

# THE LAW OF ARMED CONFLICT — A CONTEMPORARY CRITIQUE

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*[The modern law of armed conflict is a testament to humanity's determination to eviscerate the horrors and suffering of war, and it has been profoundly successful in its penetration of the contemporary military psyche, particularly in the case of Western militaries. While this body of law is championed by all, its iconic success has resulted in an 'enchantment' of its character that resists effective re-examination of its underlying principles and precepts. Recent conflicts in Afghanistan and Iraq, in conjunction with the more general global war on terror, have fostered an unprecedented amount of popular discussion and critical review of the modern law of armed conflict. This article adds to that critique by arguing that the ambiguities inherent in key aspects of the law of armed conflict may contribute to neither the proper realisation of humanitarian goals nor the attaining of effective victory on the battlefield. There is a need for a more pragmatic assessment of many of the principles underpinning the law and a recognition that the law should evolve to take account of current operational and technological realities, especially in the context of targeting decisions.]*

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## I INTRODUCTION

The events of 11 September 2001 reignited the scholarship of realist legal commentators who argue the necessity of a more pertinent, post-Cold War

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interpretation of the right to go to war, or *jus ad bellum*.<sup>1</sup> The innovative legal positions subsequently adopted to undertake military operations in Afghanistan and Iraq reflected this realist approach and have, not surprisingly, been subject to intense and unprecedented popular commentary.<sup>2</sup> Concomitantly, the law of armed conflict, which has been necessarily invoked to govern military operations in these conflicts, has equally been subjected to intense scrutiny, as well as in the broader context of the global war on terror. The unrelenting debate concerning the status of captured al Qaeda and Taliban members, the targeting of terrorist enemies and the propriety of the military tribunals has focused attention on the efficacy and integrity of the modern law of armed conflict, and has highlighted many of the ambiguities and limitations of this disaggregated body of law.

The goal of invoking international legal prescriptions in order to frame the modern law of armed conflict was always an audacious one. Seeking to restrain humanity's basest tendencies when engaging in warfare seems noble and yet potentially quixotic. Is it travesty or triumph that international law is harnessed in this way to regulate war by 'formulating' the bloodshed and mayhem of armed conflict? The eminent Harvard commentator Professor David Kennedy observes that 'the law in war and the law of war are situated between a promise and a fear: the promise that violence will be displaced by law and the fear that it will not'.<sup>3</sup> Such ambivalence derives from the ambitious project of seeking to regulate violence, which allows violence to be admitted into the legal realm. Here, Kennedy notes that violence may be tamed, rendered knowable and revealed 'in all its nuances and subtleties'.<sup>4</sup> It remains a persistent challenge to harness law's restraining promise, especially when interpreted through the prism of positivist hegemony and the invocation of sovereign prerogatives.

The humanitarian strategy of inculcating the law of armed conflict into the military psyche has been a decisively successful enterprise.<sup>5</sup> Military professionals and advocates of humanitarian intervention draw upon a shared vocabulary when planning and executing military operations. This synthesis has been rightfully celebrated as a victory, and has supported — to a large extent — the continuing 'upward spiral for humanitarianism' as a check on warfare.<sup>6</sup> However, it seems that there is a growing realisation by some academic commentators and military professionals that this success comes at a price. Adherence to the existing law of armed conflict framework and use of its vocabulary has sometimes been at the expense of more pragmatic assessments of the efficacy of the law in achieving both humanitarian goals and also, ironically,

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<sup>1</sup> Michael Reisman, 'Assessing Claims to Revise the Laws of War' (2003) 97 *American Journal of International Law* 82, 90.

<sup>2</sup> See generally Steven Ratner, '*Jus ad Bellum* and *Jus in Bello* after September 11' (2002) 96 *American Journal of International Law* 905; Hurst Hannum, 'Iraq, US and the War on Terror: *Bellum Americanum*' (2003) 27(1) *Fletcher Forum of World Affairs* 29; Lucy Martinez, 'September 11<sup>th</sup>, Iraq and the Doctrine of Anticipatory Self-Defense' (2003) 73 *University of Missouri at Kansas City Law Review* 123; Derek Jinks, 'State Responsibility for Sponsorship of Terrorist and Insurgent Groups: State Responsibility for the Acts of Private Armed Groups' (2003) 4 *Chicago Journal of International Law* 83.

<sup>3</sup> David Kennedy, *International Legal Structures* (1987) 256.

<sup>4</sup> *Ibid* 278.

<sup>5</sup> David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (2004) 284.

<sup>6</sup> *Ibid* 279.

decisive victory. A ‘law of armed conflict as ideology’ mindset has developed that resists honest reappraisal of the law’s function in minimising violence in order to ensure the best humanitarian outcomes. This ideological posture is especially adopted by humanitarian advocates to ensure continued maintenance of the shared vocabulary and, thus, access to power.<sup>7</sup> Such idolatry also acts to defer examination of the precise contours of the law. These contours operate in certain circumstances to impose arbitrary and inapposite concepts upon the conduct of modern warfare.

The purpose of this article is to critique the current state of the law of armed conflict so as to expose both substantive and doctrinal limitations and to suggest alternative strategies of approach. The calls for repositioning the *jus ad bellum* are paralleled by an increasing demand within the professional literature for a more realistic appraisal of *jus in bello*.<sup>8</sup> Given recent involvement by the United States and its allies in a number of separate major international combat operations, such a demand is timely. We believe that the ambiguities inherent in many of the fundamental principles underlying the existing law of armed conflict can no longer be tolerated in the name of ‘enchaining’ this body of law. The growing chorus of academic and professional military critiques of the efficacy of the existing structure signals the arrival of a precipitous ‘moment’ where honest reappraisal of the efficacy of the law must be undertaken.

Part II of this article will briefly trace the historical evolution of the right to wage war and the correlative ‘enchantment’ of the law of armed conflict within the context of the overall advocacy of international law throughout the 20<sup>th</sup> century. Part III of this article will analyse the manner in which tactical military decisions are made under the current law. This part will highlight both the strengths and weaknesses of the law of armed conflict in its application to the tactical military decision-making process and will describe the ambiguities and contradictions inherent in the contemporary state of this law. Part IV will critique the proposals for reform that have been advocated and highlight alternative approaches which might more effectively inform the military decision-making processes to ensure the reliable maintenance of both humanitarian and military goals.

## II THE MODERN *JUS IN BELLO* AND THE HISTORICAL QUEST FOR RELEVANCY

The origins of the modern law of armed conflict can be traced to the mid-19<sup>th</sup> century. At the time of its modern conception, there was no meaningful *jus ad bellum* because the right to resort to force was essentially unchallenged.<sup>9</sup> The contemporary emphasis on the separation between *jus ad bellum* and *jus in*

<sup>7</sup> ‘The humanitarian professional [is] eager both to legitimate intervention for humanitarian purposes and to demonstrate his or her bona fides as a partner in statecraft or participation in government’: *ibid* 271.

<sup>8</sup> Michael Schmitt, ‘Targeting and Humanitarian Law — Current Issues’ (2004) 34 *Israel Yearbook on Human Rights* 59; Michael Reisman, ‘In Defense of World Public Order’ (2001) 95 *American Journal of International Law* 833; William Bradford, ‘Barbarians at the Gates: A Post September 11<sup>th</sup> Proposal to Rationalize the Laws of War’ (2004) 73 *Mississippi Law Journal* 639.

<sup>9</sup> Kennedy notes that ‘law governing the decision to go to war languished for a century after the decline of natural law — until it was revived by the *United Nations Charter* as the modern “law of force”’: *Dark Sides of Virtue*, above n 5, 242.

*bello* contrasts with the amalgamated character of the law that prevailed in previous centuries. The ‘just war’ tradition, as understood within European Christian theology, usually accorded a level of civility in the conduct of warfare between Christian antagonists, but offered no such restraint when waging war against non-Christian enemies.<sup>10</sup> Gardam has noted that the ‘just war’ tradition was informed by the perceived justness of the cause, which translated into the (ruthless) means of warfare employed.<sup>11</sup> Far from acting as a restraining mechanism, the ‘just war’ tradition more readily propagated unparalleled brutality and personal enmity. The logical inconsistency of mutually assured justness on both belligerent sides was recognised when the doctrine more firmly entered secular approaches. Accordingly, the doctrine became increasingly discredited during the 19<sup>th</sup> century,<sup>12</sup> which corresponded with the emergence of the modern law of armed conflict.

While propelled by differing impulses, a distinctive philosophical foundation for the modern law of armed conflict is found in Rousseau’s differentiation between states and men in his ‘social contract’.<sup>13</sup> Recognising in the 18<sup>th</sup> century that war was an instrument of political policy rather than a matter of personal vengeance between men, Rousseau famously opined: ‘War is not, therefore, a relationship between man and man, but between state and state, in which individuals become enemies only by accident, not as men, nor even citizens’.<sup>14</sup> The praxis of such sentiment demonstrated the fulfilment of the post-Westphalian emphasis upon the state and yet simultaneously celebrated the common humanity of war’s participants. The sentiment provides a continuing touchstone for the validity of the contemporary law of armed conflict and is reflected in the famous ‘Martens Clause’<sup>15</sup> which appeals to the public conscience of humanity as a perennial check on martial excess.<sup>16</sup>

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<sup>10</sup> Judith Gardam, ‘Proportionality and Force in International Law’ (1993) 87 *American Journal of International Law* 391, 395.

<sup>11</sup> *Ibid.*

<sup>12</sup> Yoram Dinstein, *War, Aggression and Self Defence* (3<sup>rd</sup> ed, 2001) 63.

<sup>13</sup> Jean Pictet (ed), *Commentary: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (1952) vol 1, 10.

<sup>14</sup> Jean Jacques Rousseau, *The Social Contract* (Christopher Betts trans, 1994 ed) 51 [trans of: *Du Contrat social*].

<sup>15</sup> This clause is contained in the preamble to the *International Convention with respect to the Laws and Customs of War on Land*, opened for signature 29 July 1899, [1901] ATS 131 (entered into force 4 September 1900):

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.

<sup>16</sup> See generally Theodor Meron, ‘The Hague Peace Conferences: The Martens Clause, Principles of Humanity, and Dictates of Public Conscience’ (2000) 94 *American Journal of International Law* 78.

