly backed the combat operations.³⁷ It appeared clear that the operational code now extended the right to self-defence to armed attacks by non-state actors.

The text of art 51 of the *UN Charter* seems to leave open that possibility in that it makes no reference to states as the source of the 'armed attack'.

³¹ SC Res 1368, UN SCOR, 56th sess, 4370th mtg, UN Doc S/RES/1368 (12 September 2001).

³² *Resolution 1373*, SC Res 1373, UN SCOR, 56th sess, 4385th mtg, UN Doc S/RES/1373 (28 September 2001).

³³ NATO, 'Statement by the North Atlantic Council' (Press Release, 12 September 2001) <<http://www.nato.int/docu/pr/2001/p01-124e.htm>> at 18 October 2007; Organization of American States, *Terrorist Threat to the Americas*, Twenty-Fourth Meeting of Consultation of Ministers of Foreign Affairs, OEA/Ser.F/II.24 (21 September 2001).

³⁴ John Howard, Prime Minister of Australia, 'Government Invokes ANZUS Treaty' (Press Conference, 14 September 2001) <<http://www.australianpolitics.com/news/2001/01-09-14c.shtml>> at 18 October 2007. See also US Department of State, *Operation Enduring Freedom Overview* (White House Fact Sheet, 1 October 2001) <www.state.gov/s/ct/rls/fs/2001/5194.htm> at 18 October 2007. Article IV of the *ANZUS Treaty* provides that '[e]ach Party recognizes that an armed attack in the Pacific Area on any of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes': *Security Treaty between Australia, New Zealand and the United States of America (ANZUS)*, opened for signature 1 September 1951, 131 UNTS 83 (entered into force 29 April 1952) ('*ANZUS Treaty*').

³⁵ See *Operation Enduring Freedom Overview*, above n 34.

³⁶ See, eg, *Resolution 1378*, SC Res 1378, UN SCOR, 56th sess, 4415th mtg, UN Doc S/RES/1378 (14 November 2001); *Resolution 1386*, SC Res 1386, UN SCOR, 56th sess, 4443rd mtg, UN Doc S/RES/1386 (20 December 2001); *Resolution 1390*, SC Res 1390, UN SCOR, 57th sess, 4452nd mtg, UN Doc S/RES/1390 (16 January 2002).

³⁷ Sean Murphy, 'Terrorism and the Concept of "Armed Attack" in Article 51 of the *UN Charter*' (2002) 43 *Harvard International Law Journal* 41, 49; Sean Murphy, 'Contemporary Practice of the United States relating to International Law' (2002) 96 *American Journal of International Law* 237, 248.

However, in July 2004 the ICJ issued its *Israeli Wall* advisory opinion,³⁸ which held that because Israel failed to aver that a foreign state was behind the terrorist attacks that the wall was designed to prevent, art 51 did not apply.³⁹ In other words, the law of self-defence required an armed attack by a state or its de facto agent as a condition precedent to its application. As Judges Higgins, Kooijmans and Buergenthal correctly pointed out, the opinion ignored recent state practice, especially as reflected in the Security Council resolutions.⁴⁰

The Court's opinion has not gained much traction. A report issued by the Secretary-General's High-Level Panel on Threats, Challenges and Change in December of the same year, for example, used 'terrorists armed with a nuclear weapon' as the sole illustration in its discussion of art 51.⁴¹ Then, when Israel launched Operation Change Direction in July 2006 to counter Hezbollah attacks, the international community generally appeared to accept Israel's right to act in self-defence. For instance, Secretary-General Kofi Annan, speaking as the conflict was underway, stated that he had 'already condemned Hezbollah's attacks on Israel and acknowledged Israel's right to defend itself under art 51 of the *United Nations Charter*'.⁴² True, he and many others criticised aspects of the Israeli defensive action, such as compliance with the proportionality principle. But as to the issue of whether Israel could act in self-defence against a non-state actor like Hezbollah, the prevailing view was that it could so long as the necessity, proportionality and immediacy criteria were respected.

The *jus ad bellum* has further responded to this new form of conflict — deadly transnational terrorism — with respect to self-defence's temporal component. In a conflict in which the enemy can strike catastrophically without warning, the 'enemies at the gate' premise of the *Caroline Case* formula no longer makes sense. As President Bush noted in the 2002 US *National Security Strategy*:

We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction — weapons that can be easily concealed, delivered covertly, and used without warning.

The greater the threat, the greater is the risk of inaction — and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.⁴³

³⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 ('*Israeli Wall*').

³⁹ *Ibid* 194.

⁴⁰ *Ibid* 215 (Separate Opinion of Judge Higgins); 229–30 (Separate Opinion of Judge Kooijmans); 242–3 (Separate Opinion of Judge Buergenthal).

⁴¹ *A More Secure World*, above n 29, [189].

⁴² UN Secretary-General, *Agenda: The Situation in the Middle East*, UN SCOR, 61st sess, 5492nd mtg, UN Doc S/PV.5492 (20 July 2006) 3.

⁴³ National Security Council (US), *The National Security Strategy of the United States of America* (2002) 15 <<http://www.whitehouse.gov/nsc/nss/2002/nss.pdf>> at 18 October 2007.

Current US *National Security*,⁴⁴ *National Defense*⁴⁵ and *National Military Strategies*⁴⁶ reaffirm the pre-emption doctrine.

The negative reactions to the President's remarks were visceral and exaggerated. Mischaracterisation of Operation Iraqi Freedom as a pre-emptive strike on Iraq exacerbated matters.⁴⁷ In fact, the doctrine did not suggest the US should act outside the law of self-defence. Rather, it adapted existing law to the context in which it is to apply, a common phenomenon in international law. Adaptation is entirely appropriate in this case, for states create international law to serve themselves and their values; it is not a jurisprudential suicide pact. To insist that a state may act anticipatorily only when a terrorist attack is just about to fall is incongruous when the first indication of attack may be the airliner crashing into the skyscraper or the explosion in a tourist nightclub.

In its report, the Secretary-General's High-Level Panel offered a balanced appraisal of the doctrine, one that likely represents the extant operational code.⁴⁸ For the Panel, the key to immediacy was not temporal proximity to the pending armed attack.⁴⁹ Instead, it astutely focused on the existence of options; should there be 'time to pursue other strategies, including persuasion, negotiation, deterrence and containment — and to visit again the military option', defensive action would be premature.⁵⁰ By this standard, acts of self-defence must occur only during the last feasible window of opportunity in the face of an attack that is almost certainly going to occur.⁵¹ This requires the confluence of an attacker's capability and intent to conduct an attack with a defender's last reasonable chance to foil an attack before it begins. Should an attack not meet these requirements, it would be unlawful preventive defence, rather than lawful pre-emptive defence. This approach represents a reasonable accommodation of the criterion of immediacy to counter-terrorism.

Another way the *ius ad bellum* has accommodated modern realities deals with the location of defensive operations. Before the advent of counter-terrorism as a form of self-defence, only states could launch 'armed attacks' in the legal sense. Attacks emanated from state A by state A against state B. State B could defend on its own territory or state A's. In this simple scenario, issues regarding the

⁴⁴ National Security Council (US), *The National Security Strategy of the United States of America* (2006) <<http://www.whitehouse.gov/nsc/nss/2006/nss2006.pdf>> at 18 October 2007.

⁴⁵ US Department of Defense, *The National Defense Strategy of the United States of America* (2005) <<http://www.defenselink.mil/news/Mar2005/d20050318nds1.pdf>> at 18 October 2007.

⁴⁶ US Department of Defense, *The National Military Strategy of the United States of America* (2004) <<http://www.defenselink.mil/news/Mar2005/d20050318nms.pdf>> at 18 October 2007.

⁴⁷ The official rationale was breach of ceasefire: see Permanent Representative of the US, *Letter Dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council*, UN Doc S/2003/351; Permanent Representative of the UK, *Letter Dated 20 March 2003 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council*, UN Doc S/2003/350.

⁴⁸ *A More Secure World*, above n 29, ch IX.

⁴⁹ *Ibid* [188].

⁵⁰ *Ibid* [190].

⁵¹ See Michael N Schmitt, 'Preemptive Strategies and International Law' (2003) 24 *Michigan Journal of International Law* 513.

territorial scope of self-defence rarely surfaced. With transnational terrorism, by contrast, the state from which terrorists strike or into which they flee may be wholly uninvolved in the incident. The context having shifted, so too has the law.

If the ‘sanctuary’ state can and will act effectively to foil future attacks, defensive actions against terrorists present in that state’s territory are impermissible absent sanctuary state consent. After all, territorial inviolability is one of the foundational principles of international law. Article 2(4) of the *UN Charter* codifies it as an aspect of the prohibition on the use of force.⁵² The ICJ has in turn labelled it a cornerstone of the *UN Charter*.⁵³

But what if a sanctuary state cannot or will not neutralise the terrorists who are attacking the ‘victim’ state, which enjoys the very weighty right of self-defence? Complementing the victim state’s right to self-defence is the sanctuary state’s duty to ensure its territory is not used to the detriment of others.⁵⁴ As noted by John Basset Moore in the 1927 Permanent Court of International Justice *Lotus Case*, ‘[i]t is well settled that a State is bound to use due diligence to prevent the commission within its dominion of criminal acts against another nation or its people’.⁵⁵ The Security Council has addressed the duty in the context of terrorism, most directly in *Resolution 1373*, which requires states to

[t]ake the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information; [d]eny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens; and [p]revent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or other citizens.⁵⁶

⁵² See also *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, GA Res 2625 (XXV), UN GAOR, 25th sess, 1883rd plen mtg, UN Doc A/RES/2625 (XXV) (24 October 1970) (*Friendly Relations and Co-operation Declaration*). This Declaration was adopted by acclamation, and states that:

Every State has a duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. Such a threat or use of force constitutes a violation of international law and the *Charter of the United Nations* and shall never be employed as a means of settling international issues.

