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Reflections on Proportionality, Military Necessity and the Clausewitzian War

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This article explores the significance of the reference, in proportionality analyses, to proper purpose and legitimate ends, given the traditional aversion of international humanitarian law (IHL) to questions of (political) legitimacy. It demonstrates the centrality of that aversion in doctrinal assertions concerning the goals, characteristics and operational strategy of IHL yet argues that, at its historical and conceptual foundations, the law draws on a construction of war that presupposes legitimacy of the political type. That construction remains embedded, though implicit, in contemporary proportionality analyses.

Thus, the instrumental understanding of war by Carl von Clausewitz poses several challenges to entrenched contemporary doctrinal claims about the law, how it operates and the effects it produces. This provides an impetus for critical reassessment of the aversion to politics and the interaction between the humanitarian, military and political spheres in the operation of IHL norms. Such critique helps to identify novel strategies of humanitarian protection in war outside the confines demarcated by orthodox doctrine.

Keywords: international humanitarian law, military necessity, proportionality, history of the law of war, Clausewitz

1. Proportionality in International Humanitarian Law

Proportionality, in general terms, is a legal principle used to assess the legality of measures that one may pursue to further or accomplish a *proper purpose*. The principle may operate in a variety of ways. It may seek to establish, first, *qualitative* relations between that end and the means used. Under German law and, under its influence, European law, proportionality is deemed to exist only when the means used are *capable* of producing the legitimate end pursued. Secondly, the principle may seek to establish *quantitative* relations between a permissible end sought and the means employed to achieve it. Thus, the means may exceed what that end requires or yield adverse effects that are not necessary to attain the legitimate goal. Thirdly, as developed by German courts in the interwar period, the principle may also require that the means themselves be adequate in light of other community goals.[1]

At present, international humanitarian law (IHL) proportionality analyses seem concerned mostly with *quantitative* relations. Article 51(5)(b) of the 1977 Additional Protocol I thus considers as 'indiscriminate' attacks those 'which may be expected to cause incidental loss of

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[1] See Jürgen Schwarze, *European Administrative Law* (1st rev edn, Sweet & Maxwell 2006); Trevor C Hartley, *The Foundations of European Community Law* (6th edn, Oxford University Press 2007); Oliver Koch, *Der Grundsatz der Verhältnismaßigkeit in der Rechtsprechung des Gerichtshofs der Europäische Gemeinschaften* (Duncker & Humblot 2003); Georg Nolte, 'General Principles of German and European Administrative Law: A Comparison in Historical Perspective' (1994) 57 Modern Law Review 191.

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'.[2] The variety of proportionality standards developed in other legal systems may contain some promise of expanded doctrinal breadth for the principle of proportionality in IHL.

The focus in this article, however, stems from the observation that, under all three tests, the end in question must be *legitimate*. Stated critically, we can say that resort to the principle in concrete cases presupposes that the end is legitimate, that the purpose is proper. This article, then, is an exploratory deconstruction of 'legitimate ends' presupposed in IHL proportionality analyses.

IHL provisions utilise proportionality analyses – of the second, *quantitative* type – in a variety of areas: from targeting;[3] through the limitation of the effects of weapons on soldiers and the environment;[4] to gradations in 'measures of control' to be taken against civilian protected persons.[5] Similarly, the principle limits the power of the occupant to requisition foodstuffs, civilian hospitals, and the like.[6] Not surprisingly, then, commentators often assert that proportionality is a general principle of IHL, which governs – that is, *restrains* – other aspects of the conduct of war even where this is not explicitly or implicitly provided for.[7] Whether or not proportionality is an overarching principle in IHL, my concern here is with the nexus it affects between restraint and legitimate end.

The first part of the article, then, addresses the proper purposes, or goals, that are referenced by IHL whenever recourse is made to proportionality analyses (Section 2). Next, I seek to identify the content of legitimacy of goals in IHL proportionality analyses. This takes place against the backdrop of the traditional aversion, in IHL doctrine, to questions of legitimacy. That aversion, grounded in the *jus in bello/jus ad bellum* distinction, implies the existence of legitimate ends *jus in bello* that are independent from legitimate ends associated with the legality of use of force, *jus ad bellum* (Section 3). Section 4, however, demonstrates that IHL has traditionally been predicated on the accommodation of military reason: it permits such means as are instrumental to the end of weakening the military forces of the enemy. This rests, I suggest, on a construction of war as an instrument of politics. To explore this foundational assumption of IHL doctrine, I turn to the author of that construction of war in Section 5: the Clausewitzian construction of war as an instrument of politics suggests, contrary to orthodox assertions of IHL doctrine, the existence of an ineluctable nexus between *jus in bello* means and *jus ad bellum* ends. *Jus in bello* derives, in other words, from *ad bellum* legitimacy. IHL proportionality and military

[2] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (entered into force 7 December 1978) 1125 UNTS 3 ('Additional Protocol I' or 'AP I'), art 51(5)(b) (emphasis added). See also art 57(2)(a)(iii)–(b).

[3] ibid.

[4] ibid art 35(2) ('superfluous injury or unnecessary suffering'), art 35(3) ('widespread, long-term and severe damage to the natural environment').

[5] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287 ('GC IV'), arts 41–43, 78.

[6] ibid arts 55, 57.

[7] See Marco Sassòli, Antoine A Bouvier and Anne Quintin, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (3rd edn, Cambridge University Press 2011) 158; the authors treat proportionality as a 'fundamental principle' of IHL. See also Judith G Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press 2004).

necessity analyses, inevitably, do address *jus ad bellum* legitimacy. Section 6 critically explores some of the implications of Clausewitzian war theory for IHL doctrine, goals and operational strategy. Section 7 suggests that these implications compel a conceptual reassessment of IHL base assumptions and doctrinal assertions, its limits and aspirations, its achievement and its costs. The conclusion recaps the principal findings and assertions made in the article.