The 1863 *Lieber Code*<sup>17</sup> and the 1868 *St Petersburg Declaration*<sup>18</sup> — two early sources of the modern law of armed conflict — focused upon regulation of methods and means of warfare. These early approaches to limiting the scope of warfare introduced restrictions on conflict by emphasising the defeat of the enemy as the goal of warfare and, more significantly, expressly recognised that the methods and means of warfare were not unlimited. The essential idea of international law that developed through the prism of European dominance was one of ‘order’. This order was manifested through the development of finite rules<sup>19</sup> and found expression in the modern law of armed conflict as it developed in the mid-19<sup>th</sup> century.<sup>20</sup> The numerous *Hague Conventions* concerning warfare,<sup>21</sup> and the nascent customary law which began developing during the late 19<sup>th</sup> and early 20<sup>th</sup> centuries, have been correctly characterised as constituting the first ‘human rights’ oriented treaties in their recognition of soldiers, sailors and (to a lesser extent) civilians as the beneficiaries of state-centred rights.<sup>22</sup> The ‘civilising’ nature of imperial and expansionist Europe in the early development of the modern law of armed conflict was propagated as an article of faith and formed a deep reservoir of inspiration for intellectual thought in international law generally.<sup>23</sup>

Developing the *jus in bello* at a time when there was no prohibition on the resort to force necessitated an examination of the moral and legal impulses that informed the law.<sup>24</sup> Commentators such as Kennedy highlight the challenges faced in developing this body of law in the 19<sup>th</sup> century with the severance of the ‘just war’ concept and the embrace of a more agnostic ‘proceduralisation’ of the law.<sup>25</sup> The late 19<sup>th</sup> and early 20<sup>th</sup> centuries were a watershed period in the emergence of the modern international legal method of dealing with warfare. It is not surprising that the period saw the establishment of the American Society of

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<sup>17</sup> US War Department, *Instructions for the Government of Armies of the United States in the Field by Order of the Secretary of War (Lieber Code)*, General Orders No 100 (24 April 1863), as reproduced in Dietrich Schindler and Jiri Toman (eds), *The Laws of Armed Conflicts* (3<sup>rd</sup> revised ed, 1988) 3.

<sup>18</sup> *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grams Weight*, opened for signature 29 November 1868, [1901] ATS 125 (entered into force 11 December 1868) (‘*St Petersburg Declaration*’).

<sup>19</sup> Annelise Riles, ‘Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture’ (1993) 106 *Harvard Law Review* 723, 732–3.

<sup>20</sup> Kennedy, *Dark Sides of Virtue*, above n 5, 247.

<sup>21</sup> See, eg, *International Convention with respect to the Laws and Customs of War on Land*, above n 15; *St Petersburg Declaration*, above n 18; *Declaration respecting the Prohibition of the Use of Projectiles Diffusing Asphyxiating Gases*, opened for signature 29 July 1899, 187 ConTS 453 (entered into force 4 September 1900); *Declaration respecting the Prohibition of the Use of Expanding Bullets*, opened for signature 29 July 1899, 187 ConTS 459 (entered into force 4 September 1900); *International Convention concerning the Laws and Customs of War on Land*, opened for signature 18 October 1907, 205 ConTS 277 (entered into force 26 January 1910); *International Convention relative to the Laying of Automatic Submarine Contact Mines*, opened for signature 18 October 1907, 205 ConTS 331 (entered into force 26 January 1910).

<sup>22</sup> Dinstein, above n 12, 141–2.

<sup>23</sup> Riles, above n 19, 736.

<sup>24</sup> Kennedy, *Dark Sides of Virtue*, above n 5, 242.

<sup>25</sup> *Ibid* 240.

International Law, which was championed by the American peace movement,<sup>26</sup> and also saw a confident commitment by ‘true believers’ in the potential of international law — not only to ameliorate suffering in a time of war, but to abolish war itself.<sup>27</sup>

In the context of warfare, the early 20<sup>th</sup> century strategies promoting the relevance of international law were primarily focused on adjudication as the principal mechanism to remedy positivism’s unbridled embrace of the right to go to war.<sup>28</sup> The hope placed in the Hague system of adjudication was, however, devastated by the reality of World War I. In reaction to this setback, the post-war emphasis shifted to the League of Nations’ institutionally driven political framework. It was believed that this framework would more effectively restrain the destructive tendencies of absolutist sovereignty than the Hague system of adjudication. The legislative and administrative techniques utilised under the aegis of the League were to be the preferred mechanisms of conflict resolution rather than a resort to judicial means.<sup>29</sup> Indeed, during the inter-war period, the role of the Permanent Court of International Justice was both structurally and psychologically separate from the normative focus of the League. The inter-war attention given to the ‘sources’ doctrine<sup>30</sup> — that infringements upon sovereignty could not be presumed — offered little to the humanitarian strategy of international legal reformers of the period. Resort was therefore had to procedural and political methods as a more reliable means of inculcating legal standards into the dynamic calculus of international relations.<sup>31</sup> Importantly, the move away from an all-encompassing adjudicatory method represented a decisive strategic choice that profoundly altered the tenor of the approach of international humanitarian lawyers and the resulting law of armed conflict.

While World War II provided a stark rejoinder to the idealism of the inter-war years, the post-war international legal structure derived much from the League and reaffirmed the commitment to relevancy by international lawyers of the period. The United Nations effectively replaced the League as the principal repository of international institutional focus and advanced the collective security arrangements of the League more realistically. Similarly, the plethora of administrative agencies within the UN system offered significantly more opportunity for procedural modes of resolving international friction than the League system had, yet it faithfully carried forward the original efforts of the League. In the modern period, international lawyers have developed a more agnostic embrace of the ‘political’,<sup>32</sup> and the fusion of law and politics offers

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<sup>26</sup> The American Society of International Law was established in 1906 ‘as an outgrowth of the 19<sup>th</sup> century American peace movement’: American Society of International Law, *Milestones in the American Society of International Law’s First Hundred Years* <[www.asil.org/aboutasil/history.html](http://www.asil.org/aboutasil/history.html)> at 1 May 2005.

<sup>27</sup> Howard Meyer, *The World Court in Action: Judging among the Nations* (2002) 11–19.

<sup>28</sup> *Ibid* 21.

<sup>29</sup> David Kennedy, ‘When Renewal Repeats: Thinking against the Box’ (2000) 32 *New York University Journal of International Law and Politics* 335, 351.

<sup>30</sup> This doctrine was reaffirmed by the PCIJ in the celebrated *Lotus Case (France v Turkey)* (*Judgment*) [1927] PCIJ (ser A) No 10.

<sup>31</sup> Kennedy, *Dark Sides of Virtue*, above n 5, 251.

<sup>32</sup> *Ibid* 254.

greater promise for renewal of the international legal discipline. The International Court of Justice, in contrast to the PCIJ, is now formally a part of the UN system,<sup>33</sup> and through its own political orientation has developed a jurisprudence that is less intent upon asserting an extreme version of positivism than its predecessor.<sup>34</sup> With this more cosmopolitan fusion, post-war intellectual discourse seeks to provide more nuanced explanations for the relevancy and role of international law — especially in the context of the law regarding the resort to, and use of, force. Relevancy and traction remain the goals of international legal discourse and the resort to the pragmatism of a political–legal fusion is perceived as the ready means for delivering these goals.

#### A *Law of Armed Conflict — The Collaborative Vocabulary*

In his insightful review of the field, Professor David Kennedy has recently examined the consequences of the international humanitarian tendency towards pragmatism in the context of the law of armed conflict. The post-war debates which led to the drafting of the 1949 *Geneva Conventions*,<sup>35</sup> and the subsequent proceedings which led to the 1977 *Additional Protocols*,<sup>36</sup> were both well attended by delegations from both the military and humanitarian communities.<sup>37</sup> Concepts based firmly in military doctrine were incorporated into the modern law of armed conflict and the broad principles propagating ‘balance’ between military and humanitarian goals were subsequently enshrined in the resulting *Conventions*.<sup>38</sup> International humanitarian advocates made a strategic choice to grasp the ‘nettle of pragmatism’ and establish foundational principles and enduring ‘standards’ under which a common vocabulary could be established with military professionals.<sup>39</sup> The assumption underpinning the humanitarian

<sup>33</sup> *Charter of the United Nations* art 38.

<sup>34</sup> See, eg, *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, 238–9 (*‘Nuclear Weapons Advisory Opinion’*).

<sup>35</sup> *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 for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of 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 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 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) (collectively ‘*Geneva Conventions*’).

<sup>36</sup> *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’*); *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’*) (collectively ‘*Additional Protocols*’).

<sup>37</sup> The Index of Speakers of the *Final Record of the Diplomatic Conference of Geneva of 1949* details that 42 states participated in the Diplomatic Conference with military representatives of 18 states playing a significant role in the debates. Indeed, military representatives were accredited as Head of Delegation in a number of circumstances: Swiss Federal Political Department, *Final Record of the Diplomatic Conference of Geneva of 1949* (1949).

<sup>38</sup> See *Geneva Conventions*, above n 35; *Additional Protocol I*, above n 36; *Additional Protocol II*, above n 36.

<sup>39</sup> Kennedy, *Dark Sides of Virtue*, above n 5, 267.

strategy is that reaching agreement on both the principles and the associated vocabulary would enable the continued relevance of the international humanitarian movement and provide an ongoing reflective humanitarian impulse to inform decision-making. It is here that we find emphasised the reassuring central principles of ‘distinction’ and ‘proportionality’, which are the bedrocks of the modern law of armed conflict.<sup>40</sup>

In essence, the principle of distinction stipulates that only military targets may be attacked.<sup>41</sup> Proportionality requires that any incidental civilian injury or damage to civilian property arising from such an attack be proportional to the military advantage anticipated.<sup>42</sup> As a testament to the humanitarian–military fusion, these principles promise much but, as will be demonstrated in this review, deliver less than one may expect. As Kennedy has noted, the real focus of this criticism is not that the law of armed conflict is being subverted by either military or humanitarian advocates but rather that its internal ambiguity, especially in the context of the principles of distinction and proportionality, undermines its effectiveness even when applied in good faith.<sup>43</sup> It is this framework, the result of the military–humanitarian collaboration, which he identifies as problematic. Having spent a week on the *USS Independence* during a deployment to the Persian Gulf in 1998, he observed that the ‘[m]odern military is proud of its relationship to law’,<sup>44</sup> and that ‘[t]here is no question that international legal norms have been metabolized into the routines of the US Navy patrolling the Gulf’.<sup>45</sup> Accordingly, ‘[t]his was not a military that aspires to send pilots off to bomb without the confidence that the objective and means were in one or another sense legitimate. It is a military which aspires to be legitimate also in its own eyes’.<sup>46</sup> However Kennedy also argues that concepts such as distinction and proportionality are notoriously broad and susceptible to wide degrees of interpretation.<sup>47</sup> The broadness of these principles creates intractable dilemmas concerning the assessment and execution of each mission and, moreover, creates a framework for the application of force that sometimes results in lengthier wars and more concomitant suffering than might otherwise be necessary.

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<sup>40</sup> Ibid 248.

<sup>41</sup> See, eg, US Navy, *The Commander’s Handbook on the Law of Naval Operations* (1995), where it is specified that

[o]nly military objectives may be attacked. Military objectives are combatants and those objects which, by their nature, location, purpose, or use, effectively contribute to the enemy’s war-fighting or war-sustaining capability and whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack: at [8.1.1].

<sup>42</sup> ‘It is not unlawful to cause incidental injury to civilians, or collateral damage to civilian objects, during an attack upon a legitimate military objective. Incidental injury or collateral damage must not, however, be excessive in light of the military advantage anticipated by the attack’: *ibid* [8.1.2.1].

<sup>43</sup> Kennedy, *Dark Sides of Virtue*, above n 5, 292, 297. The good faith requirement was discussed in the *Nuclear Weapons Advisory Opinion* [1996] ICJ Rep 226, 263–4.

<sup>44</sup> Kennedy, *Dark Sides of Virtue*, above n 5, 284.

<sup>45</sup> *Ibid* 289.