⁵³ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ [148] <<http://www.icj-cij.org>> at 18 October 2007.

⁵⁴ *SS Lotus (France v Turkey) (Judgment)* [1927] PCIJ (Ser A) No 9 (*‘Lotus Case’*).

⁵⁵ *Ibid* 77 (Moore J dissenting on other grounds). In support, Moore J cited *US v Arjona*, 120 US 479 (1887). See also the ICJ’s first case which highlighted both the duty to police one’s own territory and the conditional nature of the right of territorial integrity: *Corfu Channel (UK v Albania) (Merits)* [1949] ICJ Rep 4.

⁵⁶ *Resolution 1373*, above n 32, 2. Numerous soft law instruments also apply the duty directly to situations involving terrorism: see, eg, ‘Draft Code of Offences against the Peace and Security of Mankind’ [1954] *Yearbook of the International Law Commission*, vol II, UN Doc A/2673, 150; *Friendly Relations and Co-operation Declaration*, above n 52; *Measures to Eliminate International Terrorism*, GA Res 49/60, UN GAOR, 49th sess, 84th plen mtg, UN Doc A/RES/49/60 (9 December 1994).

When international legal rights collide, a fair accommodation of the generative purposes of each must be sought. In this situation, such an accommodation would first require the victim state to demand that the sanctuary state police its territory. Recent state practice supports this requirement as part of the operational code.⁵⁷ Three years of Security Council pre-9/11 exhortations for the Taliban to cooperate in eradicating the al Qaeda presence in Afghanistan, as well as post-9/11 US demands, preceded Operation Enduring Freedom.⁵⁸ Security Council and Israeli demands that the Lebanese armed forces move south into territory from which Hezbollah was attacking Israel likewise preceded Operation Change Direction.⁵⁹ Only when the Taliban and Hezbollah failed to comply did the US-led Coalition, in the former case, and the Israel Defense Force, in the latter, strike back defensively. Once in the country, the counter-terrorism force must respect the sovereignty of the state in which it is operating both by doing nothing beyond that required to end, deter or defeat the terrorists and by withdrawing as soon as the mission is complete.

A final way in which the law may be accommodating 21st century conflict involves state sponsorship. As noted, the ICJ's *Nicaragua* decision required a very close relationship between a terrorist group and its state sponsor before defensive action can be taken against a state sponsor. Moreover, recall the condemnation of Operation El Dorado Canyon, which included attacks on Libyan Government facilities.⁶⁰ Yet, when Coalition forces struck the Taliban on 7 October, the operations received universal acceptance. The US justified its

⁵⁷ Indeed, in the *Caroline* incident, the British Government repeatedly asked the US to put an end to use of its territory by insurgents. Only when the US failed to act did British forces cross into the US to capture and destroy the ship, which was used to support the rebels: *Caroline Case (Exchange of Diplomatic Notes between the United Kingdom of Great Britain and Ireland and the United States of America)*, Letter from Mr Webster to Mr Fox (24 April 1841) (1841-42) 29 *British and Foreign State Papers* 1129, 1138.

⁵⁸ *Resolution 1193*, above n 26; *Resolution 1214*, above n 26; *Resolution 1267*, above n 26; *Resolution 1333*, above n 26; *Resolution 1363*, above n 26; George W Bush, US President, 'Address before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11' (Address delivered at Joint Session of Congress, 20 September 2001) 37(38) *Weekly Compilation of Presidential Documents* 1347, 1347; George W Bush, US President, 'Radio Address' (Address delivered from the Cabinet Room at the White House, 6 October 2001) 37(41) *Weekly Compilation of Presidential Documents* 1429, 1430.

⁵⁹ See *Resolution 1680*, SC Res 1680, UN SCOR, 61st sess, 5540th mtg, UN Doc S/RES/1680 (17 May 2006); *Resolution 1655*, SC Res 1655, UN SCOR, 61st sess, 5362nd mtg, UN Doc S/RES/1655 (31 January 2006); *Resolution 1583*, SC Res 1583, UN SCOR, 60th sess, 5117th mtg, UN Doc S/RES/1583 (28 January 2005); *Resolution 1559*, SC Res 1559, UN SCOR, 59th sess, 5028th mtg, UN Doc S/RES/1559 (2 September 2004); *Resolution 1310*, SC Res 1310, UN SCOR, 55th sess, 4177th mtg, UN Doc S/RES/1310 (27 July 2000).

⁶⁰ Libyan leader Muammar el Qadhafi had openly praised terrorist actions. Additionally, before it attacked, the US intercepted communications to the Libyan People's Bureau in West Berlin containing an order to attack Americans. Additional communications intercepts immediately preceding and following the discothèque bombing presented further evidence of Libyan complicity: Marian Nash Leich, 'Contemporary Practice of the United States relating to International Law' (1986) 80 *American Journal of International Law* 612, 633; Gregory Intoccia, 'American Bombing of Libya: An International Legal Analysis' (1987) 19 *Case Western Reserve Journal of International Law* 177; Jeffrey McCredie, 'The April 14, 1986 Bombing of Libya: Act of Self-Defense or Reprisal?' (1987) 19 *Case Western Reserve Journal of International Law* 215; David Turndorf, 'The US Raid on Libya: A Forceful Response to Terrorism' (1988) 14 *Brooklyn Journal of International Law* 187.

attacks on the Taliban by asserting that

[t]he attacks of September 11 2001 and the ongoing threat to the United States and its nationals posed by the Al Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation. Despite every effort by the United States and the international community, the Taliban regime has refused to change its policy.⁶¹

No assertion was made that al Qaeda had acted on behalf of the Taliban or that the Taliban were directly involved in any past or future attacks. Indeed, less state support was involved in this case than either the Nicaragua or Libya incidents.

Not a whisper of criticism ensued. There are two possible explanations. On the one hand, the Taliban seemed villains 'out of central casting'. Vilified globally for their human rights abuses,⁶² the international community might simply have turned a blind eye to their welcome ouster. On the other, the non-reaction might be a preliminary indication of an emerging operational code as to when state sponsorship of terrorism rises to the level of an 'armed attack'. The US has certainly adopted the position that merely providing sanctuary to terrorists suffices to meet the threshold. For example, its 2006 *National Strategy for Combating Terrorism* proclaimed that the US 'and its allies and partners in the War on Terror make no distinction between those who commit acts of terror and those who support and harbor terrorists'.⁶³

One recent indication of hesitancy about lowering the threshold of state sponsorship too far came (albeit in the context of state responsibility, not 'armed attack') with the ICJ's 2007 judgment in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*.⁶⁴ There the Court held firm to its *Nicaragua* standard, finding that

persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in 'complete dependence' on the State, of which they are ultimately merely the instrument. In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious.⁶⁵

⁶¹ Permanent Representative of the US, *Letter Dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council*, UN Doc S/2001/946.

⁶² See, eg, Amnesty International, *Afghanistan* (Amnesty International Report, 2001); Human Rights Watch, *Afghanistan* (Human Rights Watch World Report, 2000); Bureau of Democracy, Human Rights, and Labor, *Afghanistan* (US Department of State Report, 4 March 2002); UN Secretary-General, *The Situation in Afghanistan and its Implications for International Peace and Security*, UN Doc A/55/1028-S/2001/789 (17 August 2001).

⁶³ White House, *National Strategy for Combating Terrorism* (White House Report, September 2006) 15.

⁶⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ <<http://www.icj-cij.org>> at 18 October 2007.

⁶⁵ *Ibid* [392].

Applying this standard, the Court rejected assertions that the Federal Republic of Yugoslavia could not be held responsible for the massacre at Srebrenica.⁶⁶ It is however premature to gauge the effect of this decision on the operational code.

As should be apparent, the *jus ad bellum* has undergone rather dramatic shifts in response to the emergence of a new form of conflict — transnational terrorism — that it was not designed to address. It has proven adaptive for two reasons. In the first place, international law is state-centric. It emerges, fades away, or is reinterpreted only through the actions, and with the acquiescence, of states. Since transnational terrorism threatens most states, the obstacles to development of a consensus operational code are few. Only state sponsors of terrorism need be concerned about the current vector of the *jus ad bellum vis-à-vis* transnational terrorism.

In the second place, there is a paucity of black letter international law governing the *jus ad bellum*. The *UN Charter* contains but a single article on self-defence.⁶⁷ There are very few ICJ judgments addressing the right to self-defence, and those are either advisory opinions or contentious cases binding only on the parties before the Court.⁶⁸ Many of the instruments purporting to develop the *jus ad bellum* are merely soft law, the prime example being the *Resolution on the Definition of Aggression*.⁶⁹ Finally, to the extent the right is developed beyond art 51, said developments are customary in nature, and therefore not a source of unambiguous prescriptive effect. This overall lack of detail and precision in the law of self-defence allows great play in the operational code and permits it to move very quickly in one direction or another when confronted with general state consensus.