2. PROPER PURPOSE: 'MILITARY NECESSITY'

On one level, an answer to this question can be sought in the particular rule requiring proportionality analysis. Thus, rules on targeting reference the legitimacy of making military objectives the 'object of attack'. The prohibition on weapons causing 'superfluous injury and unnecessary suffering' references the legitimacy of neutralising enemy combatants. Measures of control against protected persons are predicated on the legitimate security concerns of the state in whose territory enemy nationals are present; or, in occupied territory, the security concerns of the occupant and the legitimate interests it has in maintaining its control of the occupied territory for the duration of the war. Rules limiting the requisition of humanitarian supplies recognise the legitimate sustenance requirements of the occupying forces.

What specific proportionality provisions identify as proper purpose is not arbitrary. Rather, these provisions embody the application of systemic reason in specific problem areas. What these provisions recognise as proper purposes, or legitimate ends, is subsumed under the single heading of 'military necessity'. Whenever IHL utilises proportionality analysis, it references some form of recognised, legitimate military necessity. We can say that, through military necessity, proportionality indicates *legitimate* ends *in bello.*

Yet the systemic reasoning of military necessity and the legitimacy of ends *in bello* itself rest on prior assumptions constructing the nature of war. Implicit in contemporary proportionality analyses, in other words, is a concrete construct of the war phenomenon and, based on that construct, the strategies law employs to restrain war. To appraise proportionality and its restraining qualities, then, we need to inquire into the military necessity logic and its underlying assumptions; how law constructs war would tell us what purposes and ends are legitimised by military necessity – and why. First, however, we need to consider how contemporary legal doctrine constructs legitimacy *in bello.*

3. LEGITIMACY IN IHL: AN ANTINOMY?

Here we come to an apparent antinomy. Proportionality, through necessity, references legitimate ends; yet IHL doctrine expresses a principled aversion to inquiries into propriety of purpose, justifiability of motives or legitimacy of ends.[8] Under prevalent doctrine, these are matters regulated

[8] Marco Sassòli, *Article 43 of the Hague Regulations and Peace Operations in the Twenty-First Century* (Humanitarian Policy and Conflict Research 2004) 10 ('it is precarious to make the (end of) application of IHL dependent on criteria of legitimacy, as this blurs the distinction between *jus ad bellum* and *jus in bello*').

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by the law governing the legality of the use of force (*jus ad bellum*), not the law dealing with the manner in which force is used (*jus in bello*). In the language of the Preamble to Additional Protocol I, IHL applies and is to be interpreted 'without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict'.[9]

Since necessity and proportionality analyses of the manner in which force is used reference, by their nature, legitimate ends, we must assume that they address legitimate ends that are different from those referenced by rules governing the legality of the use of force. *Jus in bello* legitimacy and *jus ad bellum* legitimacy are, in other words, disparate matters. This resolves the apparent antinomy: IHL is averse to the *jus ad bellum* legitimacy, yet it employs its own independent legitimacy analyses.

This raises the need to identify the content of *jus in bello* legitimacy; this would allow us to test the assumption that it is truly distinct and independent from *jus ad bellum* legitimacy. Before this inquiry can begin, we must note that shying away from adjudicating, or even commenting on, the legitimacy of ends *jus ad bellum* is more than an incidental idiosyncrasy of IHL doctrine, lawyers and institutions. Rather, abstention from questions concerning 'the nature or origin of the armed conflict or … [its] causes' is central to explanations of IHL's goals, characteristics and operational strategy. The total separation of *jus ad bellum* and *jus in bello*, and the legitimacy test each utilises, is theorised as a *sine qua non* for the effectiveness and the very existence of rules restraining war conduct.[10]

3.1 The Goals of IHL

First, questioning the legitimacy of ends and the propriety of purpose under *jus ad bellum* is perceived as unnecessary, even harmful, for attaining the modest goals IHL harbours: not the abolition of war, but its mitigation; not absolute protection against all 'calamities of war',[11] but some protection for the most vulnerable against some of its worst excesses. IHL is predicated on the realisation that notwithstanding the prohibition of war in the United Nations Charter,[12] wars continue to occur, and ought to be mitigated.[13] Until war is abolished, until mankind can 'repudiate this vestige of barbarity which they have inherited', law will 'have to deal with human passions and their deadly consequences … [I]f there is no immediate, absolute means of guarding against

[9] AP I, Preamble. For the *jus ad bellum/jus in bello* distinction, its origin, validity, expression, and meaning see Rotem Giladi, 'The *Jus Ad Bellum/Jus In Bello* Distinction and the Law of Occupation' (2008) 41 Israel Law Review 246.

[10] Giladi, ibid 259.

[11] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, St Petersburg (entered into force 11 December 1868) 1 American Journal of International Law Supp 95 ('St Petersburg Declaration'), Preamble.

[12] Charter of the United Nations and the Statute of the International Court of Justice (entered into force 24 October 1945) 1UNTS xvi.

[13] Sassòli, Bouvier and Quintin, (n 7) 114. For discussion, see Hersch Lauterpacht, 'The Limits of the Operation of the Law of War' (1953) 30 British Year Book of International Law 206; Theodor Meron, 'The Humanization of Humanitarian Law' (2000) 94 American Journal of International Law 239, 241.

them', law ought to try 'to alleviate them'.[14] A central assertion here is that, politically neutral, restraining war does not adversely affect the prohibition on the use of force.[15]

3.2 The Character of IHL

International lawyers perceive IHL as a protective legal regime that is politically neutral, factually objective, and which operates universally and independently from the rules, institutions and entanglements of politics that characterise *jus ad bellum*.