<sup>46</sup> *Ibid* 292.

<sup>47</sup> *Ibid* 296–8.



The test of proportionality necessarily requires an assessment of the military value of a particular target, balanced against the expected loss of life resulting from an attack. Accordingly, any mission planner is confronted with the questions of how to value human life and how to ascribe relative values to enemy lives, both civilian and military. In addition, that planner must also determine the acceptable level of risk for one's own forces and the degree to which that risk should vary to potentially decrease civilian casualties. The standards remain generally amorphous, turning on personal 'status' and 'military advantage'.<sup>48</sup> The malleability of the language was necessary to gain inclusion of these principles in the 1949 *Geneva Conventions* and 1977 *Additional Protocols*. When incorporated into operable rules of engagement, difficult choices need to be made, choices that vigorously test the limits of the concepts. Kennedy correctly observes that commanders will often conclude that it is a 'judgment call'<sup>49</sup> that needs to be made when deciding the cost of an attack. A commander is certain of the obligation to protect soldiers, sailors and airmen within his or her command, but must grapple with this obligation when directing an attack and must make crucial decisions regarding these lives as well as those of the opposition. In a more general sense, Kennedy queries the effectiveness of the law, asking in the context of the principle of distinction why it is that the young enemy draftee soldier gets the 'benefit' of being a combatant (and thus a target) when enemy civilian elites who indirectly, but more critically, support the conduct of a war are allowed the protections afforded to them, even if their specific targeting would reduce the length and the suffering caused by war.<sup>50</sup> In summary, Kennedy argues that military professionals and international humanitarian advocates must not confuse progress in creating law with the more critical goal of actual progress on the ground. The nettle of pragmatism grasped by international humanitarian advocates as the price of relevance,<sup>51</sup> is not the type of pragmatism that necessarily ensures that military operations are conducted efficiently and humanely.

### III TARGETING CHOICES AND MODERN SCHISMS

As Kennedy has noted, military decision-makers are currently afforded wide discretion under the law of armed conflict. Such discretion has been criticised by some as permitting an 'open licence' for the initiation of destruction.<sup>52</sup> The tenor of this critique focuses on the features of the law which are regarded as too 'porous' for allowing extrinsic considerations to factor into planning decisions.

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<sup>48</sup> *Additional Protocol I*, above n 36, arts 48, 51(5)(b), 52(2), 57(2)(a)–(b), 57(3).

<sup>49</sup> Kennedy, *Dark Sides of Virtue*, above n 5, 270, 290–1.

<sup>50</sup> *Ibid* 270.

<sup>51</sup> *Ibid* 237.

<sup>52</sup> See generally Roger Normand and Chris af Jochnick, 'The Legitimation of Violence: A Critical History of the Laws of War' (1994) 35 *Harvard International Law Journal* 49 ('A Critical History of the Laws of War'); Rosa Ehrenreich Brooks, 'The New Imperialism: Violence, Norms, and the "Rule of Law"' (2003) 101 *Michigan Law Review* 2275, 2320; Matthew Lippman, 'Aerial Attacks on Civilians and the Humanitarian Law of War: Technology and Terror from World War I to Afghanistan' (2002) 33 *California Western International Law Journal* 1.

These features, under this perspective, thus permit a malevolent interpretation of the law's terms.<sup>53</sup>

An influential analysis by Normand and af Jochnick made in the mid-1990s is a well-known example of such reasoning.<sup>54</sup> The central contention of the authors' treatise is that, as narrative, the law of war principally serves state military priorities, ensuring the subordination of concomitant humanitarian objectives. Thus, the authors note that '[w]hile liberal jurists view law as a tool to influence belligerent conduct, the critical view adds the possibility that law may actually legitimize, and thereby encourage, the commission of atrocities'.<sup>55</sup> Such dissonance is seen by the authors as reflective of the positivist base of the original Hague laws, whose values they contend were perpetuated in the subsequent *Geneva Conventions* and resulting customary international law.<sup>56</sup> While the authors concede that *jus in bello* was informed by greater humanitarian influences through the 20<sup>th</sup> century, the militaristic priorities remain the same. Hence in their review of the Coalition's<sup>57</sup> compliance with the law of armed conflict in the first Gulf War, they take issue with the vocabulary employed by Coalition leaders concerning observance of that law.<sup>58</sup> The rhetoric of legal compliance implied a notion of legitimacy, which was used to conceal, in their view, a massively destructive agenda where everything was tendentiously justified behind the fig leaf of 'military necessity'.<sup>59</sup> The criticism levelled by the authors seems to have an underlying assumption of *mala fides*.

It is our contention that the review undertaken by Normand and af Jochnick is both harsh and misplaced.<sup>60</sup> While the review demonstrates the clash of expectations between humanitarian and military interpretations of the law and the inherent uncertainties of the principles in play, its repeated implications that the military acted in bad faith when interpreting the principles of distinction and proportionality prevents it from realistically assessing important law of armed conflict issues raised by the first Gulf War.

Normand and af Jochnick's failure to investigate the military perspective on the first Gulf War is evidenced by their use of a World War II era bombing

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<sup>53</sup> Normand and af Jochnick, 'A Critical History of the Laws of War', above n 52.

<sup>54</sup> *Ibid.*

<sup>55</sup> Roger Normand and Chris af Jochnick, 'The Legitimation of Violence: A Critical Analysis of the Gulf War' (1994) 35 *Harvard International Law Journal* 387, 414 ('A Critical Analysis of the Gulf War').

<sup>56</sup> Normand and af Jochnick, 'A Critical History of the Laws of War', above n 52, 76-7, 95.

<sup>57</sup> The members of the Coalition were: Argentina, Australia, Bangladesh, Belgium, Britain, Canada, Czechoslovakia, Denmark, Egypt, France, Germany, Greece, Gulf Cooperation Council (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates), Italy, Japan, Morocco, Netherlands, New Zealand, Niger, Norway, Pakistan, Poland, Portugal, Senegal, Spain, Syria, Turkey, the US, the USSR: Ian Bickerton and Michael Pearson, *43 Days: The Gulf War* (1991) 239.

<sup>58</sup> Normand and af Jochnick, 'A Critical History of the Laws of War', above n 52, 77. The authors observe that 'the Coalition's legal rhetoric was intended to defend specific actions as well as to justify the war as a whole by making it more acceptable to the American public. Coalition leaders used the law to protect specific attacks and military policies from criticism'.

<sup>59</sup> *Ibid.* 64.

<sup>60</sup> See Michael W Lewis, 'The Law of Aerial Bombardment in the 1991 Gulf War' (2003) 97 *American Journal of International Law* 481.

survey to explain the motivation of the US Air Force in 1990.<sup>61</sup> Their misinterpretation of military terminology<sup>62</sup> and their insistence that attacks on the oil sector and the electrical grid conferred no military advantage on the Coalition, but rather were undertaken for economically punitive reasons, prevent Normand and af Jochnick from undertaking a meaningful proportionality analysis that might have actually supported their criticism.<sup>63</sup> Even a cursory investigation of military contingency planning<sup>64</sup> and the requirements for overcoming an advanced integrated air defence system<sup>65</sup> would reveal the military advantage gained from these attacks. Once this advantage is recognised, a more thorough analysis of the proportionality of these attacks can be undertaken.

Normand and af Jochnick's critique illustrates the ambiguities of a common but broad vocabulary. The humanitarian values they place upon target selection did not correspond with the military assessment of the operational significance and 'price' of attacking those targets.<sup>66</sup> Their resulting disillusionment leads to their conclusion that there has been a subversion of principle. What appears not to be accepted is that the target assessment formulas employed were a product of a different set of values that was nonetheless consistent with the broad discretions acknowledged under the prevailing law. This point is highlighted by Kennedy when he observes that

the humanitarian seems to reserve the right to exit the conversation, to depart the vocabulary of pragmatism about consequences, while the military planner must remain within it. Watching discussions between students with military and humanitarian backgrounds, one often feels the military's frustration after walking through a lengthy analysis of costs and benefits and proportionality and necessity, only to be denounced as inhumane — 'these civilians can just say *anything*.' They lack discipline.<sup>67</sup>

#### A *The Nuclear Weapons Advisory Opinion — Variations on the Treatment of Proportionality*

A striking example of the difficulty in applying the principles of distinction and proportionality is evident in the ICJ's 1996 *Nuclear Weapons Advisory*

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<sup>61</sup> Normand and af Jochnick, 'A Critical History of the Laws of War', above n 52, 88.

<sup>62</sup> Normand and af Jochnick use the term 'unchallenged air supremacy' to imply that the Coalition Air Forces flew with impunity over Iraq. No mention is made of the 39 Coalition aircraft shot down or of the more than 80 Coalition aircraft damaged during the war: Normand and af Jochnick, 'A Critical Analysis of the Gulf War', above n 55, 391.

<sup>63</sup> *Ibid* 403–6.

<sup>64</sup> The oil sector was a meaningful target in spite of the fact that the Iraqi military had three months of oil reserves at the beginning of the war because the Coalition planned for the contingency that, due to unforeseen circumstances such as Israeli intervention, Iraqi use of chemical or biological weapons, or a stubborn Iraqi defence of Kuwait, the war might outlast this reserve: Eliot Cohen (dir), *Gulf War Air Power Survey: Planning and Command and Control*, (1998) 310–11.

<sup>65</sup> Iraq's French-designed KARI integrated air defence system was one of the most modern in the world at that time. All components of this system, from the early warning radars to the communications net, to the missile launchers themselves, were dependent upon a reliable electrical system.

<sup>66</sup> Normand and af Jochnick, 'A Critical Analysis of the Gulf War', above n 55, 404, 407.

<sup>67</sup> Kennedy, *Dark Sides of Virtue*, above n 5, 282 (emphasis in original).

*Opinion*.<sup>68</sup> Asked by the General Assembly to assess the legality of the threat or use of nuclear weapons,<sup>69</sup> the Court had the opportunity, for the first time, to address both *jus ad bellum* and *jus in bello*.<sup>70</sup> Following a comprehensive survey of disparate areas of international law, the Court decided that it could not definitively conclude that in every circumstance the threat or use of nuclear weapons was axiomatically contrary to international law, especially in the context of a state whose survival is in question. Such a result is hardly surprising given the speculative nature of the question posed by the General Assembly.<sup>71</sup> What has proven particularly controversial is the ambiguity of the ICJ's conclusions relating to the interaction between *jus ad bellum* and *jus in bello* and the ICJ's analysis of the proportionality principle.<sup>72</sup>

The majority opinion determined that the use of nuclear weapons was 'scarcely reconcilable' with the dictates of *jus in bello*,<sup>73</sup> and concluded that the threat and use of nuclear weapons would generally be contrary to international law applicable in an armed conflict.<sup>74</sup> Yet, the majority opinion also stated that

in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake.<sup>75</sup>

The apparent logical inconsistency between the conclusions of the ICJ regarding general noncompliance with the law of armed conflict and the rights exercisable in accordance with the *jus ad bellum* has been subject to considerable academic critique. Greenwood seeks to reconcile those conclusions by identifying a complementary character between *jus ad bellum* and *jus in bello* within the *Nuclear Weapons Advisory Opinion*. This vindicates a linear relationship between the two streams. Hence, rather than seeing the *jus ad bellum* as merely a mechanism for initiating armed conflict, he cites the *Advisory Opinion* as authority for the continuing impact of the *jus ad bellum* within the progress of a war.<sup>76</sup> In this manner, the principle of proportionality continues to inform political-military judgements as to 'choice of weapons and targets and the area of conflict'.<sup>77</sup>

Judge Higgins' Dissenting Opinion provides some insight into the rationalisation of Greenwood. Her Honour observes that proportionality in the

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<sup>68</sup> [1996] ICJ Rep 226.