II ASYMMETRY AND THE *JUS IN BELLO*

A dramatically different situation holds with regard to the *jus in bello*. In the first place, no agreement exists as to the content of the law, either in terms of *lex lata* or *lex ferenda*. For instance, the most militarily powerful nation on earth, the US, is not party to *Additional Protocol I*, the only comprehensive codification of norms governing the conduct of hostilities.⁷⁰ India, Indonesia, Iran, Iraq, Israel and Pakistan, inter alia, join the US as non-parties.⁷¹ With the exception of the four 1949 *Geneva Conventions*, to which all states are party,

⁶⁶ Ibid [395].

⁶⁷ *UN Charter* art 51.

⁶⁸ *ICJ Statute* art 59.

⁶⁹ GA Res 3314 (XXIX), UN GAOR, 6th Comm, 29th sess, 2319th plen mtg, UN Doc A/RES/3314 (XXIX) (14 December 1974).

⁷⁰ Other treaties to which the US is not a party include: *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) ('*Rome Statute*'); *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction*, opened for signature 18 September 1997, 2056 UNTS 241 (entered into force 1 March 1999) ('*Ottawa Convention*'); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) ('*Additional Protocol II*').

⁷¹ For the current states parties status of international humanitarian law treaties, see ICRC, *State Parties to the Following International Humanitarian Law and Other Related Treaties* (ICRC Report, 22 August 2007).

other international humanitarian law instruments are similarly less than universally embraced.

Because the treaty obligations that bind states vary widely, in 1995 the ICRC launched a worldwide effort to identify customary norms applicable in armed conflict.⁷² The intent was to articulate an international humanitarian law baseline that binds every state. Released a decade later, the resulting three-volume opus, *Customary International Humanitarian Law*, contains 161 rules.⁷³ However, the study has not been met with universal acclaim.⁷⁴ The US, for instance, has formally notified the ICRC that it is

concerned about the methodology used to ascertain rules and about whether the authors have proffered sufficient facts and evidence to support those rules. Accordingly, [it] is not in a position to accept without further analysis the Study's conclusions that particular rules related to the laws and customs of war in fact reflect customary international law.⁷⁵

Thus, unlike the *jus ad bellum*, no consensus as to the content of the *jus in bello*, or the direction in which it should head, exists. Further, this body of law is extraordinarily detailed. The ICRC international humanitarian law treaty database, for instance, contains a hundred treaties and related documents.⁷⁶ Some include scores of provisions. Three of the key treaties — *Geneva Convention III*, *Geneva Convention IV* and *Additional Protocol I* each have well over a hundred individual articles.

This complexity, combined with the aforementioned lack of consensus on the law's content and its interpretation, renders the *jus in bello* exceedingly inflexible. Complicating matters is the fact, demonstrated by the ICRC's experience, that customary international law has proven an unsuitable vehicle for marking change. As a result, significant international humanitarian law transformation typically requires adoption of a new treaty. But even when that occurs, states may be slow to join the new treaty regime. For instance, with regard to the four international humanitarian law instruments adopted since

⁷² Henckaerts, above n 16, 176.

⁷³ ICRC, Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (2005).

⁷⁴ For instance, Chatham House and the British Institute of Humanitarian Law conducted a series of expert meetings to assess the study, in which the author was privileged to participate. Cambridge University Press will publish the associated papers as Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (2007) (forthcoming).

⁷⁵ Letter from John B Bellinger III, Legal Advisor, Department of State, and William J Haynes, General Counsel, US Department of Defense, to Dr Jakob Kellenberger, President of the ICRC, 3 November 2006 (copy on file with author).

⁷⁶ ICRC, *International Humanitarian Law — Treaties & Documents* <<http://www.icrc.org/ihl>> at 18 October 2007.

2000, the number of parties ranges from 13 to 116.⁷⁷ Furthermore, achieving consensus as to the application of even those treaty provisions on which everyone agrees can prove daunting. The ICRC and TMC Asser Institute, for example, have been sponsoring a series of ‘experts meetings’ regarding the notion of direct participation in hostilities.⁷⁸ While all participants accept the relevant treaty text, after four years of meetings significant differences remain over its interpretation.⁷⁹ At the end of the day, therefore, most law applicable in today’s conflicts was designed for yesterday’s.

Asymmetry arguably imposes the greatest stress on this rather inflexible normative environment. Of course, fighting asymmetrically has always been a preferred operational doctrine; it is in the very nature of warfare to seek strategies, tactics, and weapons that leverage one’s own strengths (positive asymmetry), exploit the enemy’s weaknesses (negative asymmetry), or both.⁸⁰ But the modern technology wielded by advanced states in the 21st century ‘battlespace’ gives them a colossal technological edge over their most likely opponents. Consider the disparity between the technological wherewithal of the US armed forces and either the Taliban in 2001 or the Iraqis in 2003.

⁷⁷ *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, opened for signature 25 May 2000, 2173 UNTS 236 (entered into force 12 February 2002); *Amendment to Article I of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects*, opened for signature 21 December 2001, 2260 UNTS 89 (entered into force 18 May 2004); *Additional Protocol V to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects*, 28 November 2003, UN Doc CCW/MSP/2003/3, [32]; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem*, opened for signature 8 December 2005, (2006) ATNIF 6 (not yet in force) (*‘Additional Protocol IIF’*). Number of parties as of 1 June 2007.

⁷⁸ *Additional Protocol I*, above n 2, art 51(3); *Additional Protocol II*, above n 70, art 13(3). On direct participation, see Michael N Schmitt, ‘Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees’ (2005) 5 *Chicago Journal of International Law* 511; Michael N Schmitt, ‘Direct Participation in Hostilities and 21st Century Armed Conflict’ in Horst Fischer et al (eds), *Crisis Management and Humanitarian Protection: In Honour of Dieter Fleck* (2004) 505 [trans of: *Krisensicherung und humanitärer Schutz: Festschrift für Dieter Fleck*].

⁷⁹ ICRC, *Direct Participation in Hostilities* (ICRC Report, 31 December 2005).

⁸⁰ Asymmetry has been usefully defined as

[a]cting, organizing, and thinking differently than opponents in order to maximize one’s own advantages, exploit an opponent’s weaknesses, attain the initiative, or gain greater freedom of action. It can be political-strategic, military-strategic, or a combination of these. It can entail different methods, technologies, values, organizations, time perspectives, or some combination of these. It can be short-term or long-term. It can be deliberate or by default. It can be discrete or pursued in conjunction with symmetric approaches. It can have both psychological and physical dimensions.

Steven Metz and Douglas V Johnson II, *Asymmetry and US Military Strategy: Definition, Background, and Strategic Concepts* (Strategic Studies Institute of the US War Army College Report, January 2001) (emphasis omitted). See also Stephen J Blank, *Rethinking Asymmetric Threats* (Strategic Studies Institute of the US War Army College Report, September 2003); Steven J Lambakis, ‘Reconsidering Asymmetric Warfare’ (2004) 36 *Joint Force Quarterly* 102; Montgomery Meigs, ‘Unorthodox Thoughts about Asymmetric Warfare’ (2003) 33(2) *Parameters* 4.

Moreover, the nature of technological advantage is shifting. In wars past, technological advantage expressed itself in systems with greater range, precision, mobility and firepower. While this construct remains valid, in contemporary warfare the key to combat often lies in gathering, processing and reacting to information — and keeping the enemy from doing the same. The goal is ‘getting inside the enemy’s OODA loop’ (observe the enemy, orient your forces, decide what to do, act).⁸¹ Performing these actions more quickly than the enemy eventually renders him purely reactive, thereby allowing you to control the flow, pace and direction of battle.

Advanced militaries possess phenomenal systems in this regard. Technology has overcome most of the obstacles that traditionally masked enemy activity — night, poor weather, range, terrain and intelligence processing and distribution times. Today, for instance, aircraft ‘see’ through clouds and into forests using laser detection systems,⁸² while unmanned aerial vehicles monitor enemy ground operations using mounted cameras.⁸³ Soldiers wear night vision goggles that pick up ambient light while fighting an enemy blinded by darkness and wear body armour impenetrable to a sniper’s bullet. Forces in contact can be tracked using laptop computers (Blue Force Tracker) that even have a chat room function, and weapons system precision is now measured in metres or less.⁸⁴

Such technology means that in a classic toe-to-toe fight, the technologically advantaged side will almost certainly win. The 2004 Battle of Fallujah is illustrative. Although the Iraqi insurgents enjoyed a positional advantage

⁸¹ Operating within an opponent’s OODA loop is a decision-making concept in which one party, maintaining constant situational awareness, assesses a situation and acts on it more rapidly than its opponent. When this happens, the opponent is forced into a reactive mode, thereby allowing the first party to seize and maintain the initiative. As the process proceeds, the opponent eventually begins to react to actions that no longer bear on the immediate situation. The resulting confusion causes paralysis. See John Boyd, 12 Manage, *OODA Loop* (2007) <http://www.12manage.com/methods_boyd_ooda_loop.html> at 18 October 2007.