> The conceptual distinction between *jus ad bellum* and *jus in bello* is seen as one of the basic principles of IHL. Ultimately, it is this distinction that guarantees the independence and universality of humanitarian action. It ensures that the rules governing the protection of the individual are applicable whenever there is an armed conflict, regardless of the legality or illegality of the use of force, and can be seen as establishing the principle of equality of the belligerents under humanitarian law.[16]

Thus, the claim is that were humanitarian restraints predicated on the legitimacy of ends pursued, no one would ever respect such restraints, and protection in war would be impossible.[17]

3.3 The Operational Strategy of IHL

Crucially, IHL shies away from questions of legitimacy because it aspires to apply and grant protection 'in the field', *durante bello*, not through inquiries conducted away from the battlefield *ex post facto*. This aspiration explains the pragmatic strategies of IHL, the modesty of aims that are limited to the realistic and realisable. As Jean Pictet warned, the humanitarian undertaking 'can be carried out only with patient persistence and by not aiming too high. Insufficiently realistic treaty provisions, the results of unbridled humanitarianism, would be rejected out of hand or at any rate not respected'.[18]

Mitigating the effects of war 'in the field' requires law and those advocating it to operate in close proximity with those who wage war, the law's principal addressees. This requires

[14] This appeal was made at the 1863 Geneva Conference by Gustave Moynier, speaking for the Committee to become the International Committee of the Red Cross (ICRC): quoted in André Durand, 'Gustave Moynier and the Peace Societies' (1996) 314 International Review of the Red Cross 532, 532–33. On the ICRC's equivocal stand on pacifism, see Caroline Moorehead, *Dunant's Dream: War, Switzerland and the History of the Red Cross* (Carroll & Graf 1999) 164–71. See also Geoffrey Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts* (Weidenfeld and Nicolson 1980) 9–10.

[15] See, for example, AP I, art 4.

[16] Aurélio Viotti, 'In Search of Symbiosis: the Security Council in the Humanitarian Domain' (2007) 89 International Review of the Red Cross 131, 132. See also Giladi (n 9) 256–57.

[17] Christopher Greenwood, 'The Relationship Between Ius ad Bellum and Ius in Bello' (1983) 9 Review of International Studies 221, 226; Lauterpacht (n 13) 212; Yoram Dinstein, *War, Aggression and Self-Defence* (2nd edn, Cambridge University Press 1994). See also Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (4th edn, Basic Books 2006) 41, 44–45.

[18] Jean Pictet, *Humanitarian Law and the Protection of War Victims* (Sijthoff 1975) 19.

familiarity with armies, their perceptions, ethos and sensitivities (these, too, often contrast the professional with the political). To be relevant, IHL must adjust to the logic of armies: constraints on the conduct of war, to command respect and gain acceptability by the norm-addressees, must express and be expressed in terms of military reason.

3.4 Accommodation of Military Reason

Although the laws of war have traditionally drawn on sources extraneous to war (such as morality, religion and class), modern IHL is grafted onto reason internal to war. IHL itself, as well as respect for its provisions, are predicated on the accommodation of modern military reason. Proponents argue that what makes IHL viable vis-à-vis its addressees is that IHL norms do not make the fighting of wars – and the accomplishment of the military mission – impossible.[19] IHL does not aim to restrain the ability of a belligerent to win the war. Law does not stand in the way of *victory*; compliance with requirements of humanity does not jeopardise the attainment of military success; humane conduct does not hinder the attainment of the purposes for which the war is fought.[20] Accommodating military reason (balancing military necessity and requirements of humanity) is precisely what carves some space – in the battlefield, PoW camp or occupied territory – for humanitarian law, action and sentiment.[21] As was noted in a 1998 ICRC Report discussing the Fourth Geneva Convention,

> [i]nternational humanitarian law gives due consideration to military imperatives and seeks to reconcile military necessity with the demands of humanity. Over the centuries this law has been gradually adjusted to take account of the realities of war. It is precisely for that reason that it does not provide for general derogation, and that is part of its strength.
>
> The Fourth Convention contains a number of concessions to State security, military necessity and other requirements of national interest. While these provisions allow a degree of latitude within the limits set by the Conventions, the general principles of law, in particular that of proportionality, obviously continue to apply.[22]

Accommodation of military reason, then, underpins the claim that IHL only prohibits that which is not necessary for the attainment of military goals, and that compliance with IHL would normally be, therefore, a wise and cost-effective policy choice.[23] Compliance with restraints imposed

[19] Sassòli, Bouvier, and Quintin (n 7) 115 ('This complete separation between *jus ad bellum* and *jus in bello* … also implies, however, that the rules of IHL are not to be drafted so as to render *jus ad bellum* impossible to implement, e.g., render efficient self-defence impossible').
[20] ibid 93–94, especially notes 15–16.
[21] ICRC, 'General Problems in Implementing the Fourth Geneva Convention', Report to the Meeting of Experts, Geneva, 27–29 October 1998, available at http://www.icrc.org/web/eng/siteeng0.nsf/html/57JPF6.
[22] ibid.
[23] Thus, 'One of the strongest arguments used to convince belligerents to respect IHL is that they can achieve victory while respecting IHL and that IHL will even make victory easier, because it ensures that they concentrate on what is decisive, the military potential of the enemy': Sassòli, Bouvier and Quintin (n 7) 439.

by IHL does not bear on, and is thus incidental to the attainment of military ends *jus ad bellum*. What costs it exacts from those who conduct war are incidental to victory.[24]

4. THE CODIFICATION OF MILITARY REASON

Today, the accommodation of military reason is often implicit in IHL norms. Historically, however, military reason was codified in explicit terms in early IHL instruments as the intellectual premise of restraining war through law.[25] One of the fullest elaborations of military reason as an overarching, foundational legal principle appears in the Preamble to the St Petersburg Declaration of 1868, which ought to be quoted here in full:

> On the proposition of the Imperial Cabinet of Russia, an International Military Commission having assembled at St. Petersburg in order to examine the expediency of forbidding the use of certain projectiles in time of war between civilized nations, and that Commission having by common agreement fixed the technical limits at which the necessities of war ought to yield to the requirements of humanity, the Undersigned are authorized by the orders of their Governments to declare as follows:
>
> Considering,
>
> That the progress of civilization should have the effect of alleviating, as much as possible the calamities of war;
>
> That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;
>
> That for this purpose it is sufficient to disable the greatest possible number of men;
>
> That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;
>
> That the employment of such arms would, therefore, be contrary to the laws of humanity.[26]

These few paragraphs raise some fascinating questions concerning the foundational assumptions of the modern project to humanise war through law that are, alas, rarely discussed in the literature.[27] Our immediate concern is the military reason this text expresses.