<sup>69</sup> *Request for an Advisory Opinion from the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons*, GA Res 49/75, UN GAOR, 49<sup>th</sup> sess, 90<sup>th</sup> plen mtg, UN Doc A/RES/49/75 (15 December 1994).

<sup>70</sup> See Louise Doswald-Beck, 'International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons' (1997) 316 *International Review of the Red Cross* 35.

<sup>71</sup> Christopher Greenwood, 'Jus ad Bellum and Jus in Bello in the Nuclear Weapons Advisory Opinion' in Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, The International Court of Justice and Nuclear Weapons* (1999) 247, 249.

<sup>72</sup> Dinstein, above n 12, 144–6.

<sup>73</sup> *Nuclear Weapons Advisory Opinion* [1996] ICJ Rep 226, 262–3.

<sup>74</sup> *Ibid* 266.

<sup>75</sup> *Ibid*.

<sup>76</sup> Greenwood, 'Jus ad Bellum and Jus in Bello in the Nuclear Weapons Advisory Opinion', above n 71, 258.

<sup>77</sup> *Ibid*.

strategic sense (*jus ad bellum*) can be reconciled with proportionality in the tactical sense (*jus in bello*) in circumstances of ‘state survival’. Thus her Honour notes:

It must be that, in order to meet the legal requirement that a military target may not be attacked if collateral civilian casualties would be excessive in relation to the military advantage, the ‘military advantage’ must indeed be one related to the very survival of a State or the avoidance of infliction (whether by nuclear or other weapons of mass destruction) of vast and severe suffering on its own population; and that no other method of eliminating this military target be available.<sup>78</sup>

Such reasoning is logical because it provides a reference for measuring what is proportionate, for example, the loss of a nation or its people, though it runs counter to the mutually re-enforcing levels of constraint that Greenwood envisages. Thus Judge Higgins would permit legitimate incidental injury of large parts of civilian populations of the aggressor state in some circumstances, provided the nuclear target within the aggressor state was a military one and that massive loss within the victim state was threatened. Within such a paradigm, the level of constraint anticipated by Greenwood by advocating compliance with the tactical limitations of the *jus in bello* actually becomes a mechanism of licence, permitting a broader canvass to assess the ‘concrete and direct military advantage anticipated’ within the terms of art 51 of *Additional Protocol I*.<sup>79</sup> This plainly represents a departure from the strict separation between the *jus ad bellum* and *jus in bello* in allowing the strategic and somewhat nebulous objectives of national self-defence to act as the measure for nuclear annihilation of the opposition, ostensibly within the formula of acceptable civilian loss under the proportionality principle.<sup>80</sup> Interestingly, Judge Weeramantry concluded that such a calculation rendered proportionality meaningless.<sup>81</sup>

Gardam treats the attempted reconciliation of the proportionality calculus between *jus ad bellum* and *jus in bello* more sceptically than Greenwood in her analysis of the operative paragraph of the ICJ’s *Nuclear Weapons Advisory Opinion* on this point. Gardam thus agrees with Greenwood’s interpretation concerning the mutually continuing obligations owed under both *jus ad bellum*

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<sup>78</sup> *Nuclear Weapons Advisory Opinion* [1996] ICJ Rep 226, 238 (Dissenting Opinion of Judge Higgins).

<sup>79</sup> Above n 36. Article 51(5) states:

Among others, the following types of attacks are to be considered as indiscriminate

...

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

<sup>80</sup> Dinstein, above n 12, 145.

<sup>81</sup> *Nuclear Weapons Advisory Opinion* [1996] ICJ Rep 226 (Separate Opinion of Judge Weeramantry). Judge Weeramantry notes that

one is here speaking in terms of measurement — measurement of the intensity of the attack and the proportionality of the response. But one can measure only the measurable. With nuclear war, the quality of measurability ceases. Total devastation admits of no scales of measurement. We are in territory where the principle of proportionality becomes devoid of meaning: at 515.

and *jus in bello* during the course of a military campaign.<sup>82</sup> Consistent with Greenwood's thesis, Gardam analyses the restraining feature of proportionality and notes that tactical decisions on target approval are required to be made against a strategic frame.<sup>83</sup> Again, the emphasis is upon a sense of mutually operative levels of constraint. Gardam notes that decisions concerning targeting were required to be measured against the relatively narrow field of removing Iraqi forces from Kuwait in the first Gulf War.<sup>84</sup> Unlike Greenwood's assessment, Gardam is more sanguine in her reading of the emphasis and import of the *Advisory Opinion*. She notes hesitancy in the ICJ's balancing of the humanitarian considerations within the *jus in bello* and the means under which legitimate rights of self-defence could be exercised.<sup>85</sup> Gardam believes that the ICJ's operative paragraph is equivocal and open to two possible interpretations.<sup>86</sup> Either the Court contemplated the use of nuclear weapons in a manner consistent with the law of armed conflict, thus broadening to extreme levels what might be justified as proportional; or alternatively, the Court determined that the requirements of the law of armed conflict had no utility in the context of state survival.<sup>87</sup> With respect to this latter implication, Mullerson also focuses on the Separate Opinion of Judge Fleisscher, who unequivocally determined that the national right of self-defence had priority over the dictates of the law of armed conflict.<sup>88</sup> In essence, the usefulness of the law of armed conflict and its proportionality requirement reaches its logical limit in the context of nuclear war.

The Court's treatment of the concept of proportionality does much to illuminate the practical difficulties of applying the concept. It is quite easy to accept the authoritative contention of the International Committee of the Red Cross that attacking an entire village to target a lone soldier home on leave is disproportionate.<sup>89</sup> Conversely, one may also accept the implicit reasoning of the ICJ that, short of nuclear annihilation in circumstances of state survival, there are actually circumstances where the tactical use of nuclear weapons might be entirely consistent with proportionality dictates of reducing or avoiding civilian loss, such as when the target was an enemy submarine in the high seas or an enemy army concentration in the desert.<sup>90</sup> But assessments are rarely that straightforward and there is much debate about requisite values for the spectrum

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<sup>82</sup> Judith Gardam, 'Necessity and Proportionality in *Jus ad Bellum* and *Jus in Bello*' in Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (1999) 275, 280.

<sup>83</sup> *Ibid* 281.

<sup>84</sup> *Ibid*.

<sup>85</sup> *Ibid* 288.

<sup>86</sup> *Ibid* 289.

<sup>87</sup> *Ibid* 289.

<sup>88</sup> Rein Mullerson, 'On the Relationship between *Jus ad Bellum* and *Jus in Bello* in the General Assembly Advisory Opinion' in Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (1999) 267, 269.

<sup>89</sup> 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) [2213].

<sup>90</sup> See also *Nuclear Weapons Advisory Opinion* [1996] ICJ Rep 226, 245; 320-1 (Dissenting Opinion of Vice-President Schwebel).

of circumstances that are within those two poles. The conundrum is expressed concisely by Michael Schmitt, a former US Air Force lawyer, when he observes:

[T]here are certain situations in which all reasonable actors would agree on the proportionality balance. No one would suggest, for example, that capturing a single low-ranking soldier would justify the death of hundreds of civilians. Similarly, the military advantage of destroying a command and control center would seldom be outweighed by damage to an uninhabited building. The complexity emerges when one moves from these extremes along the proportionality continuum toward the center. It is here that dissimilar valuation paradigms clash. Despite the resulting dissonance, however, at this point parties may still agree that they should all be judged by objective standards; they simply disagree as to what those standards should be.<sup>91</sup>

### B *Factors regarding Proportionality Determinations*

Upon ratification of *Additional Protocol I*, certain states made declarations regarding the determination of an acceptable loss of civilian personnel within the proportionality equation. Accordingly, a number of states maintain that while civilian loss within a discrete area of the battlefield may be disproportionate to the local military advantage to be achieved, if measured against ‘the attack as a whole’<sup>92</sup> such loss may be considered acceptable. The logical extreme of this approach was seemingly accepted by the ICJ in the *Nuclear Weapons Advisory Opinion* with its acknowledgement of the concept of ‘state survival’.<sup>93</sup> When ‘state survival’ is employed as the criterion to measure the acceptable loss occasioned on an enemy population during an ‘attack as a whole’,<sup>94</sup> it becomes plausible to accept the consequential nuclear annihilation as an acceptably proportionate response. Greenwood and, to a lesser extent, Gardam, seek to rationalise the decision as a reaffirmation of the continued vitality of both the *jus ad bellum* and the *jus in bello* within conventional understandings.<sup>95</sup> It is difficult not to conclude however, that the implications of the *Advisory Opinion* are exactly as stated by Judge Fleischer: that the ‘cause’ of state survival overrides compliance with the law of armed conflict in situations where this is necessary. This allows for a very fluid assessment of proportionality but seems to represent a major indictment of the usefulness of the law in this most strategic of circumstances.

<sup>91</sup> Michael Schmitt, ‘The Principle of Discrimination in 21<sup>st</sup> Century Warfare’ (1998) 2 *Yale Human Rights and Development Law Journal* 143, 170.

<sup>92</sup> See, eg, *Australian Declaration in relation to Protocol I*, [5], which states:

In relation to paragraph 5(b) of article 51 and to paragraph 2(a)(iii) of Article 57, it is the understanding of Australia that references to the ‘military advantage’ are intended to mean the advantage anticipated from the military attack considered as a whole and not only from isolated or particular parts of that attack.

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<sup>93</sup> *Nuclear Weapons Advisory Opinion* [1996] ICJ Rep 226, 556 (Opinion of Judge Koroma).

<sup>94</sup> *Nuclear Weapons Advisory Opinion* [1996] ICJ Rep 226, 311 (Dissenting Opinion of Vice-President Schwebel).

<sup>95</sup> Greenwood, ‘*Jus ad Bellum* and *Jus in Bello* in the *Nuclear Weapons Advisory Opinion*’, above n 71, 247; Gardam, ‘Necessity and Proportionality’, above n 82.