⁸² Laser Radar uses laser beams reflected from potential targets to generate a virtual depiction of an object. See ‘Laser Radar (LADAR) Guidance System’ (2004) 4 *Defense Update: International Online Defense Magazine* <<http://www.defense-update.com/products/ladar.htm>> at 18 October 2007.

⁸³ In the battle of Fallujah, for example, the US Marine Corps relied heavily on the RQ-2 Pioneer Unmanned Aerial Vehicle to observe enemy positions and movements: Interview with senior USMC Officer involved in the operation (Garmisch-Partenkirchen, Germany, 6 June 2007).

⁸⁴ The two most frequently dropped guided weapons in Operation Iraqi Freedom were the GBU 12 laser-guided bomb and the GBU 32 Joint Direct Attack Munition (‘JDAM’). Their CEP (radius of a circle within which 50 per cent of the weapons will strike) is eight and 13 metres respectively. The JDAM is an unguided free fall bomb to which a guidance tail kit has been attached. It has an unclassified CEP of approximately 13 metres from as far away as 15 miles (an upgrade has improved accuracy to three metres) based on global positioning system (satellite) and inertial navigation system guidance. Global Security, *Military — Smart Weapons* (2006) <<http://www.globalsecurity.org/military/systems/munitions/smart.htm>> at 18 October 2007. Thirty per cent of the 19 948 guided munitions employed in Operation Iraqi Freedom were JDAMs: T Michael Moseley, *Operation Iraqi Freedom — By the Numbers: Assessment and Analysis Division* (Shaw Air Force Base SC: Combined Forces Air Component, Assessment and Analysis Division Report, 30 April 2003) 11.

(defending an urban area), well over a thousand died in the fighting compared to approximately 50 US Marines.⁸⁵

Since it will win, the advantaged side has little incentive to violate international humanitarian law. But the disadvantaged side faces two problems. Survival is the first. When an enemy can see at night or locate you through cell phone intercepts, rapidly vector forces towards you using secure communication, and kill you from such a distance that you die completely unaware you were even at risk, coming out to fight in the classic sense makes little sense. Even if you manage not to be killed, you must still find a way to get close enough to the enemy to kill them, for in traditional battle, defeat of the enemy's military paves the path to victory.

Violating international humanitarian law may offer a way to resolve both predicaments. Consider survival: in the contemporary asymmetrical battlespace, the tactic most likely to guarantee survival is preventing the enemy from locating and identifying you in the first place. Lawful means and methods of warfare exist to do so — encryption, camouflage, ruses, manoeuvrability, jamming, meaconing, forcing the fight into a more advantageous environment such as an urban area, and so forth.

Unfortunately, a highly logical technique is leveraging the international humanitarian law norms which safeguard civilians and civilian objects to your advantage.⁸⁶ Such tactics violate the principle of distinction codified in *Additional Protocol I*, art 48:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.⁸⁷

Specific prohibitions on attacking civilians, civilian objects, and specially protected individuals and objects, such as medical facilities and those who are *hors de combat*, operationalise the general principle.⁸⁸ They also forbid launching

⁸⁵ Interview with senior USMC Officer involved in the operation (Garmisch-Partenkirchen, Germany, 6 June 2007).

⁸⁶ On the moral dimensions of this practice, see Michael Skerker, 'Just War Criteria and the New Face of War: Human Shields, Manufactured Martyrs, and Little Boys with Stones' (2004) 3(1) *Journal of Military Ethics* 27. On the legal dimensions, see Michael N Schmitt, 'The Impact of High and Low-Tech Warfare on the Principle of Distinction' in Roberta Arnold and Pierre-Antoine Hildbrand (eds), *International Humanitarian Law and the 21st Century's Conflicts: Changes and Challenges* (2005) 169.

⁸⁷ The prescription is undoubtedly customary: see ICRC, Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law — Volume I: Rules* (2005) r 7.

⁸⁸ For specific prohibitions on attacking civilians and civilian objects, see *Additional Protocol I*, above n 2, arts 51(2), 52(1). The ICRC study suggests that the following are specially protected under customary international humanitarian law: medical and religious personnel and objects, humanitarian relief personnel and objects, journalists, protected zones, cultural property, works and installations containing dangerous forces, the natural environment and those who are *hors de combat* (wounded, sick, shipwrecked, those who have surrendered, prisoners of war): ICRC, *Customary International Humanitarian Law*, above n 87, pts II and V.

[a]n attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.⁸⁹

This is the *jus in bello* proportionality principle. Indeed, even an attacker striking a lawful target in an operation unlikely to cause excessive harm to civilians ('incidental injury') or civilian property ('collateral damage') must take 'precautions in attack' by doing 'everything feasible' to verify the target; taking 'all feasible precautions' when choosing weapons and tactics so as to minimise collateral damage and incidental injury; and selecting a target from among potential targets offering 'similar military advantage' with an eye towards avoiding collateral damage and incidental injury.⁹⁰

The Iraqis violated the principle of distinction regularly once they realised that engaging the Coalition directly was by and large suicidal. For instance, they donned civilian clothes to avoid being identified and killed.⁹¹ Although not technically a violation of international humanitarian law, the practice has a de facto effect of undercutting the principle's goal of minimising risk to the civilian population.⁹²

A plainly unlawful tactic Iraqis employed to keep from being identified was the use of human shields, also known as 'counter-targeting'.⁹³ In some cases, the shielding was 'passive' in that the Iraqi forces situated themselves near protected persons or places. However, there were numerous incidents involving 'active' shielding, that is, forcing civilians, including women and children, to act as shields.⁹⁴

⁸⁹ *Additional Protocol I*, above n 2, arts 51(5)(b), 57(2)(a)(iii), 57(2)(b). See also ICRC, *Customary International Humanitarian Law*, above n 87, r 14.

⁹⁰ *Additional Protocol I*, above n 2, art 57; ICRC, *Customary International Humanitarian Law*, above n 87, rr 15–21.

⁹¹ Human Rights Watch Report, *Off Target: The Conduct of the War and Civilian Casualties in Iraq* (December 2003) 78–9 ('*Off Target*').

⁹² Jean Pictet, *Commentary III: Geneva Convention relative to the Protection of Prisoners of War* (1960); Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) [1577]–[1578]. Despite *Additional Protocol I*'s pronouncement in art 44(3) that 'combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack', failure to do so is not a violation of international humanitarian law. Instead, military personnel who wear civilian clothes merely lose lawful combatant status and its associated benefits: see Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2004) 27–44; W Hays Parks, "'Special Forces' Wear of Non-Standard Uniforms' (2003) 4 *Chicago Journal of International Law* 493.

⁹³ *Off Target*, above n 91, 67–73. Counter-targeting is preventing or degrading detection, characterisation, destruction and post-strike assessment: US Department of Defense, *Saddam's Use of Human Shields and Deceptive Sanctuaries* (US Department of Defense Report, 26 February 2003).

⁹⁴ Todd Purdum, 'Nighttime Ambush in Iraqi City: An Episode in a Drawn-Out Battle', *The New York Times* (New York City, US) 5 April 2003, 1; Dexter Filkins, 'Iraqi Fighters or Civilians? Hard Decision for Coverters', *The New York Times* (New York City, US) 31 March 2003, 5.

Article 51(7) of *Additional Protocol I*, which codifies customary international law, prohibits the use of

[t]he presence or movements of the civilian population or individual civilians ... to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations.⁹⁵

The tactic has been universally condemned as unlawful.⁹⁶ For instance, the UN General Assembly labelled Iraq's use of human shields during the first Gulf War as a 'most grave and blatant violation of Iraq's obligations under international law'.⁹⁷ In another well-known case, Bosnian Serbs seized UN Protection Force peacekeepers in May 1995 and used them as human shields against NATO air strikes. In response, the UN condemned the action, demanded release and authorised the creation of a rapid reaction force to handle such situations in the future.⁹⁸

A related method of neutralising an enemy's technological advantage is taking advantage of protected property. Iraqi forces positioned military equipment and troops in or near civilian buildings (for example, schools) and used specially protected objects, such as medical and religious buildings and cultural property, as bases for military operations or supply depots.⁹⁹ Although a civilian object used by an enemy becomes a legitimate military objective,¹⁰⁰ and thereby in theory offers no additional protection to the side so using it, in practice there is a de facto chilling effect on the attacker's operation. Moreover, the practice violates the prescriptive norm requiring defenders to

⁹⁵ See also *Geneva Convention IV*, above n 5. Article 26 states: 'The presence of a protected person may not be used to render certain points or areas immune from military operations'. The prohibition only applies vis-à-vis those who 'find themselves ... in the hands of a Party, to the conflict or Occupying Party of which they are not nationals': art 4. It would not apply to Iraqi forces using Iraqis as shields. As to customary law, see ICRC, *Customary International Humanitarian Law*, above n 87, r 97; *Rome Statute*, above n 70, art 8(2)(b)(xxiii).

⁹⁶ Human shielding is unlawful only when involuntary. Voluntary shields forfeit the protection they are entitled to as civilians by taking a 'direct part in hostilities'. 'Civilians shall enjoy the protection afforded by this Section, *unless and for such time as they take a direct part in hostilities*': *Additional Protocol I*, above n 2, art 51(3) (emphasis added). Since they may therefore be attacked, they can shield nothing as a matter of law.