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[24] Nicolas Lamp, 'Conceptions of War and Paradigms of Compliance: The "New War" Challenge to International Humanitarian Law' (2011) 16 Journal of Conflict & Security Law 225, 231 ('In order to accommodate what is assumed to be this single immediate aim in warfare, IHL accepts, via the doctrine of military necessity, that the warring parties need to be able to attain military victory by attacking combatants and military objectives of the enemy'). For a contrary view, see, for example, Gabriella Blum, 'The Laws of War and the Lesser Evil' (2010) 35 Yale Journal of International Law 1.

[25] But see the ICRC Commentary on AP I art 35: Claude Pilloud and others (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross, Martinus Nijhoff 1987) 393 ('Military necessity means the necessity for measures which are essential to attain the goals of war, and which are lawful in accordance with the laws and customs of war').

[26] St Petersburg Declaration (n 11).

[27] Of the nineteenth century early instruments of the modern laws of war, the St Petersburg Declaration seems among those that draw the least academic attention; even Gasser dedicates no more than four pages to this instrument: Hans-Peter Gasser, 'A Look at the Declaration of St Petersburg of 1868' (1993) 33 International Review of the Red Cross 511. The dearth of writing – and its narrow focus – is further demonstrated by Henri Meyrowitz, 'The Principle of Superfluous Injury or Unnecessary Suffering: From the Declaration of St Petersburg of 1868 to

This text, rather than having 'revolutionized military thinking',[28] militarised the laws of war. It modernised the law of war by making military reason its conceptual stepping stone. The Preamble to the St Petersburg Declaration seems to offer a clear and narrow answer to the question 'what ends are legitimate *in bello*?': weakening 'the military forces of the enemy' and, to this end, using means (and methods) 'sufficient to disable the greatest possible number of men'. And, couched in military terms, the legal precepts of necessity and proportionality to which the text refers are rooted in military logic itself. As we shall soon see, it is not that the formula of the St Petersburg Declaration 'has become a classic definition of the purpose of war';[29] rather, that formula codified a pre-existing construction of war and its purposes.[30] Moreover, the standard of legitimacy *in bello* in the St Petersburg Declaration, though it casts this formula in military terms, proceeds on the basis of two assumptions that, in 1868, required no explication. One was that the pursuit of war itself was legitimate and necessary: the Covenant of the League of Nations,[31] the Kellogg-Briand Pact[32] and the UN Charter were decades into the future. The other assumption involved a construction of war itself. Thus, the proposition that weakening 'the military forces of the enemy' was a legitimate object in war – indeed, was the *only* legitimate object in war – rested on the understanding that war was an instrument of politics. Formulated by Clausewitz several decades before it was codified in the St Petersburg Declaration, the instrumental construction of war suggests an ineluctable nexus between *jus in bello* and *jus ad bellum* legitimacy.

5. THE CLAUSEWITZIAN WAR

The reason why weakening the military forces of the enemy could be considered the only legitimate objective in war was that modern war – 'war between civilized nations', in the St Petersburg Preamble – was fought for ends that transcend the military dimension of war. This was the construction of war propounded by Carl von Clausewitz (1780–1831) in *On War* (1832) – immediately before the formative period of the modern law of war. For Clausewitz, a first-hand witness of the Revolutionary and Napoleonic Wars, war was instrumental to ends that were political.[33]

Additional Protocol I of 1977' (1994) 34 International Review of the Red Cross 98; Best (n 14) 160; and Stephen C Neff, *War and the Law of Nations: A General History* (Cambridge University Press 2005).

[28] Gasser, ibid 511.

[29] ibid 513.

[30] Geoffrey Best, *War & Law Since 1945* (Oxford University Press 1994) 42–43.

[31] Covenant of the League of Nations (entered into force 28 April 1919), 11 Martens Nouveau Receuil (ser 3) 331.

[32] Treaty providing for the Renunciation of War as an Instrument of National Policy (entered into force 24 July 1929) available at http://www.fco.gov.uk/resources/en/pdf/treaties/TS1/1929/29.

[33] Carl Philipp Gottfried von Clausewitz (1780–1831), Prussian soldier and military theorist, author of the posthumously published influential military theory work *Vom Kriege*: Carl von Clausewitz, *On War* (1832, Michael Howard and Peter Paret (eds and trs), Princeton University Press 1984) ('*On War*'). On Clausewitz and his place in modern military thought, see Peter Paret, *Clausewitz and the State: The Man, His Theories, and His Times* (Princeton University Press 2007); 'Clausewitz' in Peter Paret (ed), *Makers of Modern Strategy from Machiavelli to the Nuclear Age* (Princeton University Press 1986) 186.

I am not suggesting here that a specific war needs to have a specific cause, nor any kind of a just war theory. Rather, I refer to the reason for what Clausewitz called 'pure' war – that is, the ideal of war as a theoretical postulate, divorced from its specific political purpose and circumstances. ('Real' war, in contrast, is modified from abstract theory by extraneous circumstances, conditions and uncertainty).[34] I refer equally to the application of reason to war. War, Clausewitz posited, was neither science nor art;[35] yet beyond the structural uncertainties it created, it was subordinated to reason. As such, it was also amenable to legal regulation. This was precisely the analytical point of departure of the drafters of the St Petersburg Declaration and other architects of the modern law of war.