In her more specific analysis of proportionality applicable in the *jus in bello*, Gardam takes issue with the subjective nature of the test applicable under the principle.<sup>96</sup> She maintains that the test of proportionality relies too heavily upon considerations of ‘military necessity’ and thus upon subjective military judgements about the acceptability of civilian loss.<sup>97</sup> Unlike the bold assertions maintained by Normand and af Jochnick, this is not represented as an apparent subversion of the principle, but rather a reflection of the intrinsically vague nature of the proportionality test required by both *Additional Protocol I* and customary international law. Gardam posits that decisions relating to the risks acceptable to the lives of the attacking state’s soldiers are validly rationalised within the mix of considerations, but this empirically results in noncombatants always suffering a greater loss.<sup>98</sup> Similarly, in citing the exclusive military nature of determining what is an acceptable loss of civilian lives, Gardam has maintained that extrinsic considerations are allowed to factor in the determination.<sup>99</sup> She maintains that such extrinsic circumstances include the perceived legitimacy of the conflict. She cites the first Gulf War as an example of the latitude taken by military planners, specifically the determination of targets in Kuwait and Iraq, which were justified not only on military advantage sought to be maintained but also took into account ‘Iraq’s flagrant disregard of existing legal rules’.<sup>100</sup> Due to its inherent subjectivity and vaguely structured methodology, the critical test of proportionality is, according to Gardam, necessarily influenced by ‘just cause’ considerations.<sup>101</sup> In respect of the first Gulf War against Iraq, she criticised the Coalition attacks on many aspects of Iraqi infrastructure, opining that ‘[m]ore destruction was perhaps regarded as legitimate in that conflict than may have been otherwise the case, in light of the clear-cut nature of Iraq’s aggression and the collective nature of the response’.<sup>102</sup> Indeed, her continuing thesis — that the Coalition’s application of the proportionality principle in that conflict was so wrought with subjectivity — compels her to conclude that

it appears that the interpretation by the United States and its allies of their legal obligations concerning the prevention of collateral casualties and the concept of proportionality comprehends prohibiting only two types of attacks: first, those that intentionally target civilians; and second, those that involve negligent behavior in ascertaining the nature of a target or the conduct of the attack itself, so as to amount to the direct targeting of civilians.<sup>103</sup>

While the ambiguities highlighted by Gardam exist, her general criticism that the principle of proportionality was essentially rendered meaningless during the first Gulf War is not supportable. The principle of proportionality was applied

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<sup>96</sup> Judith Gardam, ‘Proportionality as a Restraint on the Use of Force’ (1999) 20 *Australian Year Book of International Law* 161, 166–7.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.* 166.

<sup>99</sup> *Ibid.* 167.

<sup>100</sup> Gardam, ‘Proportionality and Force in International Law’, above n 10, 410.

<sup>101</sup> *Ibid.*

<sup>102</sup> See Roy Lee (ed), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence* (2001) 150.

<sup>103</sup> Gardam, ‘Proportionality and Force in International Law’, above n 10, 410.



throughout the first Gulf War and evidently played a role in the approximately 25 per cent of Coalition aircraft returning with undelivered ordnance.<sup>104</sup> An illuminating example of the extensive effort expended to comply with the principle of proportionality during this war is the attack on Iraqi chemical weapons facilities.<sup>105</sup> Before attacking chemical facilities that were suspected to contain anthrax, planners consulted with the Lawrence Livermore Laboratory and Los Alamos National Laboratory about limiting the release of spores after an attack.<sup>106</sup> Based on the laboratories' recommendations for destroying anthrax, and after consulting with US General Colin Powell and US Secretary of Defense Dick Cheney, the military used penetrating munitions and followed them with incendiaries to keep high intensity fires burning because anthrax was particularly vulnerable to high heat.<sup>107</sup> To further ensure that any spores would be exposed to the maximum intensity heat, the area around the target was 'seeded' with aerial mines to prevent firefighters from extinguishing the blaze. Finally, because the scientific consensus stated that anthrax was vulnerable to direct sunlight, the attack was conducted at dawn so that any escaping spores would be exposed to the maximum amount of sunlight immediately after their release.<sup>108</sup> Recognition that the military undertook these calculated measures to consciously limit the spread of anthrax spores to adjacent civilian areas plainly detracts from Gardam's broad conclusion that the principle of proportionality was effectively ignored or somehow assimilated within the principle of distinction.

More recent conflicts have also seen the principle of proportionality applied without reference to the legitimacy of the conflict, which Gardam posits as a relevant factor. Writing in relation to the North Atlantic Treaty Organisation campaign in Kosovo, Montgomery details a four-tier targeting analysis which was conducted during that campaign. It illustrates the decision-making variables applied to assess potential civilian loss. This analysis evaluated, among other things, specific munition blast effects, population concentrations, historical data on munition accuracy, possibilities of error and potential computer simulation and modelling to predict likely effects which were then factored into the mission planning evolutions.<sup>109</sup> This mature targeting approval process is entrenched in modern military approaches as a matter of law and doctrine and gives full effect to the principle of proportionality as a self-contained methodology of cause and

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<sup>104</sup> See Lewis, above n 60, 501; see also John Humphries, 'Operations Law and the Rules of Engagement in Operations Desert Shield and Desert Storm' (Autumn 1992) *Airpower Journal* 25, 37.

<sup>105</sup> Lewis, above n 60, 489–90.

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> Tony Montgomery quoted in Andru Wall, 'Legal and Ethical Lessons of NATO's Kosovo Campaign' (2002) 78 *Naval War College International Law Studies Series* 189, 194.

effect, quite impervious to the justness of cause being fought.<sup>110</sup> This process was also applied to full effect by Coalition forces during Operation Enduring Freedom in 2001 to ensure that attacks complied with the principle of proportionality.<sup>111</sup> As in Kosovo, these decisions were also subject to higher-level political approvals even where an attack was determined to be entirely lawful under the principle of proportionality but nonetheless anticipated significant civilian losses.

C *Lives of One's Own Military Members — Relevance in the Proportionality Equation*

Gardam's assessment that the lives of a nation's own military members are factored into calculations of risk and proportionality is both correct and entirely defensible. The law of armed conflict does not require that a nation needlessly sacrifice its own military members in order to minimise incidental civilian injury.<sup>112</sup> Indeed, while the ICJ has expressly asserted the precedence of the law of armed conflict as the *lex specialis* over human rights norms during a war,<sup>113</sup> this still allows for the application of human rights norms where the *jus in bello* is silent.<sup>114</sup> One obvious area of intersection concerns the rights of a nation's own military members and the risks to which they must be exposed to preserve the lives of civilians of the enemy nation. As previously mentioned, a number of countries have expressly acknowledged this issue under the law of armed

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<sup>110</sup> See also Sandoz, Swinarski and Zimmermann, above n 89, who assert that

[p]roportionality is concerned with incidental effects which attacks may have on persons and objects, as appears from the reference to 'incidental loss'. The danger incurred by the civilian objects depends on various factors: their location (possibly within or in the vicinity of a military objective), the terrain (landslides, floods etc), accuracy of the weapons used (greater or lesser dispersion, depending on the trajectory, the range, the ammunition used etc), weather conditions (visibility, wind etc), the specific nature of the military objectives concerned (ammunition depots, fuel reservoirs, main roads of military importance at or in the vicinity of inhabited areas etc), technical skill of the combatants (random dropping of bombs when unable to hit the intended target): at [2213].

<sup>111</sup> Rebecca Grant, 'In Search of Lawful Targets' (2003) 86 *Air Force Magazine* 38, 44.

<sup>112</sup> See Charles Dunlap, 'Kosovo, Causality Aversion, and the American Military Ethos: A Perspective' (2000) 10 *United States Air Force Academy Journal of Legal Studies* 95, where the author states

although [the law of armed conflict] obviously prohibits the targeting of *bona fide* noncombatants, it does not *per se* place a higher *value* on the lives of civilians over those in uniform. There is, of course, a significant body of both conventional and customary international law that seeks to shield noncombatant civilians from the adverse effects of war, but nothing in that legal regime expressly requires an assumption of more risk by a combatant than a noncombatant: at 99 (emphasis in original).

<sup>113</sup> *Nuclear Weapons Advisory Opinion* [1996] ICJ Rep 226, 240.

<sup>114</sup> See generally Dale Stephens, 'Human Rights and Armed Conflict — The Advisory Opinion of the International Court of Justice in the *Nuclear Weapons Case*' (2001) 4 *Yale Human Rights and Development Law Journal* 1.

conflict when ratifying *Additional Protocol I* by declaring that the ‘security of the attacking force’ will indeed be factored into the proportionality equation.<sup>115</sup>

The question that remains is the extent to which enemy civilian lives may be endangered in order to better protect a nation’s own military members and it is here that considerations as to the ‘justness’ of the conflict, or more particularly, the public support for the conflict, may indirectly come into play.

The question of popular support for a conflict in the context of interpreting broad legal standards under the *jus in bello* is an intriguing one, at least in Western liberal democracies. Kennedy has addressed this point principally in the context of the *jus ad bellum*. Normatively speaking, Kennedy observes that, notwithstanding its high goals, the *Charter of the United Nations* merely provided a new vocabulary for the initiation and substantiation of the use of force to secure familiar strategic goals. Accordingly, the new justifications for the application of force extending around variations of either the ‘self-defence’ or ‘collective security’ rubrics are only the most recent incantations of the inevitability of the armed conflict process. Situated within the political crucible of the international order, it follows that Kennedy’s assertions about the persuasiveness of such legal arguments in drawing upon perceptions of ‘legitimacy’ of cause, when balanced against the prior moral-political transactions of the state concerned, have certain appeal. Facts are corrigible, especially when viewed through the prism of international relations theory. Accordingly, clever legal arguments may be synthesised to achieve the requisite legitimacy. Ultimately, however, it remains a matter of moral and political balance whether armed intervention ‘sells’ to the wider international audience irrespective of the strict interpretation of such actions against the frame of the *UN Charter*. Echoing the sentiments of Kennedy, noted Oxford Professor Vaughan Lowe is undoubtedly right when, commenting on the second Gulf War, he writes that ‘claims to new legal rights and duties will find their value in the market place of State practice, which alone can confer upon them the status of formally binding law’.<sup>116</sup>

Applying these sentiments at the tactical level, Kennedy asks:

In contemplating a potential target, precisely *how much more heavily* should one weigh civilian than military casualties in assessing the proportionality and necessity of the target? From the military point of view, as much more heavily as their death would delegitimize our campaign. If relevant publics — within the enemy society, at home, in third countries — will view the strike as illegitimate, this may harden the enemy’s resolve, strengthen opposition elsewhere, or undermine support for our campaign at home or among our allies. We can imagine calculating a ‘CNN effect’, in which the additional opprobrium resulting from civilian deaths, discounted by the probability of it becoming known to relevant audiences, multiplied by the ability of that audience to hinder the

<sup>115</sup> For example, New Zealand declared: ‘In relation to paragraph 5 (b) of Article 51 and to paragraph 2 (a) (iii) of Article 57 ... the term “military advantage” involves a variety of considerations, including the security of attacking forces’. A similar declaration was made by Australia. Whilst not a party to *Additional Protocol I*, the US has included in *The Commander’s Handbook on the Law of Naval Operations*, above n 41, the following commentary: ‘Military advantage may involve a variety of considerations, including the security of the attacking force’.