⁹⁷ *Situation of Human Rights in Iraq*, GA Res 134, UN GAOR, 2280th plen mtg, UN Doc A/RES/46/134 (17 December 1991).

⁹⁸ *Resolution 998*, SC Res 998, UN SCOR, 50th sess, 3543rd mtg, UN Doc S/RES/998 (16 June 1995).

⁹⁹ US Central Command, *1 MEF Roots Out Paramilitaries, Destroys Several Ba'ath Party Headquarters* (News Release 03-04-13, 1 April 2003) <<http://www.globalsecurity.org/wmd/library/news/iraq/2003/iraq-030401-centcom10.htm>> at 18 October 2007.

¹⁰⁰ *Additional Protocol I*, above n 2, art 52(2):

Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

In other words, a civilian object can become a military objective because of its placement, current use or intended future use. See also ICRC, *Customary International Humanitarian Law*, above n 87, r 8.

endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objects; [a]void locating military objectives within or near densely populated areas; [and] take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.¹⁰¹

Although defenders are only responsible for compliance ‘to the maximum extent feasible’, it is always ‘feasible’ to avoid placing military objectives near civilian objects as a means of deterring attack.¹⁰²

Iraqi forces also misused specially protected objects to avoid attack, seek sanctuary or store military materiel. Among those so used were al-Nasiriyya Surgical Hospital, the Baghdad Red Crescent Maternity Hospital and the Imam Ali and Abu Hanifa mosques.¹⁰³ Article 12(4) of *Additional Protocol I* codifies the customary international law prohibition: ‘under no circumstances shall medical units be used in an attempt to shield military objectives from attack’.¹⁰⁴ Article 53(a) sets forth an analogous prohibition for ‘historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples’.¹⁰⁵

It is clear that the internal logic of technological asymmetry can drive the weaker party into tactical choices involving a violation of the *jus in bello*. Although condemnable, such violations make military sense, as do unlawful tactics designed to facilitate attacks on an asymmetrically advantaged opponent.

Because technological advantage makes it difficult to get close enough to attack the enemy without first being identified and killed, an increasingly common tactic is perfidious attack.¹⁰⁶ Article 37(1) of *Additional Protocol I*

¹⁰¹ *Additional Protocol I*, above n 2, art 58. See also ICRC, *Customary International Humanitarian Law*, above n 87, ch 6.

¹⁰² On the obligations of defenders, see discussion in Marco Sassòli, ‘Targeting: The Scope and Utility of the Concept of “Military Objectives” for the Protection of Civilians in Contemporary Armed Conflicts’ in David Wippman and Matthew Evangelista (eds), *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts* (2005) 181, 206–9.

¹⁰³ *Off Target*, above n 91, 72–3. On the misuse of religious locations, see also US Central Command, *Regime Shows Disregard for Historical, Religious Sites in Holy City* (News Release 03–04–28, 2 April 2003); Jim Wilkinson, CENTCOM Director of Strategic Communications, *Regime Use of Baghdad Mosques and Hospitals* (News Briefing, 6 April 2003).

¹⁰⁴ See also ICRC, *Customary International Humanitarian Law*, above n 87, r 28.

¹⁰⁵ Both of the mosques cited by Human Rights Watch meet the special significance criterion. The Iman Ali mosque is the holiest site in Iraq for Shi’a Muslims, whereas the Abu Hanifa mosque is an important shrine for Sunnis. See also *Hague Convention (IV) respecting the Laws and Customs of War on Land, Annex to the Convention, Regulations respecting the Laws and Customs of War on Land*, opened for signature 18 October 1907, (1910) UKTS 9 (entered into force 26 January 1910) (*‘Hague Regulations’*).

¹⁰⁶ See *Additional Protocol I*, above n 2, art 37(1). At art 37(2) perfidy is distinguished from ruses:

Ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law.

codifies the contemporary prohibition:

It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with the intent to betray that confidence, shall constitute perfidy.

One perfidious practice cited by art 37 is feigning surrender.¹⁰⁷ On multiple occasions, Iraqi forces violated this unquestionably customary prohibition.¹⁰⁸ Another is wearing civilian clothing to cause the enemy to lower its guard.¹⁰⁹ Although the *Protocol's* inclusion of 'feigning civilian, non-combatant status' as an example of perfidy has been contested,¹¹⁰ the ICRC's *Customary International Humanitarian Law* study includes it;¹¹¹ the international humanitarian law manuals of many countries, such as the US, characterise wearing civilian clothes to attack the enemy as perfidious; and the *Protocol's* negotiating history suggests it was considered a settled case at the time.¹¹² Wearing civilian clothing to attack Coalition forces was widespread in Iraq.¹¹³

In some cases, those attired in civilian clothes have engaged in suicide bombings. Sadly, the tactic is a growing phenomenon, especially in asymmetrical conflicts such as those in Israel, Iraq and Afghanistan. While it is lawful to give your life to kill the enemy, suicide bombing amounts to perfidy when conducted by combatants out of uniform or civilians *intentionally* using their civilian appearance to enable them to approach their targets.¹¹⁴

¹⁰⁷ Ibid art 37(1)(a); ICRC, *Customary International Humanitarian Law*, above n 87, r 65.

¹⁰⁸ See, eg, Glenn Collins, 'Allied Advances, Tougher Iraqi Resistance, and a Hunt in the Tigris', *The New York Times* (New York City, US) 24 March 2003, 1; Brian Knowlton, 'Bush Tells of "Good Progress" but Says War Has Just Begun', *International Herald Tribune* (Paris, France) 24 March 2003, 6.

¹⁰⁹ *Additional Protocol I*, above n 2, art 37(1)(c).

¹¹⁰ Yoram Dinstein has perceptively pointed out that elsewhere *Additional Protocol I* relaxes the requirement for uniform wear; this inconsistency renders characterisation of feigned civilian status as perfidy 'not ... much more than lip-service': Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, above n 92, 203. That perfidy constitutes a grave breach under *Additional Protocol I*, but feigning civilian status does not, further supports this position: *Additional Protocol I*, above n 2, art 85(3)(f). But see Parks, above n 92.

¹¹¹ ICRC, *Customary International Humanitarian Law*, above n 87, 224.

¹¹² Ibid; US Department of Navy, Office of the Chief of Naval Operations, *Commander's Handbook on the Law of Naval Operations* (Naval Warfare Publication, NWP 1-14M/MCWP 5-2.1/COMDTPUB P5800.1, October 1995) [12.7]; International and Operational Law Department, The Judge Advocate General's Legal Center and School, School, *Law of War Handbook* (2005) 192. See also UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004) [5.9.2(c)], although, because the UK is a party to *Additional Protocol I*, the manual's bearing on the existence of a customary norm is limited. According to the Official Record of the Diplomatic Conference that adopted *Additional Protocol I*, the Committee that drafted the article on perfidy 'decided to limit itself to a brief list of particularly clear examples. Examples that were debatable or involved borderline cases were avoided': *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, vol XV, CDDH/236/Rev.1 (21 April – 1 June 1976) [17].

¹¹³ Amnesty International, *Iraq* (AI Report 2004) <<http://web.amnesty.org/report2004/irq-summary-eng>> at 18 October 2007.

¹¹⁴ Regarding use of this method in Iraq, see Yoram Dinstein, 'Jus in Bello Issues Arising in the Hostilities in Iraq in 2003' (2004) 34 *Israel Yearbook on Human Rights* 1, 4–5.

Perfidy requires that the misuse of the protected status be intended to kill, injure or capture the enemy.¹¹⁵ However, misuse of certain entities protected by international humanitarian law need not evidence a specific *mens rea* to constitute a violation. For instance, multiple provisions of the law address misuse of the distinctive emblems of medical and religious personnel, transports, and units, or the personnel, property, and activities of the International Movement of the Red Cross and Red Crescent.¹¹⁶ Predictably, Iraqi forces seized marked ambulances, using them as surreptitious scout vehicles and platforms from which to attack Coalition forces. Additionally, they marked the Ba'ath Party building in Basra, which was used as a mustering point, with an ICRC emblem.¹¹⁷

As the aforementioned examples illustrate, the technologically disadvantaged party in an asymmetrical clash has an incentive to violate certain international humanitarian law norms to counter enemy superiority. At a certain point, however, the technological gap is so wide that even these tactics will not bridge it. Unable to inflict sufficient pain on an opponent's military, the disadvantaged side may decide to target a centre of gravity other than the armed forces. The logical candidates are the civilian population and civilian objects because they are virtually indefensible in any comprehensive fashion.¹¹⁸

A number of aims may underlie attacks on civilians and civilian objects. In the macro sense, they may serve as strategic lever, as in the Iraqi scud attacks against Israeli population centres during the first Gulf War.¹¹⁹ Iraq launched the attacks hoping to draw Israel into the conflict in order to rupture an opposing force which consisted of such strange bedfellows as the Americans and Syrians.¹²⁰ Non-governmental organisations and inter-governmental organisations are also increasingly attacked, thereby creating a situation where they cannot help maintain basic societal needs. In Iraq, for instance, insurgents bombed both ICRC and UN facilities, resulting in substantial loss of life.¹²¹ The

¹¹⁵ *Additional Protocol I*, above n 2, art 37(1).