In the Clausewitzian universe, the reason of war both 'pure' and 'real' is not military; waging war, or weakening the military forces of the enemy, are means to ends, not ends unto themselves. Rather, the successful conduct of war was its service to ends that lie beyond the military sphere. Military success – of the kind discussed in the preamble to the St Petersburg Declaration – in and of itself does not represent victory. Victory consists of one side imposing its will – that is, its *political* war aims – on the other through the application of force.[36] The Clausewitzian war is an '*act of force to compel our enemy to do our will*', and the Clausewitzian victory, though attained by military means, occupies the political realm: it constitutes 'success in compelling the enemy to do our will'.[37] Thus, the object of pure war is to overcome and disarm the enemy: the armed forces must be destroyed or incapacitated; 'The Country must be occupied' to prevent the raising of 'fresh military forces' (or, presumably, other war-making capabilities); and the enemy's will must be broken. War can come to conclusion only when 'the enemy government and its allies have … been driven to ask for peace, or the population made to submit'.[38] Political coercion brought by military means is the essence of victory: the imposition of the victor's war aims on the vanquished.

[34] This dialectical distinction between 'the pure concept of war and the concrete form that, as a general rule, war assumes' (Clausewitz, ibid 579) pervades Clausewitz's war theory, but see especially ibid 580: 'We must … be prepared to develop our concept of war as it is ought to be fought, not on the basis of its pure definition, but by leaving room for every sort of extraneous matter. We must allow for natural inertia, for all the friction of its parts, for all the inconsistency, imprecision, and timidity of man; and finally we must face the fact that war and its forms result from ideas, emotions, and conditions prevailing at the time.'

[35] ibid 99: 'Strictly speaking war is neither an art nor a science. … war … is part of man's social existence. War is a clash between major interests, which is resolved by bloodshed – that is the only way in which it differs from other conflicts. Rather than comparing it to art we could more accurately compare it to commerce, which is also a conflict of human interests and activities, and it is *still* closer to politics, which in turn may be considered as a kind of commerce on a larger scale. Politics, moreover, is the womb in which war develops' (emphasis in the original).

[36] ibid, 266, 526. Compare to Sassòli, Bouvier and Quintin (n 7) 93 note 15 ('The state fighting in self-defense has only to weaken the military potential of the aggressor sufficiently to preserve its independence; the aggressor has only to weaken the military potential of the defender sufficiently to impose its political will; the governmental forces involved in a non-international armed conflict have only to overcome the armed rebellion and dissident fighters have only to overcome the control of the government of the country (or parts of it) they want to control').

[37] Clausewitz, ibid 75; Beatrice Heuser, 'Clausewitz's Ideas of Strategy and Victory' in Hew Strachan and Andreas Herberg-Rothe (eds), *Clausewitz in the Twenty-First Century* (Oxford University Press 2007) 138, 144. See also William C Martel, *Victory in War: Foundations of Modern Military Policy* (Cambridge University Press 2007).

[38] Clausewitz, ibid 90–91.

In Clausewitzian war theory, the military and the political are inseparable. War is instrumental to political ends – a political instrument, a means to a political end: 'not merely an act of policy but a true political instrument, a continuation of political intercourse, carried on with other means'.[39] This is the modern war reason: wars are fought to political ends; conduct in war must serve the political ends of war. Political ends, then, control the choice of military means and govern the conduct of belligerents *in bello*, even if the inherent uncertainty of war and other factors drive the antagonists towards escalation.[40]

In postulating that 'the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy', and that 'for this purpose it is sufficient to disable the greatest possible number of men', the authors of the St Petersburg Declaration adopted the Clausewitzian construction of war and its implications: that the military means would serve political ends; that the former drew their legitimacy from their instrumentality to, and the legitimacy of, the latter; and that the two spheres, the military and the political, are inseparable. Ends *jus in bello* ultimately depend on ends *ad bellum.*

Incidentally or not, the innate nexus between *jus ad bellum* and *jus in bello* legitimacy is illustrated in the Clausewitzian treatment of questions of proportionality, or 'The Scale of the Military Objective and of the Effort to be Made' in the title of Chapter 3.B of the eighth book of *On War*. Here, Clausewitz discusses the 'degree of force that must be used against the enemy' which largely (but not exclusively) 'depends on the scale of political demands on either side'.[41] Thus, the application of force 'should be suitable and proportionate to the military objective and the political purpose'.[42] Other factors may intervene to modify the Clausewitzian requirements of proportionality: uncertainty that is inherent in the 'size and variety of factors to be weighed' in war, its 'tendency toward the extreme' and the acts of the adversary may all compel greater force.[43] Conversely, constrained resources and domestic concerns may inhibit against maximum efforts.[44] Yet intervening factors do not severe that nexus: they merely cause a belligerent to be 'driven to adopt a middle course … using no greater force, and setting … no greater military aim, than would be sufficient for the achievement of his political purpose'.[45] Yet decisions on the extent of force to be used, even before the impact on civilians is factored in, do hinge on political purpose.

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[39] ibid 87; ibid 75, on the law of war: '*War is thus an act of force to compel an enemy to do our will* …; to impose our will on the enemy is its object' (emphasis in the original). See Daniel Moran, 'The Instrument: Clausewitz on Aims and Objectives in War', in Strachan and Herberg-Rothe (n 37) 91.

[40] In the Clausewitzian war, writes Peter Paret, '[t]he political purpose for which a war is fought should determine the means that are employed and the kind and degree of effort required. The political purpose should also determine the military objective': Paret, 'Clausewitz' (n 33) 206–07; see Clausewitz, ibid 80–81. While the military purpose 'is dependent on the political purpose', it also depends on other factors: ibid 585–86. On the escalatory tendency of war, see, for example, ibid 589.

[41] Clausewitz, ibid 585.

[42] Paret, 'Clausewitz' (n 33) 207.

[43] Clausewitz (n 33) 585–89; see also 77–78.

[44] ibid 585–89.

[45] ibid 585.