<sup>116</sup> Vaughan Lowe, ‘The Iraq Crisis: What Now?’ (2003) 52 *International and Comparative Law Quarterly* 859, 860.

continued prosecution of the war, will need to be added to the probable costs of the strike in calculating its proportionality and necessity.<sup>117</sup>

As the Vietnam War demonstrated, public support for both military intervention and ongoing operations is critical for their ultimate success.<sup>118</sup> In contemporary military command structures (at least for military forces in liberal democratic societies) military public affairs and legal officers rightfully take their place as key advisers to senior military commanders. It is therefore logical that the types of calculations about public perceptions highlighted by Kennedy inform judgements in the context he describes. This is not to suggest that the law of armed conflict is being subverted or, more perniciously, fused with the *jus ad bellum* causes, but is to acknowledge the wide scope of considerations which are indirectly incorporated into the proportionality equation. The modern commander is compelled to weigh the loss of all lives (enemy, civilian and own forces) when planning an attack and, under the prevailing law, must apply requisite values to both lives and military objectives when deciding whether the proposed attack meets the proportionality criteria. These values are shaped by both the cultural background of the officer as well as the significance of the military objective and the broad cost of securing it.<sup>119</sup> This is not to imply mathematical certainty, but does require that a decision actually be made and values ascribed to what losses are justifiable. Discretions are broad and the factors which apply to determine these respective values are a product of judgement. While the popularity of a war must never play a direct role in analysing the proportionality of a target, this factor may indirectly influence the determination of what losses are sustainable.

#### D Granularity of Standards

The language of the law of armed conflict is, in part, necessarily general, which may seem untenable in circumstances where life and death decisions are being made. This is rendered more problematic with the acknowledged application of human rights standards on the battlefield (albeit subject to the *lex specialis* of the law of armed conflict).<sup>120</sup> Questions concerning the 'correct' loss of lives to secure military objectives are not easily answerable. Indeed, as already discussed, when applying the principle of proportionality in the context of nuclear weapons, the many eminent judges of the ICJ have followed significantly

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<sup>117</sup> Kennedy, *Dark Sides of Virtue*, above n 5, 275–6 (emphasis in original).

<sup>118</sup> Charles Dunlap, 'A Virtuous Warrior in a Savage World' (1998) 8 *United States Air Force Academy Journal of Legal Studies* 71, notes that

[t]he United States has already seen how an enemy can carry out a value-based asymmetrical strategy. For example, one of the things that America's enemies have learned in the latter half of the 20<sup>th</sup> century is to manipulate democratic values. Consider the remarks of a former North Vietnamese commander: 'The conscience of America was part of its war-making capability, and we were turning that power in our favor. America lost because of its democracy; through dissent and protest it lost the ability to mobilize a will to win.' By stirring up dissension in the United States, the North Vietnamese were able to advance their strategic goal of removing American power from Southeast Asia. Democracies are less-resistant to political machinations of this sort than are the totalitarian systems common to neo-absolutists: at 77.

<sup>119</sup> Schmitt, 'The Principle of Discrimination in 21<sup>st</sup> Century Warfare', above n 91, 151.

<sup>120</sup> *Nuclear Weapons Advisory Opinion* [1996] ICJ Rep 226, 240.

divergent approaches and produced strikingly diverse results.<sup>121</sup> The difficulty for the battlefield commander to arrive at the ‘right’ decision when senior jurists provide such diffuse analysis and conclusions is patently apparent. The distinct certainties to be drawn from prevailing authoritative commentary are the extremes of the certainty of not attacking a town to target a lone soldier and the possibility of embarking upon nuclear annihilation where the survival of a state is in question. Between these two extremes lies the ‘correct’ choice as to the proportionality determination.

Notwithstanding these apparent structural conundra, the standards against which such decisions are measured have been enunciated with a level of particularity and, as the recent prosecutorial review of NATO actions undertaken in Kosovo indicates, such decisions are objectively examinable.<sup>122</sup> It is significant that the prosecutor concluded in that instance that none of the nine incidents of alleged violations investigated, including attacks upon civilian wagon trains and domestic broadcasting studios, provided prima facie grounds for prosecution of any NATO military members.<sup>123</sup>

The principle of proportionality necessarily requires that ‘value judgments’ should be made as to the respective worth of attaining military objectives against the cost of securing such an objective.<sup>124</sup> Article 8(2)(b)(iv) of the *Rome Statute of the International Criminal Court* articulates this balance within its terms by providing that it is an individual crime for a military member to

intentionally [launch] an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.<sup>125</sup>

A recent commentary to the debates that led to the adoption of this article acknowledges the ambiguity inherent in the formulation of art 8(2)(b)(iv) with its references to ‘clearly excessive’ and ‘overall military advantage’.<sup>126</sup> Indeed, an assessment by Daniel Frank, a member of the Swiss delegation during the *Rome Statute* negotiations, reflects upon the debates which led to the framing of art 8(2)(b)(iv) and states that ‘all accept that a value judgment must have been made’.<sup>127</sup> Ultimately, while the assessment of criminality will not be made by the International Criminal Court, ‘to second guess value judgments made in

<sup>121</sup> Ibid 287 (Separate Opinion of Judge Guillaume); 294 (Separate Opinion of Judge Ranjeva); 305 (Separate Opinion of Judge Fleischhauer); 311 (Dissenting Opinion of Vice-President Schwebel); 330 (Dissenting Opinion of Judge Oda); 375 (Dissenting Opinion of Judge Shahabuddeen); 429 (Dissenting Opinion of Judge Weeramantry); 556 (Dissenting Opinion of Judge Koroma); 583 (Dissenting Opinion of Judge Higgins).

<sup>122</sup> ICTY, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia* (8 June 2000).39 ILM 1257.

<sup>123</sup> Ibid [58]–[62], [71]–[79], [90]–[91].

<sup>124</sup> Schmitt, ‘The Principle of Discrimination in 21<sup>st</sup> Century Warfare’, above n 91, 151.

<sup>125</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) (‘*Rome Statute*’).

<sup>126</sup> Michael Bothe, ‘War Crimes’ in Antonio Cassese, Paola Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) vol 1, 379, 397–8.

<sup>127</sup> Daniel Frank as quoted in Lee, above n 102, 150.

difficult circumstances and often on the basis of incomplete information ... such judgments should be reasonable and made in good faith'.<sup>128</sup>

This acknowledgment of the basically subjective nature of these decisions — albeit within a margin of reasonable appreciation — undermines the suspicions held by commentators such as Normand and af Jochnick regarding the methodology applied and demonstrates the apparent ‘disconnect’ of expectations between the international humanitarian and professional military frames. To the extent that decisions concerning target selection under the principle of proportionality are based upon value judgments, they will necessarily reflect the values of the military commander making those judgments. Whether a bridge is worth five or 50 lives will be dependent upon the attendant values placed on the destruction of that particular bridge in those particular circumstances.

There is plainly potential conflict between Western and other values or sensibilities which may produce differing results and it is certainly wrong to assume a universality of virtue.<sup>129</sup> Different military commanders from different cultures bring their own moral compass as well as their own sense of value regarding ‘military objectives’ to the target planning process. Thus, the commentator Schmitt notes that

[v]aluation paradigms may also be experientially determined. On an immediate individual basis, of course, there is no distinction in the value placed on life by different societies. It would be absurd, for instance, to suggest that a Belgian valued the life of a loved one any more or less than a Somali. Yet, in some societies, death, poverty, and deprivation tragically are so widespread that their population can become desensitized to death in the more general sense. In much the same way that a doctor becomes less personally affected by death over time, or a criminal defense attorney learns to react somewhat impersonally to the crimes of her client, those who have the misfortune to live amongst death-filled circumstances may become inured to death when it is not personally relevant. This notion flies in the face of the objective valuation of life sought by humanitarian law, but represents an unfortunate reality that shades proportionality calculations. Among makers of proportionality calculations, therefore, the value attributed to the human suffering caused by a military operation may vary widely with social or cultural background.<sup>130</sup>

Similarly, Schmitt observes that such normative relativism is also impacted by the different military capabilities of different nations.<sup>131</sup> Amazingly, however, notwithstanding this potential for dissonance, there is in practice a broad consensus among professional military thinkers as to the requisite values reflected in the targeting process. This has been bolstered by the ongoing socialising experience fostered by the greater internationalisation of operations over the past 50 years (through coalitions of the willing as well as UN operations), as well as the increasing globalisation of military training through foreign officer programs and exchanges in tertiary level professional military

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<sup>128</sup> Lee, above n 102, 151.

<sup>129</sup> Kennedy, *Dark Sides of Virtue*, above n 5, 20.

<sup>130</sup> Schmitt, ‘The Principle of Discrimination in 21<sup>st</sup> Century Warfare’, above n 91, 151.

<sup>131</sup> *Ibid* 170.

colleges.<sup>132</sup> Fundamentally, the law of armed conflict ultimately seeks to promote ‘what is right’,<sup>133</sup> and thus it is not surprising if the humanitarian impulses that underpin the law are increasingly being interpreted in a like manner across disparate military cultures.

### E *The Principle of Distinction*

The principle of distinction has been declared by the ICJ to be a ‘cardinal’ principle underpinning the law of armed conflict.<sup>134</sup> This principle restricts targeting to enemy military personnel and enemy military objectives. This reinforces the humanitarian protection afforded to civilians by the principle of proportionality. Indeed, violation of the principle of distinction constitutes a ‘grave breach’ of *Additional Protocol I*<sup>135</sup> and is rightfully condemned under the *Rome Statute*.<sup>136</sup> Wanton violence directed towards civilians violates the established military doctrine of economy of force,<sup>137</sup> undermines the morale of a well-disciplined military and wastes political capital.

In spite of the logical clarity and expressed sanctity of this principle it has been challenged by developments in modern warfare. The principle of distinction traditionally worked well when applied in the context of massed armies on the battlefield, where through the process of attrition, each would seek to destroy as many of the other as possible thus ensuring victory. However, the face of contemporary warfare has changed. The ‘post-9/11’ environment and subsequent global war on terrorism epitomises asymmetric warfare waged by an enemy that seeks the destruction of the very fabric of a society.<sup>138</sup>

The *Geneva Conventions* and their *Additional Protocols* make a profound distinction between combatants and noncombatants. In accordance with common art 3 of the 1949 *Geneva Conventions*,<sup>139</sup> a civilian is entitled to protection provided he or she is taking no active part in hostilities. Similarly, under *Additional Protocol I*, civilians are protected ‘unless and for such time as they

<sup>132</sup> US Naval War College, *Naval Command College History* <[www.nwc.navy.mil/ncc/history.htm](http://www.nwc.navy.mil/ncc/history.htm)> at 1 May 2005.

<sup>133</sup> Charles Garraway, ‘Training: The Whys and Wherefores’ (2002) 69 *Social Research* 949, 950–1.

<sup>134</sup> *Nuclear Weapons Advisory Opinion* [1996] ICJ Rep 226, 257.

<sup>135</sup> *Additional Protocol I*, above n 36, art 85.

<sup>136</sup> Above n 125, art 8(1). The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes. Article 8(2) states:

For the purpose of this Statute, ‘war crimes’ means

...

(b) serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives.

<sup>137</sup> Kennedy, *Dark Sides of Virtue*, above n 5, 269.

<sup>138</sup> Reisman, ‘Assessing Claims to Revise the Laws of War’, above n 1.