¹¹⁶ See, eg, *Instructions for the Government of Armies of the United States in the Field by Order of the Secretary of War (Lieber Code)* (1863) art 117; *Hague Regulations*, above n 105, art 23(f); *Geneva Convention I*, above n 5; *Geneva Convention II*, above n 5; *Additional Protocol I*, above n 2, art 38(1); *Commander's Handbook on the Law of Naval Operations*, above n 112, [11.9.6]; *The Manual of the Law of Armed Conflict*, above n 112, [5.10(a)]. Permitted purposes are set forth in *Geneva Convention I*, above n 5, arts 24–7, 38–44; *Geneva Convention II*, above n 5, arts 22, 24–5, 27, 36–9, 41–4; *Geneva Convention IV*, above n 5, arts 18–22; *Additional Protocol I*, above n 2, arts 8, 18, 22–3.

¹¹⁷ *Off Target*, above n 91, 70.

¹¹⁸ On the death toll of operations in Iraq, see Michael O'Hanlon and Jason Campbell, The Brookings Institution, *Iraq Index* (2007) <<http://www.brookings.edu/saban/iraq-index.aspx>> at 18 October 2007; Hannah Fischer, *Iraqi Civilian Death Estimates* (Congressional Research Service Report, 22 November 2006).

¹¹⁹ See US Department of Defense, *Conduct of the Persian Gulf War* (Final Report to Congress, April 1992) 36 <<http://www.ndu.edu/library/epubs/cpgw.pdf>> at 18 October 2007.

¹²⁰ *Ibid.*

¹²¹ The attack on the UN Headquarters killed 23, including Sergio Vieira de Mello, the Secretary-General's Special Representative in Iraq. The attack on the ICRC compound killed 18. Many aid organisations, including the UN, withdrew or scaled back their staff following the attacks. For a discussion of the subject, see Nicholas de Torrente, 'Humanitarian Action under Attack: Reflections on the Iraq War' (2004) 17 *Harvard Human Rights Journal* 1.

weaker side may simply seek to undercut the morale of the population where the conflict is taking place or that of the other side. Kidnappings have proven highly effective in this regard.¹²² Finally, attacks may be designed to deter cooperation with the enemy, as with the recurring attacks against Iraqi officials.¹²³ All of the above actions directly violate the customary law distinction norms codified in arts 48, 51 and 52 of *Additional Protocol I*.¹²⁴ They are a rational reaction to battlefield asymmetry.

III THE 'BULLY SYNDROME'

Exacerbating the propensity of the disadvantaged party to turn its back on the law is the effect asymmetry has on those not involved in the conflict. Dramatic technological asymmetry on the battlefield tends to result in short classic combat phases. In 1991, Operation Desert Storm consisted of a three and a half week air war followed by a 100-hour ground campaign. During the 1999 Operation Allied Force, NATO, using only air power, forced Milošević back to withdraw forces from Kosovo in just 78 days.¹²⁵ Operation Iraqi Freedom lasted three weeks in 2003, from launch of operations until the fall of Tikrit.¹²⁶ This was so despite the fact that the victorious side was numerically inferior.¹²⁷ Operation Change Direction in 2006 consumed a mere 34 days.¹²⁸

Of course, no legal requirement for a 'fair fight' exists. On the contrary, the objective of military strategy is to achieve victory swiftly and optimally by leveraging your own strengths and exploiting the enemy's weaknesses. Nevertheless, the rapidity by which technologically advantaged states have imposed defeat on lesser-equipped enemies in the past two decades seems to have resulted in what might be best labelled the 'bully syndrome'.

It is natural to 'pull' for the underdog. It is similarly natural to hold the 'bully' to a higher standard, thereby levelling play, or to turn a blind eye to tactics and

¹²² Brian Jenkins, Meg Williams and Ed Williams, 'Kidnappings in Iraq Strategically Effective', *Chicago Tribune* (Chicago, US) 29 April 2005, 25.

¹²³ Hannah Fischer, *Iraqi Civilian, Police and Security Forces Casualty Estimates* (Congressional Research Service Report, 14 September 2006); Hannah Fischer, *Iraqi Civilian, Police and Security Forces Casualty Estimates* (Congressional Research Service Report, 17 November 2006).

¹²⁴ See also ICRC, *Customary International Humanitarian Law*, above n 87, rr 1–10. The US specifically finds both provisions to be reflective of customary international humanitarian law: *Memorandum for John McNeil, Assistant General Counsel (International) Office of the Secretary of Defense regarding 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications*, 8 May 1986 (copy on file with author).

¹²⁵ US Department of Defense, *Kosovo Operation Allied Force After-Action Report* (Report to Congress, 31 January 2000) <<http://www.dod.mil/pubs/kaar02072000.pdf>> at 18 October 2007.

¹²⁶ Moseley, above n 84, 12.

¹²⁷ Iraq had a military of 430 000 troops, complemented by a 400 000 paramilitary/security force: Jane's Security Sentinel, *Periscope, War In Iraq — Forces: Iraq/Army* (2003) CNN <<http://www.cnn.com/SPECIALS/2003/iraq/forces/iraq/army/index.html>> at 18 October 2007. By contrast, the Coalition numbered 270 000, many of which were based outside of Iraq during the hostilities: Donald Rumsfeld, Secretary of Defense and General Richard Myers, Chairman, Joint Chiefs of Staff, *DoD News Briefing* (Pentagon, Washington DC, US, 28 March 2003) <<http://www.globalsecurity.org/wmd/library/news/iraq/2003/iraq-030328-dod01.htm>> at 18 October 2007.

¹²⁸ But many judged it a failure for having taken too long: see, eg, Israel Ministry of Foreign Affairs, *Winograd Commission Submits Interim Report* (Israel Ministry of Foreign Affairs Report, 30 April 2007).

strategies by the weaker party that would otherwise be unacceptable. Sometimes, as has happened in Iraq, the weaker party can turn the tables by adopting asymmetrical tactics of its own — such as suicide bombings, roadside bombs, and terror. But by then, the die has often been cast; once a bully always a bully, and a bully being defeated is simply getting his just desserts.

This certainly appears to be a dynamic in evidence with regard to application of the *jus in bello* during recent armed conflicts. The best example is that between Israel and the various terrorist groups arrayed against it. Although Israel has engaged in practices that are certainly objectionable, and which its Supreme Court has condemned,¹²⁹ its technologically disadvantaged opponents have adopted a strategy of fighting asymmetrically by attacking civilians. Counter-factually, much world opinion nevertheless continues to view Israel as the ‘bully’, while only half-heartedly condemning glaring *jus in bello* violations by its enemies.

The phenomenon is also perceptible in Iraq, where Coalition opponents have adopted tactics to counter technological wherewithal that self-evidently violate international humanitarian law.¹³⁰ The violations are systematic and widespread, yet most condemnation focuses on the inexcusable, but far less frequent or egregious, excesses committed by Coalition forces. In this asymmetrical conflict, Abu Ghraib somehow generates a greater visceral reaction than the kidnapping and beheading of innocent civilians.¹³¹

In part, globalised real-time media coverage contributes to this dynamic. Technologically advanced militaries tend to come from democracies, which facilitate the fourth estate as a matter of national values. The notion of imbedded journalists with Iraqi insurgents or Hezbollah terrorists is, by contrast, unimaginable. Thus, a disproportionate number of ‘the bully’s’ violations become public knowledge, thereby distorting public perceptions of relative compliance with the law.

Moreover, the media is a poor vehicle for conveying the balance between military necessity and humanitarian values that underpins the *jus in bello*. Consider the principle of proportionality. Destruction of civilian property and the deaths of civilians are easily depicted, and often quite spectacularly, on television. On the other hand, how do visual images capture the military advantage that rendered the collateral damage and incidental injury lawfully justified? Inevitably, the war the public watches is portrayed out of context.

The disadvantaged side has learned these lessons well, often engaging in ‘lawfare’.¹³² Lawfare is the use of law as a ‘weapon’ by creating the impression, correct or not, that an opponent acts lawlessly.¹³³ In Iraq, for instance, insurgents

¹²⁹ See, eg, the Israeli Supreme Court’s torture decision: *Public Committee Against Torture in Israel v The State of Israel* (1999) HC 5100/94.

¹³⁰ See, eg, *Off Target*, above n 91, 74–8.

¹³¹ See, eg, Human Rights Watch, *The Road to Abu Ghraib* (Human Rights Watch Report, June 2004) 79.

¹³² On lawfare, see Charles Dunlap Jr, ‘Law and Military Interventions: Preserving Military Values in 21st Century Conflicts’ (Working Paper, Harvard University Carr Center, 2001).

¹³³ During the first Gulf War, for instance, the Iraqis dismantled a mosque at Al-Basrah to feign bomb damage and offered photos of damage incurred during the war with Iran as evidence of Coalition violations: US Department of Defense, *Conduct of the Persian Gulf War* (US Department of Defense Report, April 1992) 614.

have learned that Coalition forces employ counter-battery fire against mortar attacks.¹³⁴ They, thus, have adopted a ‘shoot and scoot’ tactic in which they fire from an area containing civilians (often with little likelihood of hitting Coalition forces) hoping the Coalition response causes civilian deaths and injuries that will generate negative public and international reaction.¹³⁵ Hezbollah employed the same tactics in Lebanon in 2006, firing Katushya rockets from populated areas in the hope of baiting the Israelis into response.¹³⁶ Such tactics are extremely effectual when the alleged wrongdoer is already perceived, and portrayed, as a bully.