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That is not to say that Clausewitz advocated a legal principle of proportionality. He was not concerned with normative legitimacy of the kind that lawyers address *jus ad bellum* or *jus in bello*. Rather, he sought to systematically 'explore the ultimate nature and dynamic of war', demonstrating in the process that war was amenable to reason.[46] Still, his observations on the reason of war, the instrumental nexus between ends and means as between the political and the military spheres, were highly influential in the formation of the modern law of war. It is noteworthy that he made these very observations, at the beginning of *On War*, precisely at the point where he excluded from consideration the legal aspect of war:

> *War is thus an act of force to compel an enemy to do our will* … Attached to force are certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it. Force – that is, physical force, for moral force has no existence save as expressed in the state and the law – is thus the *means* of war; to impose our will on the enemy is its *object*. To secure that object we must render the enemy powerless; and that, in theory, is the true aim of warfare.[47]

And so, the antinomy is far from being resolved. The Clausewitzian construction of war suggests that legitimacy *jus in bello* is not independent of legitimacy *jus ad bellum.* In the conduct of belligerents, military ends are instrumental to political ends; legitimate ends *jus in bello* draw on *jus ad bellum* ends. Proportionality and military necessity therefore must address 'the nature or origin of the armed conflict or on the causes espoused by or attributed to the parties to the conflict', contrary to contemporary doctrinal assertions. That was self-evident to the drafters of the St Petersburg Declaration; it was equally evident for Francis Lieber, who, in another foundational IHL instrument, asserted the instrumental nature of war and the consequent nexus between war's means and its ends. Article 68 of the Lieber Code, promulgated a few years before 1868, thus stated:

> Modern wars are not internecine wars, in which the killing of the enemy is the object. *The destruction of the enemy in modern war*, and, indeed, *modern war itself, are means to obtain that object* of the belligerent *which lies beyond the war*.
>
> Unnecessary or revengeful destruction of life is not lawful.[48]

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[46] Paret, 'Clausewitz' (n 33) 199, 213.

[47] Clausewitz (n 33) 75 (emphases in the original). For conflicting evaluations of Clausewitz's position on law in war see, eg, LC Green, 'Cicero and Clausewitz or Quincy Wright: The Interplay of Law and War' (1998) 9 United States Airforce Academy Journal of Legal Studies 59; cf Martin van Creveld, 'The Clausewitzian Universe and the Law of War' (1991) 26 Journal of Contemporary History 403.

[48] US War Department, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, 24 April 1863 (emphasis added). I explore the central role that the instrumentality of war plays in its restraint in the Lieber Code in Rotem Giladi, 'A Different Sense of Humanity: Occupation in Francis Lieber's Code' (2012) International Review of the Red Cross (forthcoming). Though acknowledged as the first modern codification of the laws of war, and as a highly influential precedent of what was to follow, the Lieber Code and, in particular, the roots of the concept of humanity it enacts still await systematic uncovering. Otherwise, see Richard R Baxter, 'The First Modern Codification of the Law of War: Francis Lieber and General Orders No. 100' (1963) 25 International Review of the Red Cross 171, 183; Burrus M Carnahan, 'Lincoln, Lieber

6. IMPLICATIONS OF THE CLAUSEWITZIAN WAR THEORY

War has changed since the time of Clausewitz. But while the means of war and the types of goal for which war is fought have been transformed,[49] the essential nature of war has not: it remains a military means to political ends.[50] What has changed is not the construction of war on which the modern law of war was predicated, but rather the normative environment. In other words, it is the first assumption made by the drafters of the St Petersburg Declaration that is no longer correct. The pursuit of war – the use of force between states – is now outlawed, subject to the familiar exceptions of self-defence or enforcement action by the UN Security Council. Other than those, war can no longer be considered legitimate and necessary. Outlawing war, however, did not change its fundamentally political character.

Proportionality analyses and the concept of military necessity itself address the means of war; orthodox IHL doctrine entrenches a complete separation of means and ends, decoupling the military from the political. The Clausewitzian construction of war suggests, however, that since '[t]he political object is the goal' and 'war is the means of reaching it, … means can never be considered in isolation from their purpose'.[51] If legitimate military ends derive from political ends in 'pure' war (and albeit to a lesser extent in 'real' war), than at the analytical level, legitimating the military means necessarily legitimates political ends. The origins, nature and causes of a conflict govern the conduct of the belligerents pursuing an efficient, rational war. The choice of military means in war is directed at creating conditions that are conducive to the imposition of one's political will on the enemy. A recent US Field Manual thus defines 'landpower' as

> **the ability – by threat, force, or occupation – to gain, sustain, and exploit control over land, resources, and people.** Landpower includes the ability to – Impose the nation's will on an enemy, by force if necessary[52]

The Field Manual proceeds to discuss means, such as destruction of key assets and territorial occupation, which make the enemy 'unable to resist the imposition of US will', as well as the connection of causes, means and outcomes.[53]

The normative transformation brought about by the United Nations Charter makes suspect the assertion that the legitimacy of means and ends can be separated. Clausewitz tells us that the military and the political are inseparable. The goals of IHL may be humanitarian, but if war *and the*

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and the Laws of War: The Origins and Limits of the Principle of Military Necessity' (1998) 92 American Journal of International Law 213.

[49] Martin van Creveld, *The Transformation of War* (The Free Press 1991).

[50] Azar Gat, *War in Human Civilization* (Oxford University Press 2006).

[51] Clausewitz (n 33) 87.

[52] US Department of the Army, Joint Publication 3-0: Joint Operations, February 2008, §1–68 (emphasis in the original).

[53] 'Termination design is driven in part by the nature of the conflict itself … The underlying causes of a particular conflict – cultural, religious, territorial, resources, or hegemonic – should influence the understanding of conditions necessary for joint operation termination and conflict resolution'; ibid §IV–7.

manner of its conduct derive from and are instrumental to the political sphere, IHL cannot be said to be politically neutral. Recourse to military necessity and proportionality presupposes the legitimacy of the war aims of the belligerents in question whatever their normative valence, for example, under the United Nations Charter. Suspending judgment about the legitimacy of such war aims operates, in practice, to validate them. Such recourse presupposes in equal measure the permissibility of one state imposing its will, by force or otherwise, on another. In other words, the question at hand is not merely whether the belligerent in question made lawful recourse to war; it concerns equally the permissibility of the political outcome sought by that belligerent. Imposing post-war arrangements on one's opponent by recourse to force amounts, under the Charter, to prohibited intervention which interferes with the right of 'people of all States to administer their own affairs and determine their own political, economic and social system without external interference or control'.[54] If the end is impermissible, the legality of the means used to bring it about is at least dubious. Weakening 'the military forces of the enemy' and disabling 'the greatest possible number of men', in the language of the St Petersburg Declaration, are not stand-alone ends; rather, they are means to imposing political war aims. In this respect, IHL legitimises all war aims – 'the causes espoused by or attributed to the Parties to the conflict' – contrary to the common doctrinal assertion.[55] Whether such legitimisation is nonetheless warranted on other grounds is another matter; this I address shortly.