<sup>139</sup> Above n 35.

take a direct part in hostilities'.<sup>140</sup> In the current global war on terror, there has emerged a considerable debate involving what taking a direct part in hostilities actually means.<sup>141</sup> US policy has loosened its strictures to conclude that the Taliban and al Qaeda members fighting in Afghanistan are deemed to be unlawful enemy combatants by virtue of executive determination.<sup>142</sup>

#### F Global War on Terror and Distinction

In the global war on terror there seems to be ample room for ambiguity in target selection. This can be seen as a necessary result of fighting an enemy that wages an asymmetric war on international society and uses terror as an indiscriminate means of delivery. There remains, however, a palpable anxiety as to whether there has been an erosion in the integrity of the law itself. Perhaps this anxiety comes from a growing realisation that the law of armed conflict, as presently framed, rests upon an outdated model of warfare and accordingly applies imprecise standards in this new conflict.<sup>143</sup>

The structure of the law of armed conflict, with its positivist heritage, has traditionally been framed to protect national armies and, as Greenwood has posited, has been informed in part by conceptions of 'fairness'.<sup>144</sup> Such overtures are plainly necessary if the regulation of warfare is to be contained within a sphere of rationality. The law has traditionally promised restraint for those who come within its state-oriented terms. Outsiders (civilians) who seek to directly participate in hostilities have been condemned, though such outsiders have usually been small in number. By excluding the direct participation of civilians, or by changing their status once they do participate in hostilities, the principle of distinction in modern warfare seeks to preserve the protection afforded to 'true' civilians. At the same time this current incarnation of *jus in bello* permits, *prima facie*, the military targeting of the international terrorist. Without commenting upon the merits of such a designation, it seems to be an unsettling outcome under application of the current law that all the enemies in the war in Afghanistan and more generally in the global war on terror are ostensibly 'civilians'.<sup>145</sup> Reconsideration of the legal means and methods of engaging non-state actors/terrorists under the aegis of a new framework would be advantageous not only to protect 'true civilians' but also to provide commanders with a higher level of confidence in their decision-making. This is especially the case for those

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<sup>140</sup> Above n 36, art 51(3).

<sup>141</sup> Schmitt, 'Targeting and Humanitarian Law', above n 8, 76–81.

<sup>142</sup> See *Hamdi v Rumsfeld*, 124 S Ct 2633 (2004) and *Rasul v Bush*, 124 S Ct 2686 (2004) where the US Supreme Court accepted this designation. It was held that decisions applicable to individuals detained were not unreviewable.

<sup>143</sup> See generally Rosa Ehrenreich Brooks, 'War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror' (2004) 153 *University of Pennsylvania Law Review* 675.

<sup>144</sup> Christopher Greenwood, 'The Law of Weaponry at the Start of the New Millennium' in Michael Schmitt and Leslie Green (eds), *The Law of Armed Conflict: Into the Next Millennium* (1998) 185, 190.

<sup>145</sup> Kennedy suggests that 'the more appropriate distinction seems to be between the international community and outlaws or rogue states who would countenance wanton violence or aggressive war': Kennedy, *Dark Sides of Virtue*, above n 5, 269. Civilians 'are also part of the war machinery — they man factories, repair communications infrastructure, provide political and economic support for the regime': at 270.



military members whose countries have ratified the *Rome Statute* and have contemplated considerable domestic criminal penalties for violation of the principle of distinction.<sup>146</sup>

### G *Naval Warfare and Standards for Distinction*

The US policy approach to the land warfare portion of the war on terror has attracted considerable academic criticism, especially in the context of targeting and detainee issues.<sup>147</sup> Ironically the relative ease with which civilian protections may be lost has been a consistent theme of the law of naval warfare since the codification of the law in the various 1907 *Hague Conventions*.<sup>148</sup> Part IV of *Additional Protocol I*, which protects civilians against the effects of hostilities, is not expressed to apply to ‘pure’ naval warfare<sup>149</sup> where, instead, customary law continues to inform the targeting decisions made by belligerents.<sup>150</sup> While the principle of distinction undoubtedly applies in the context of naval warfare, there remain numerous grounds for concluding that enemy, and even neutral, merchant ships may lose their civilian protection and ultimately be susceptible to attack. Thus enemy or neutral merchant ships that make an effective contribution to the enemy’s military action may lose their civilian designation<sup>151</sup> as may those

<sup>146</sup> See, eg, the Australian *Criminal Code Act 1995* (Cth) s 268(24), which provides:  
War crime — willful killing:

- (1) A person (the *perpetrator*) commits an offence if:
  - (a) the perpetrator causes the death of one or more persons; and
  - (b) the person or persons are protected under one or more of the *Geneva Conventions* or under *Protocol I* to the *Geneva Conventions*; and
  - (c) the perpetrator knows of, or is reckless as to, the factual circumstances that establish that the person or persons are so protected; and
  - (d) the perpetrator’s conduct takes place in the context of, and is associated with, an international armed conflict.

Penalty: Imprisonment for life.

- (2) Strict liability applies to paragraph (1)(b).

<sup>147</sup> See generally Joan Fitzpatrick, ‘Speaking Law to Power: The War against Terrorism and Human Rights’ (2003) 14 *European Journal of International Law* 241; Philip Heymann, *Terrorism, Freedom and Security: Winning Without War* (2003); Jordan Paust, ‘War and Enemy Status after 9/11: Attacks on the Laws of War’ (2003) 28 *Yale Journal of International Law* 325.

<sup>148</sup> Normand and af Jochnick, ‘A Critical History of the Laws of War’, above n 52, 75–6. See *International Convention with respect to the Laws and Customs of War on Land*, above n 15; *International Convention relative to the Laying of Automatic Submarine Contact Mines*, above n 21.

<sup>149</sup> *Additional Protocol I*, above n 36, art 49(3) states:

The provisions of this Section apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.

<sup>150</sup> See, eg, Louise Doswald-Beck, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (1995) 61, where, in discussing the purpose of the *Manual*, the author notes that ‘treaty law on the conduct of hostilities at sea is not only fragmentary but also mostly dates back to 1907, thus requiring an assessment of the continuing validity of its provisions in the light of later developments in customary law’.

<sup>151</sup> *Ibid* 146–8, 154–61.

carrying 'contraband' (the content of which is essentially determined by the belligerent) who resist visit or search.<sup>152</sup> Enemy or merchant ships may even lose protection if they refuse to stop when summoned or breach a declared blockade.<sup>153</sup> In each of these broad categories, merchant ships, whether enemy or neutral flagged, may be susceptible to attack and sinking.

The application of the principle of distinction in the naval warfare context provides significantly more scope to attacking forces and allows for civilian protections to be more easily lost than in the land warfare context. Critically, however, in the context of naval warfare, the broadness of the law relating to target selection will not necessarily result in commanders automatically acting to engage selected targets. Cultural imperatives and restraints operate to help frame the value judgment that applies to determine the military significance of a target. Thus, legally sinking a vessel reasonably believed to be carrying contraband and actively resisting visit and search is one thing; but where the contraband are toxic chemicals which threaten massive human and environmental damage if dispersed, other questions emerge and cultural predilections come into play to temper targeting decisions more firmly than the law might.

In an insightful assessment of the US military character, Dunlap observes that the US military is drawn from the very fabric of America and represents, on the whole, the values of US society, noting:

The persisting ideal of the American-at-arms is the altruistic yeoman farmer who lays down his plow to take up arms for the duration, always nevertheless intending to return to the responsibilities of family and farm at the very first opportunity. It would be a great mistake to underestimate how deeply embedded this archetype still remains in American culture. Consider that for the bulk of US history the nation rarely maintained significant standing military forces. Instead, vast numbers of mobilized reserves, volunteers, or conscripts augmented rather small cadres of professional soldiers when needed to fight wars. The US military today is very much one where notions of citizenship and individual rights are quite strong, and its perspective in that regard scarcely differs from that of the populace at large.<sup>154</sup>

Modern militaries, at least those from the West, share the same perspective that Dunlap accords to the US military. It is wrong to perceive the modern military force as an autonomous 'machine' where commonly held societal values are somehow jettisoned in toto in favour of one dimensional militaristic ones. Therefore, it should not be surprising that military decisions are heavily informed by values fundamental to national and international society as a whole.

In contrast to the law applicable in land warfare, the law that applies in naval warfare affords naval commanders broader targeting discretion. This is a function of the historic character of the law of naval warfare, which still relies heavily on its 1907 *Hague Convention* base. Such discretion has, however, been recently broadened in the land context in relation to the global war on terror and the consequential targeting of Taliban and al Qaeda elements. This 'back to the future' approach demonstrates the malleable nature of the principles and does

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<sup>152</sup> Ibid.

<sup>153</sup> Ibid.

<sup>154</sup> Dunlap, 'Kosovo, Causality Aversion, and the American Military Ethos: A Perspective', above n 112, 100.

strongly suggest that it may be time to re-evaluate the substance of the principles underpinning the law of armed conflict (on land, sea and air) as the nature of warfare itself changes. In terms of effectiveness though, cultural predilections offer a firm basis for ensuring ‘traction’ in the law and this truism should be expressly acknowledged and harnessed when deciding how to recast the law of armed conflict to be both more militarily effective and humane.

#### H Summary

The principles of proportionality and distinction are rightly heralded as the cornerstones of the modern law of armed conflict.<sup>155</sup> Both international humanitarians and professional military officers alike share the same commitment to the humanitarian impulses underlying each of these principles, and, as Kennedy has correctly asserted, each share the same vocabulary.<sup>156</sup> Victory in achieving a shared vocabulary does not necessarily mean saying the same thing and that, accordingly, harmonious military and humanitarian results will necessarily follow. The indecisiveness of the ICJ’s *Nuclear Weapons Advisory Opinion* is a testament to that.<sup>157</sup> Kennedy has argued for a more thorough pragmatism, advocating a ‘disenchanted [of] the doctrines and institutional tools which substitute for analysis, insisting on a rigorous pragmatic analysis of costs and benefits. We might achieve a humanitarianism which could throw light on its own dark sides’.<sup>158</sup> The reluctance of humanitarians to accept responsibility for the logical outcomes of the formulas established, and the indecision experienced by military officers when having to calculate the value of human life, are the by-products of the modern *jus in bello* framework. This is not to deny the commitment to the principles underpinning the law, as this commitment is now unquestionably part of the military psyche. Rather it highlights the limits of the law and the deferment of responsibility which comes from the ambivalence of the principles themselves. When cultural factors provide a more predictable guide for restraint, and when targeting is based upon a determination of mere status as opposed to genuine effectiveness in shortening the war, then it is surely time to ‘disenchant’ the law — or at least recognise its realistic limits as Kennedy suggests.<sup>159</sup>

The heritage of the law of armed conflict can be traced back to the mid-19<sup>th</sup> century when wars were fought by massed armies whose goal was simply the attrition of the enemy on the battlefield. It may be fairly asked whether that model can still provide the basis for the modern *jus in bello*. Is killing the most enemy combatants really the ideal goal of the law or can the law be more surgical in its application? Allowing military victory with the lowest possible loss of life, through acknowledging that targets which are not strictly ‘military’ under existing definitions might be attacked, seems like a more meaningful and relevant objective. Part IV of this article will examine proposals for reforming the law of armed conflict by reorienting the law to more realistic expectations and outcomes.

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<sup>155</sup> Kennedy, *Dark Sides of Virtue*, above n 5, 248.