Like the media, some NGOs have unintentionally contributed to the phenomenon. In the first place, they tend to focus on the activities of the advantaged party, the ‘bully’ if you will. In doing so, they distort perceptions as to the comparative lawlessness of belligerents. Consider *Collateral Damage*, Amnesty International’s provocatively titled analysis of Operation Allied Force.¹³⁷ Amnesty International looked at a mere nine incidents in depth. Given an air campaign of 14 000 strike sorties dropping over 23 000 bombs and missiles,¹³⁸ it would seem that Amnesty International should have instead heralded the unprecedented fidelity to targeting norms displayed by NATO. Similarly, Human Rights Watch named its report on the conduct of Operation Iraqi Freedom *Off Target*, thereby reproving an air and ground campaign with tens of thousands of engagements based on a handful of questionable incidents. In fairness, the ratio demonstrates exactly the opposite — the surgical nature of Coalition operations.¹³⁹ Most recently, during Operation Change Direction, both Amnesty International and Human Rights Watch promptly issued condemnatory reports about Israeli actions that barely mentioned Hezbollah attacks, which directly targeted civilians.¹⁴⁰

In the second place, NGOs sometimes get the law wrong, a fact usually missed by non-experts. For instance, Amnesty International condemned attacks

¹³⁴ *Off Target*, above n 91, 94.

¹³⁵ Interview with senior USMC Officer with combat experience in Iraq (Garmisch-Partenkirchen, Germany, 6 June 2007). Counter-battery fire is fire delivered to suppress an enemy’s fire (for example, from mortars or artillery) after detecting its source. Aircraft or ground observers may identify the source. Today, radar is often used to calculate the source of an incoming shell.

¹³⁶ See Israel Ministry of Foreign Affairs, *Hizbullah’s Exploitation of Lebanese Population Centers and Civilians: Photographic Evidence* (2006) <http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2006/Operation+Change+of+Direction+Video+Clips.htm> at 18 October 2007.

¹³⁷ Amnesty International, ‘*Collateral Damage*’ or *Unlawful Killings?*, AI Index: EUR 70/018/2000 (June 2000), available from <<http://web.amnesty.org/library/engindex>> at 18 October 2007 (‘*Collateral Damage*’).

¹³⁸ Operation Allied Force, NATO, *Forces Southern European Fact Sheet* (2002).

¹³⁹ For breakout of sorties flown, that is flights made by combat aircraft during a mission, see Moseley, above n 84, 7.

¹⁴⁰ Amnesty International, *Israel/Lebanon: Deliberate Destruction or “Collateral Damage”?* *Israeli Attacks on Civilian Infrastructure*, AI Index MDE 18/007/2006 (23 August 2006), available from <<http://web.amnesty.org/library/engindex>> at 18 October 2007. The Amnesty International report on Hezbollah was released three weeks later: Amnesty International, ‘Israel/Lebanon: Hizbullah’s Deliberate Attacks on Israeli Civilians’, AI Index MDE 02/026/2006 (Press Release, 14 September 2006). Although Human Rights Watch issued press releases condemning Hezbollah attacks on civilians, it issued no contemporaneous full report: see Human Rights Watch, ‘Fatal Strikes: Israel’s Indiscriminate Attacks against Civilians in Lebanon’ (Press Release, August 2006).

from altitude during Operation Allied Force, apparently without realising that altitude increases the accuracy of guided weapons because the guidance system has more opportunity to refine the weapon's aim.¹⁴¹ Similarly, HRW criticised targeting during Operation Iraqi Freedom on the ground that US forces failed to take 'precautions in attack', as required by international humanitarian law.¹⁴² The 'precautions in attack' norm mandates the consideration of tactics or weapons that would result in the least collateral damage or incidental injury (while attaining similar military advantage).¹⁴³ In other words, the norm focuses on options. Yet, HRW failed to cite any alternative tactics or weapons the US forces could have selected in lieu of those which they employed. Absent alternatives, an allegation of failure to take precautions is meaningless.¹⁴⁴

IV COLLAPSE OF THE WALL?

These dynamics risk an insidious impact on the technologically advantaged side, the genesis of which lies in the nature of the *jus in bello*. As previously discussed, the *jus ad bellum* proved quickly adaptable to the emergence of transnational terrorism, both because the paucity of black letter law allowed for flexibility and because states share the threat it poses. Terrorists have transmogrified in the operational code from mere criminals into entities capable of presenting threats to state survival and thus, subject to responses under the law of self-defence.

By contrast, the *jus in bello*, rich in detail but often the source of state-based disagreement, is markedly inflexible. Such inflexibility may, as illustrated above, lead the technologically disadvantaged side in an asymmetrical conflict to conclude it must violate this rigid body of law, if only to survive and fight on. This skews the normative character of the hostilities, for the battle is no longer a 'fair fight'; one party has elected not to be fully bound by international humanitarian law. The 'bully syndrome' only serves to exacerbate the technologically advantaged side's resulting sense of 'victimisation'.

In such a situation, the technologically advantaged party may also begin to perceive the *jus in bello* as an obstacle to operational success, thereby throwing off the delicate balance between humanitarian concerns and military necessity that has underpinned international humanitarian law since at least the *St Petersburg Declaration*. The result may be disastrous, since it is accepted humanitarian law dogma that compliance with international humanitarian law is only realisable when applicable norms take cognisance of both the strategic interests of states and the battlefield realities their soldiers face. In the asymmetrical environment described above, military necessity looms much larger in response to unlawful tactics and strategies embraced by a militarily inferior opponent.

Understandably, blowback can occur, expressing itself in a number of ways. The advantaged side might adopt lax interpretations of the law or assert arguments that the law is technically inapplicable to the specific situation at

¹⁴¹ *Collateral Damage*, above n 137, 18–20.

¹⁴² *Off Target*, above n 91, 74–8.

¹⁴³ *Additional Protocol I*, above n 2, art 57.

¹⁴⁴ *Off Target*, above n 91.

hand. As an example of the former, consider the Bush Administration's detention policies, some of which have been rejected by the (conservative) Supreme Court.¹⁴⁵ The current US Government position that detainees in the 'armed conflict with al Qaeda, the Taliban, and associated forces' are 'unlawful enemy combatants' who neither qualify as prisoners of war nor civilians and, therefore, are barred from the protections of *Geneva Conventions III* and *IV* (beyond those set forth in Common Article 3) illustrates the latter.¹⁴⁶

More broadly, violations by the 'weaker' side risk fuelling perceptions of law as unnecessarily fettering a state's freedom of action. Paradoxically, international legal regimes, which possess the potential to enhance soft power, may come to be seen as a drain on hard power.¹⁴⁷ That neither the US nor Israel is party to *Additional Protocol I*, the *Ottawa Convention* or the *Rome Statute* illustrates this phenomenon.

Potentially more nefarious are assertions that the law itself no longer fits the conflict environment in which it is at play, and that as a consequence, it should at times be ignored. Whether taken out of context or not, White House Counsel Alberto Gonzales' labelling of the 1949 *Geneva Conventions'* provisions as 'quaint' resonated with certain audiences.¹⁴⁸ A recent editorial appearing in a number of unofficial, but widely read and influential, US military newspapers was paradigmatic.¹⁴⁹ According to its author:

The laws of war reflect the Golden Rule of doing unto your enemy as you would have him do unto you. These laws have evolved over time out of a sense of conviction and hope that enemies sharing diverse cultural mind-sets can, nonetheless, adhere to a battlefield culture of mutual respect for various time-tested principles in the conduct of combat operations.

But the battlefield conditions have required revisions to the laws of war.

... The Islamo-facist has no concept of the warrior culture ... In fact, his lack of respect for human life is wielded as a new tactic with which to instil fear in his enemy ... it is doubtful that it [was] ever envisioned [that] an enemy [would use] such violations as an outright strategy in fighting a war.

For this reason, initiative should be taken to review the laws, with an eye toward providing more liberal interpretations to enhance the capabilities of civilized forces in combating uncivilized ones.¹⁵⁰

¹⁴⁵ *Hamdi v Rumsfeld*, 124 US 2633 (2004); *Rasul v Bush*, 124 US 2686 (2004); *Rumsfeld v Padilla*, 542 US 426 (2004); *Hamdan v Rumsfeld*, 126 US 2749 (2006). See discussion in Michael N Schmitt, 'The United States Supreme Court and Detainees in the War on Terror' (2007) *Israel Yearbook on Human Rights* (forthcoming).

¹⁴⁶ George W Bush, US President, 'Executive Order: Interpretation of the *Geneva Conventions* Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency' (Press Release, 20 July 2007).

¹⁴⁷ On the subject, see Michael N Schmitt, 'The Law of Armed Conflict as Soft Power: Optimizing Strategic Choice', in Michael N Schmitt (ed), *International Law across the Spectrum of Conflict* (2000) 455.

¹⁴⁸ For US public opinion on Gonzales, see Robert Collier, 'Gonzales OK Could Be Seen as OK for Torture Rules', *San Francisco Chronicle* (San Francisco, US) 2 February 2005, A-12.