The instrumental understanding of war underscores the permissive aspect of necessity and proportionality. We tend to focus on the restraining effect of such principles, yet fundamentally they effect licence; the point of departure of both principles is the acceptance not only of the necessities of war but also acceptance that war itself may be necessary. Such acceptance cannot be easily reconciled with the UN Charter or, at times, with human rights law. It is true that today, IHL presents a number of absolute prohibitions (torture, or the taking of civilians hostage); yet most forms of protection it grants are relative, and susceptible to dilution by necessity and proportionality analyses. Humanity in war, in other words, remains largely subordinate to the necessities of war, to the war aims of the belligerents, and to the political sphere.

That the regulation of war legitimises war is not a new critique of IHL. It took strategic form in the preparation of the First Geneva Convention. Thus, the appeal made by Gustave Moynier in 1863, cited above,[56] in defence of the charitable alleviation of 'human passions and their deadly consequences' was made in response to Peace Movement 'detractors' arguing that the

[54] Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, UNGA Res 36/103, UN Doc A/Res/36/103 (1981), 9 December 1981, Preamble.

[55] Legitimisation obviates the need to inquire, in concrete cases, into the propriety of purpose: the legitimate purpose is the conduct of war per se. As long as a measure can be couched in terms of military necessity, and is not strictly unlawful 'in accordance with the laws and customs of war', the legitimacy of the end for which it is employed would remain presumed. Thus, IHL permits what may well amount to indefinite detention of civilians in occupied territories if the occupant considers it 'necessary, for imperative reasons of security'. GC IV (n 5), art 78, presupposes, in other words, that the occupant may legitimately enforce its control over the territory it occupies, and that it occupies the territory for legitimate reasons. Military necessity is predominantly permissive, not restrictive. Charter norms make this presupposition unwarranted. IHL refrains from engaging questions of purpose; in doing so, in effect, it validates all purposes as proper.

[56] Text accompanying n 14.

introduction of humanitarian restraint into war 'is legitimising warfare as a necessary evil'. Tolstoy made a similar argument, couched in moral, perhaps even utilitarian terms, in *War and Peace*.[57] What Clausewitz tells us on the nature of war and the nexus between military means and political ends gives this critique a concrete normative form.

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This analysis of the principles of proportionality and necessity suggests that the distinction between *jus in bello* and *jus ad bellum* rests on shaky analytical ground: military means *in bello* draw their legitimacy from their instrumentality to, and the legitimacy of, political ends *ad bellum*.[58] The Clausewitzian construction of war calls into question the assertions of IHL doctrine about its goals, characteristics and operational strategy. After all, IHL doctrine assumes that it can only exist outside politics. Jean Pictet, as Vice President of the ICRC, professed that just like that body IHL's 'only chance of success lies in its being carried on, as far as possible, outside the sphere of politics'.[59] To that end, doctrine constructs distinctions between the military and the humanitarian, on the one hand, and the political on the other. It casts the military sphere itself as apolitical: incidental to victory, not an instrument thereof; and if the military is apolitical (necessity is military, not political), it may leave room for humanitarian law, sentiment and action that, being politically neutral, do not jeopardise military victory. As such, compliance with humanitarian restraints can be made to appear a wise, cost-effective policy choice. Yet the first assumption made by the drafters of the St Petersburg Declaration is no longer correct:[60] war has been now outlawed. Its pursuit can no longer be assumed to be legitimate and necessary. With this normative transformation, the political neutrality of IHL is no longer analytically sustainable.

IHL doctrine operates by decoupling military reason from political reason, and limits itself to accommodating the former. It is political, not military, legitimacy that the law avoids: the origins, nature and causes of the conflict vis-à-vis the parties to the conflict, not how these translate into military goals and policies. Military necessity is imagined as referencing only the military legitimacy of the military goals of war: IHL operates by permitting what is militarily necessary. Military necessity is distinct, and divorced, from political necessity. If compliance with humanitarian restraints is constructed as incidental to military goals (that is, as not jeopardising victory), military goals are themselves constructed as incidental to political goals.

The instrumental understanding of war suggests that such constructions are flawed. Clausewitz suggests that there can be no gap for the humanitarian between the military and the political spheres; these cannot be decoupled. Means and ends are inseparable, and so are assessments of their legitimacy. Pictet observed that IHL's only chance of success lies in its operation outside the sphere of politics; what can we read into the observation that IHL necessarily references and legitimises the war aims of belligerents, and that these are political *par excellence*? Other than critical reflection about legal doctrine (does it describe the reality of how IHL operates

[57] Discussed by Best (n 14) 14; but cf 120.
[58] Text following n 40.
[59] Pictet (n 18) 15.
[60] Text following nn 30, 50.

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or does it, in fact, obfuscate that reality?), this mandates a reassessment of IHL's record and the feasibility of its strategy.

7. FINAL THOUGHTS: COMING TO TERMS WITH THE CLAUSEWITZIAN WAR

In the final analysis, the Clausewitzian construction of war suggests that IHL, through recourse to necessity and proportionality analyses, references not merely proper purpose *in bello* but also propriety *ad bellum.* Applying necessity and proportionality serves to demarcate an illegitimate sphere of conduct in war. At the same time, such exercise reaffirms not only a legitimate sphere of conduct but also, by refraining from commenting on the legitimacy of the ends of war, the legitimacy of conducting war in the first place.