<sup>156</sup> *Ibid* 267.

<sup>157</sup> [1996] ICJ Rep 226.

<sup>158</sup> Kennedy, *Dark Sides of Virtue*, above n 5, 309.

<sup>159</sup> *Ibid*.

## IV PROPOSALS FOR REFORM

Modern military doctrine is undergoing a revolution in self-examination.<sup>160</sup> The omnipotent military power of the US, sustained partly by her vast technological superiority, has demanded changes in military thinking regarding force structure and the deployment of that force. ‘Transformation’ is the buzz word across all the US services, and such developments are shared more generally within the international context.<sup>161</sup> Lighter, faster and more technologically potent forces deployed to engage non-state actors employing non-traditional strategies and tactics in conflict have become necessary to better prepare modern forces to defend their populations and national interests. These changes to operational doctrine are not confined solely to the US. The increasing willingness of the UN Security Council to authorise peacekeeping missions over the past 15 years<sup>162</sup> has also prompted a serious doctrinal re-examination within the international arena. This has seen the emergence of concepts such as ‘grey area’ peacekeeping operations which take account of such realities. The application of the law of armed conflict within failed states and against sponsored non-state actors has been increasingly modified to accommodate the realities of such missions.<sup>163</sup> Indeed, there are calls for further revisions to the law of armed conflict to introduce a bias in favour of peacekeepers engaged in peace enforcement missions.<sup>164</sup>

This reorientation of military doctrine has also prompted a re-examination of the underlying tenets of the law of armed conflict. The development of the concept of ‘effects-based operations’ is a response to the emerging realities of the post-Cold War world.<sup>165</sup> Effects-based operations challenge the attrition paradigm of the classic *jus in bello* by focusing attacks on particular objects or people important to sustaining the war effort, rather than enemy targets of a traditional military character. While effects-based operations can be traced back to the first Gulf War,<sup>166</sup> their impact on the law of armed conflict has only recently begun receiving significant attention. Schmitt describes effects-based operations as systematically attacking critical enemy ‘centers of gravity’ in order

<sup>160</sup> See generally Robert Gibson, *Space Power: the Revolution in Military Affairs* (2001); James Gieck, *Nuclear Weapons and the Revolution in Military Affairs* (2000).

<sup>161</sup> See generally Michael Ignatieff, *Virtual War* (2000); Michael Evans, ‘Australia and the Revolution in Military Affairs’ (Working Paper No 115, Land Warfare Studies Centre, 2001).

<sup>162</sup> See, eg, the UN Assistance Mission In Rwanda, the UN Transitional Administration in East Timor, the UN Organisation Mission in the Democratic Republic of Congo, and the UN Advance Mission In Cambodia: UN Department of Public Information, Peace and Security Section, *United Nations Peacekeeping* <<http://www.un.org/Depts/dpko/dpko/index.asp>> at 1 May 2005.

<sup>163</sup> See, eg, *Prosecutor v Tadic (Defence Motion for Interlocutory Appeal on Jurisdiction)*, Case No IT-94-1-AR72 (2 October 1995) [87], where the ICTY determined that the customary law of international armed conflict can, in certain circumstances, apply in what may otherwise be regarded as an internal armed conflict. The ICTY’s interpretation overcame many of the historic objections to the application of customary rules to internal armed conflict, especially the strict literalism approach to interpretation, as well as invoking humanitarian considerations. See generally Jinks, above n 2.

<sup>164</sup> Walter Gary Sharp, ‘Protecting the Avatars of International Peace and Security’ (1996) 7 *Duke Journal of Comparative and International Law* 93, 163.

<sup>165</sup> Schmitt, ‘Targeting and Humanitarian Law’, above n 8, 59–60.

<sup>166</sup> Lewis, above n 60, 486.

to compel submission.<sup>167</sup> While this concept is almost as old as military aviation itself,<sup>168</sup> it was not reconcilable with the modern vision of the law of armed conflict until the widespread development of precision-guided munitions. These weapons allow for effective attacks on critical enemy targets anywhere in the country, and at any stage of the war. In comparing the difference between effects-based operations and more traditional military action, Schmitt writes:

If one is trying to conquer an enemy absolutely, destroying its military through attrition warfare, albeit less efficient and effective than [effects-based operations], makes some sense; given the objective, the military is a logical center of gravity. But if the objective is compellence, force must be applied surgically, striking at centers of gravity likely to alter the opponent's cost-benefit analysis, without imposing costs so great as to render him either intransigent or irrational. Because the objectives underlying the use of force determine centers of gravity, they may shift from the enemy's armed forces to non-military targets dear to the civilian population or leadership.<sup>169</sup>

The target sets identified by Schmitt in his analysis of 'centers of gravity' include traditionally described military objectives — such as military intelligence facilities — but also encompass 'dual use' targets such as broadcasting stations.<sup>170</sup> Also included are targets which do not necessarily fit within classic definitions of 'military objective' but which, nonetheless, serve to sustain the war directly. Thus, civilian elites who directly support the maintenance of the enemy regime are identified as appropriate targets under effects-based operations targeting considerations. Similarly, pure economic and technical facilities and institutions that directly sustain the power structure of the enemy regime, would also be appropriate targets.

As previously mentioned, 'effects-based operations' is hardly a new concept to the legal framework of warfare. Concepts such as 'direct participation' in land warfare and 'war sustaining' capacity in naval warfare provide for wide discretion in determining which targets are susceptible to attack. Likewise it has been argued that the principles of distinction and proportionality provide similarly wide degrees of discretion in target selection.<sup>171</sup> It is the conscious enunciation of new standards, and the acceptance of new targeting methodologies through which potential targets may be examined, that provide innovation for the law of armed conflict. The thrust of this pragmatic approach, as contemplated in the 'effects-based targeting' regime, shares much with Kennedy's original rhetorical question concerning the fate of the young draftee and his or her 'benefit' of constituting a legitimate target.<sup>172</sup> On that particular point, synergistic targeting of key civilian power bases that directly sustain the continuation of the war patently ensures greater humanitarian returns than the mass slaughter of young draftees.

<sup>167</sup> Schmitt, 'Targeting and Humanitarian Law', above n 8, 64.

<sup>168</sup> In the inter-war years Emilio Douhet envisioned that the next war would be won solely by airpower. The tradition of airpower 'enthusiasts' willing to make such claims was carried on by Hermann Göring, Sir Arthur Harris and Curtis LeMay without ever delivering on this promise. It was not until the Kosovo campaign that this vision was ever realised.

<sup>169</sup> Schmitt, 'Targeting and Humanitarian Law', above n 8, 64–5.

<sup>170</sup> Ibid 69.

<sup>171</sup> Kennedy, *Dark Sides of Virtue*, above n 5, 270.

<sup>172</sup> Ibid.

In better securing humanitarian outcomes, Kennedy has queried whether cultural or religious imperatives might also more firmly ground the *ius in bello*.<sup>173</sup> Such suggestions possibly signal a return to the scholarship of pre-19<sup>th</sup> century thinking and simultaneously threaten a return to the ‘just war’ methodology. Yet it is evident that cultural imperatives do already play a larger role in military decision-making than is usually acknowledged. Reflecting these cultural standards, public support for the conduct of warfare remains a critical element in the overall success of a campaign. Indeed, it has been argued in this article that it is often these cultural restraints that are a more reliable predictor of decision-making than the loose standards promulgated under the existing law. If the key objective is to identify qualities that will give the law greater ‘traction’, and provide a more pragmatic cost/benefit methodology to military decision-making, then this suggestion surely has merit.

## V CONCLUSION

The old adage holds that ‘all’s fair in love and war’. While one should never presume to comment on the subterranean mysteries of love, the adage does not obviously apply to the conduct of warfare. The modern law of armed conflict provides a necessary bulwark against humankind’s most destructive tendencies and is rightfully championed by both humanitarian and military stakeholders. The law of armed conflict, as it presently exists, provides a useful and essentially stable framework for ameliorating the horrors of war and promoting humanitarian goals. Through this review we have sought to situate the law within the context of the political strategies employed by the humanitarian movement through the 20<sup>th</sup> century to make the law ‘stick’.

‘Relevancy’ was the key objective of the early humanitarian movement and, as has been argued in this review, this has resulted in a shared vocabulary between humanitarian and military frames and the genuine inculcation of legal principle into military decision-making processes. The enunciation of humanitarian standards, as contained within the broad legal principles of distinction and proportionality, allows for greater flexibility and much coveted relevancy. These principles are derived from shared goals and basic common sense. They do, however, also have their limits. As has been highlighted in this review, notwithstanding the shared vocabulary and the shared conversation between humanitarian and military camps, there exists the real possibility of divergent results. Humanitarian criticism of recent operations suggests a subversion (or waiver) of some, or all, of the basic principles by political and military players because the results occasioned by their application do not conform to expected humanitarian outcomes. That this criticism exists is not altogether surprising. International law is heralded by ‘true believers’ as an axiomatically progressive mechanism.<sup>174</sup> It exists to correct injustices and to

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<sup>173</sup> Ibid 276, 278.

<sup>174</sup> See, eg, Alejandro Álvarez, ‘The New International Law’ (1929) 15 *Transactions of the Grotius Society* 35. In the late 1920s Álvarez suggested that

overcome global problems in all of their cultural, economic and political guises. The law of armed conflict, however, seems slightly aberrant in achieving this goal; for at its core it deals with, and facilitates, death and destruction. While the focus of the law of armed conflict is upon reducing suffering, destruction is nonetheless still its subject matter. This is an unfamiliar and distasteful reality for many students and practitioners of international law and explains the despair and suspicions held by some as to the outcomes generated by the law of armed conflict.

As the law espouses broad standards that incorporate value judgments about the military significance of targets and relativism with regard to the value of lives that will be lost in securing such targets, it is not unexpected that there should be disagreement as to the values assigned. What has been contended in this review is that there should be recognition of the limits of the existing law and, especially in the current paradigm of fighting a global war on terrorism, a sustained assessment of the efficacy of the existing structure. It is a mutual goal of the humanitarian and military camps that victory in warfare should be achieved swiftly and with the least amount of suffering. It has been contended that the existing principles of distinction and proportionality do not always secure these laudable goals especially in the new 'battle-space' in which we find ourselves, and that new concepts dealing with 'effects-based operations' may promise a better alternative. The goals of the early 20<sup>th</sup> century humanitarian advocates have been achieved. The principles of the modern law of armed conflict are firmly embedded in the military psyche, and victory for the 'relevancy' of law when engaging in conflict has been established. The test for us all in the 21<sup>st</sup> century should be to disenchant the principles of the existing law and, thus, permit space for a rational assessment of whether the law of armed conflict is still truly 'effective' in securing its noble goals of ameliorating suffering while allowing for military success.

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the establishment of this harmony between politics and legal rules is the greatest step which can be accomplished in International Law. And the great mission of international jurists should not consist of seeking legal rules for all questions, but in striving to apply the principles of morality and justice to the problems which must in future guide politics. ... There are many questions which must receive a juridical solution. They form International Law, properly so called, and must be regulated not by the old conception of traditional justice, but by new conceptions of economic, social and general utility: at 47.