¹⁴⁹ James Zumwalt, 'Laws of War Need to Change to Defeat "Uncivilized" Enemy', *Air Force Times* (Springfield, US) 25 December 2006, 62. The editorial also appeared in the *Army Times* (25 December 2006) and *Marine Corps Times* (27 November 2006).

¹⁵⁰ *Ibid.*

He concludes by referring to a popular US television show in which a police sergeant always concludes daily briefings to subordinates with the admonition: 'Let's do it to them before they do it to us'.¹⁵¹ According to the editorial's author, '[t]his is exactly what we need to be doing for our troops'.¹⁵² A decade ago, it would have been unimaginable for such an argument to have found its way into mainstream weeklies published for the US armed forces. Today, it is no longer dismissed as the ranting of an individual who simply misunderstands the nature and function of international humanitarian law.

These 'extreme' views have found their way onto the battlefield. A late 2006 survey conducted by US military mental health specialists in Iraq dramatically illustrates this reality.¹⁵³ The results were stunning. Only 47 per cent of the soldiers and 38 per cent of the marines surveyed believed they should treat all non-combatants with dignity and respect.¹⁵⁴ Seventeen per cent of both groups felt all non-combatants should be treated as insurgents, while 39 per cent of the marines and 36 per cent of the soldiers would countenance torture to gather important information about insurgents. Disturbingly, only a quarter of the respondents would risk their own safety to assist a non-combatant in danger.¹⁵⁵ Twelve per cent of the marines and nine per cent of the soldiers had damaged or destroyed Iraqi property when doing so was unnecessary and seven and four per cent respectively had hit or kicked a non-combatant needlessly.¹⁵⁶ Finally, they appear to be willing to turn a blind eye to misconduct by fellow unit members. Despite regular training that they must do so, only 40 per cent of the marines and 55 per cent of the soldiers would report another for 'injuring or killing an innocent non-combatant'.¹⁵⁷

Ultimately, such attitudes may lead to erosion of the heretofore impenetrable wall between the *jus in bello* and the *jus ad bellum*. The start point is the emergence of a *jus ad bellum* 'good guys' versus 'bad guys' dichotomy, in which malfasants are denied the full benefits of the *jus in bello* (or other bodies of law protecting individuals, such as human rights law). Indications of just such a trend are already evident. Most notable in this regard are the various legal machinations over the 'global war on terrorism'. The 'global war on terrorism' has been characterised by Guantánamo, the abuse of detainees, secret CIA detention facilities and extraordinary renditions, all in the name of a new type of conflict against a 'lawless' enemy.¹⁵⁸ Perhaps most memorable in this regard were the 'torture memos' issued by the US Department of Justice, especially the *Bybee Memo* of August 2002. That memo suggested that:

151 Ibid.

152 Ibid.

153 Office of the Surgeon, Multinational Force-Iraq and Office of The Surgeon General, US Army Medical Command, *Mental Health Advisory Team ('MHAT') IV Operation Iraqi Freedom 05-07: Final Report* (17 November 2006).

154 Ibid 35.

155 Ibid.

156 Ibid 36-8.

157 Ibid 36.

158 See White House, *Progress Report on the Global War on Terrorism* (White House Report, 2003) <http://www.whitehouse.gov/homeland/progress/progress_report_0903.pdf> at 18 October 2007.

If a government defendant were to harm an enemy combatant during an interrogation in a manner that might arguably violate Section 2340A [US legislation outlawing torture in accordance with the *Convention against Torture*¹⁵⁹], he would be doing so in order to prevent further attacks on the United States by the al Qaeda terrorist network. In that case, we believe that he could argue that his actions were justified by the executive branch's constitutional authority to protect the nation from attack. This national and international version of the right to self-defense could supplement and bolster the government defendant's individual right.¹⁶⁰

The *Bybee Memo* provoked such a firestorm of controversy that it was withdrawn in a subsequent Department of Justice opinion, which stated, *inter alia*, that it was unnecessary to address the President's constitutional authority since he had unambiguously rejected torture by US personnel.¹⁶¹ Be that as it may, the first memo demonstrated a clear acceptance of technically extrajudicial actions in the face of 'necessity'.

V CONCLUSION: TO THE BARRICADES

This is not a healthy trend, for it enters upon a very slippery slope. If terrorists are 'bad guys', what about rogue states? What is a rogue state? Are rogue states undemocratic states? States that act lawlessly? States that remain outside comprehensive legal regimes? Is the US a rogue state? Australia? Will the international community eventually determine the applicability of the *jus in bello* by a belligerent's degree of compliance with the *jus ad bellum*? How does one reliably identify an aggressor within a body of law that is at the same time sparse and highly malleable?

The trend towards convergence of the *jus ad bellum* and the *jus in bello* must be resisted. It ignores the fact that the two distinct bodies of law operate to different ends. The *jus ad bellum* is about *state* survival. It must be flexible to allow states to respond to unanticipated threats. But this flexibility must not come at the cost of the humanitarian protections for *individuals* that underpin the *jus in bello*. To elevate either body of law to determinacy is to risk sacrificing one on the other's altar.

Sadly, there is no ready remedy to the dilemmas described above. From an operational point of view, it would be absurd to suggest surrendering technological asymmetrical advantage so as not to unintentionally encourage international humanitarian law violations by the enemy. No commander would accept such a nonsensical proposition. Instead, the answer, unsatisfactory and pedestrian as it may be, lies in education, enforcement and dialogue.

¹⁵⁹ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85, art 1 (entered into force 26 June 1987) ('*Convention against Torture*').

¹⁶⁰ *Memorandum from Assistant Attorney-General Jay S Bybee to Counsel to the President Alberto Gonzales regarding Standards of Conduct for Interrogation under 18 USC §§2340–2340A*, 1 August 2002 ('*Bybee Memo*').

¹⁶¹ *Memorandum from Acting Assistant Attorney-General Daniel Levin to Deputy Attorney-General James B Comfey regarding Legal Standards Applicable under 18 USC §§2340–2340A*, 30 December 2004, citing US, *Statement on United Nations International Day in Support of Victims of Torture*, 40 *Weekly Compilation of Presidential Documents* (5 July 2004) 1167–8.

First, political and military leaders must be made to understand the soft power benefits of strict compliance with international humanitarian law. Simply put, the international cooperation without which today's enemies cannot be defeated is easiest to build and maintain when one is viewed as a lawful international actor. Moreover, strict compliance with international humanitarian law minimises the enemy's opportunity to employ 'lawfare'¹⁶² as a tactic and strategy. Obviously, this requires that one's armed forces be well-trained in the principles and application of international humanitarian law.

Second, in order for the preceding approach to work, strict enforcement of international humanitarian law stricture is required. In particular, senior officers must be held accountable for the misconduct of their subordinates, both under the international law doctrine of command responsibility and domestic military law practices such as punishment for dereliction of duty when superiors fail to properly lead their subordinates.¹⁶³ One need only recall the outrage generated by the failure to punish senior officers for the Abu Ghraib abuses to grasp the criticality of a comprehensive enforcement regime.¹⁶⁴

Third, and finally, effectively countering the 'bully' syndrome requires robust proactive strategic communications with relevant audiences.¹⁶⁵ Obviously, such efforts require engagement with the governments, militaries and populations of other states in order to explain policies, practices and incidents. It also requires a corresponding focus on media relations, which states have finally recognised as beneficial, typically by assigning dedicated public affairs officers to military and other government entities involved in a conflict.

Sadly, this emphasis has not been matched by activities designed to enhance dialogue between governments (and their militaries) and NGOs. Proactive efforts must be undertaken to better educate NGOs regarding military affairs and to make military operations more transparent to them. In this regard, many of the public affairs practices currently in place for dealing with the media could be readily adapted to use with NGOs. In particular, the judge advocate departments within the armed forces could establish closer relations, for instance, by inviting NGO representatives to attend and speak at their professional education courses. On the battlefield, public affairs officers could proactively develop programs designed to involve NGOs (as with the media) early on in the conflict, rather than waiting to do triage when tragic incidents occur.

The point is that the preferred normative response to the key shifts in the nature of 21st century conflict proves rather counterintuitive. It lies not in a

¹⁶² Dunlap, above n 132, 155.

¹⁶³ *Additional Protocol I*, above n 2, art 86.

¹⁶⁴ See 'New Abu Ghraib Photos Confirm Need for Independent Counsel, ACLU Says' (2006) *UN Observer and International Report* <<http://www.unobserver.com/layout5.php?id=2137&blz=1>> at 18 October 2007.

¹⁶⁵ US Department of Defense Dictionary of Military Terms defines 'strategic communication' as:

Focused United States Government efforts to understand and engage key audiences to create, strengthen, or preserve conditions favourable for the advancement of United States Government interests, policies, and objectives through the use of coordinated programs, plans, themes, messages, and products synchronized with the actions of all instruments of national power.

Department of Defense Dictionary of Military Terms and Associated Terms (12 July 2007) <http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf> at 18 October 2007.

weakening of the boundaries separating the *jus ad bellum* and *jus in bello*, but rather in their maintenance. Moreover, in terms of strategic outcome, unlawful tactics adopted by the enemy to compensate for military disadvantage pose less of a risk to the advantaged side than do actions which enable that enemy to effectively employ lawfare. At the end of the day, the answer lies in the law, not outside it. Law can, and must, survive.