Two principal imperatives emerge. The first impels a re-examining of IHL doctrine describing and constructing the relations between the humanitarian and the political. Clausewitzian military theory provides the impetus and powerful analytical tools for a conceptual reassessment of orthodox claims about IHL, its goals, its idiosyncratic characteristics and operational strategies. Other theoretical perspectives may provide equally important insight for such inquiries: in this respect, deconstruction of the IHL culture and how it impacts upon legal construction offers some promise. Legal doctrine emphasises modesty, pragmatism, realism, objectivity, independence and neutrality as markers of the law; cultural analysis may provide some clues to these markers (how come, one may ask, the mere proposition that law may legitimise war produces such a strong reaction in us?).[61]

The other imperative is closely related. It concerns a critical evaluation of the law, its limits, its aspiration and its achievement. One implication of the Clausewitzian critique is that the common perception of IHL as independent (from the *jus ad bellum*), politically neutral and effect-objective is fictitious. The reasons why orthodox view considers these characteristics to be conditions precedent for IHL's ability to offer protection to victims of political violence themselves require exploration. Here the concern is not that the law constructs fictions; that, at this or that level, is the usual business of law. One question here is whether these fictions themselves serve a useful purpose; another question is whether the cost they exact is warranted. The answers may be positive, but the utility of these fictions must never be assumed.

With regard to costs, the Clausewitzian construction of war suggests that recognising military necessity indiscriminately (that is, available both to aggressor and defender) lends some legitimacy to causes and war aims that, under *jus ad bellum*, are illegitimate. Requiring that the requisition of foodstuffs in occupied territory be proportional to the resources of the country and the needs of the occupied territory[62] thus permits the occupation army to feed off the land in furtherance of war policies that may well be in contravention of the United Nations Charter. Similarly,

[61] I seek some answers to this question in Rotem Giladi, 'Rites of Affirmation: Progress and Immanence in International Humanitarian Law Historiography' (on file with the author).
[62] GC IV (n 5), art 55.

limiting the scope of permissible collateral damage to civilians is predicated not only on the permissibility of targeting military objectives but, more crucially, on the legitimacy of those political ends which attacks on such military targets seek to promote.[63] Legitimising collateral damage caused in the pursuit of aggressive war legitimises, to some degree, its pursuit.

We turn, then, to the more difficult question of the useful purpose served by resorting to such fictions. Is the cost of legitimising illegitimate war acceptable? What other community goals does it serve? The answer offered by common wisdom (the same one professing the severability of means and ends) is that IHL's political neutrality is warranted for a combination of 'practical, policy and humanitarian reasons'.[64] These traditionally include the following arguments. First, it is argued that, notwithstanding the prohibition on the use of force, armed conflicts continue to occur and require moderation.[65] Second, the indeterminacy and politicisation of *jus ad bellum* determinations, together with the rarity of Security Council designating the aggressor, is invoked in favour of employing indiscriminate standards of restraint applicable to all belligerents.[66] Third, it is argued that distinguishing between belligerents on the basis of *jus ad bellum* criteria 'would thus almost certainly lead to a total disregard for humanitarian law'.[67] An associated argument is that placing a more onerous burden on aggressors would invariably cause them to fight without any restraints. Last, there are arguments about the moral equality of *victims*,[68] and the individual protection objectives of IHL:[69] victims should be protected irrespective of any wrongdoing by their state and its leaders.[70]

The analytical flaw identified in IHL doctrine does not necessarily compel the rejection of any of these arguments. It does, however, compel critical reflection on their persuasiveness and implications. None of these justifications for the equality of belligerents necessitates, for example, that IHL's point of departure should be the accommodation of licence. Analytically, the acceptance of all, some, or no permissible collateral damage at all – as long as such a standard binds all belligerents – is perfectly consistent with the fact that wars continue to occur and offers an equally pragmatic solution to the indeterminacy of *jus ad bellum.* The last of these hypothetical standards – under which no collateral damage is ever acceptable – would even inject moral content into the formal principle of the moral equality of victims.[71] It is at least uncertain, in other words, that the equality of belligerents really requires the cost of legitimising illegitimate wars: it can operate on the basis of censure as much as on the basis of licence.

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[63] Text to n 2.
[64] Sassòli, Bouvier and Quintin (n 7) 114. See also Giladi (n 9).
[65] Greenwood (n 17) 226; Giladi, ibid 257–58.
[66] Giladi, ibid 258–59; Sassòli, Bouvier and Quintin (n 7) 114–15; Greenwood, ibid 226.
[67] Christopher Greenwood, 'Historical Development and Legal Basis' in Dieter Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (2nd edn, Oxford University Press 2009) 1, 11. See also sources cited (n 17); Giladi, ibid 259.
[68] Sassòli, Bouvier and Quintin (n 7) 115 ('from the humanitarian point of view, the victims of the conflict on both sides need and deserve the same protection').
[69] Greenwood (n 17) 227 (the purpose of humanitarian norms, rather than to confer benefits onto parties to a conflict, is 'to protect individuals and to give expression to concepts of international public policy').
[70] Giladi (n 9) 259–60.
[71] Akin to the line of thought proposed by Jeff Mcmahan, *Killing in War* (Oxford University Press 2009).

At the same time, other considerations do warrant questioning whether the doctrinal fiction about the severability of ends and means really serves a useful purpose. Against the indeterminacy of *jus ad bellum*, it may be argued that the 'unbounding' of the Security Council since the end of the Cold War may facilitate the identification of aggressors and the appraisal of the legitimacy of the aims that belligerents seek to attain by force.[72] While the Council's practice in the past two decades or so still leaves much to be desired, we may be witnessing a shift towards greater *jus ad bellum* determinacy bolstered by an *ex post facto* exercise of jurisdiction by international criminal tribunals and the International Criminal Court.

The normative and institutional developments in international criminal law raise certain doubts not only with regard to the pragmatic argument about *jus ad bellum* indeterminacy, but also about the moral groundings of the doctrinal separation of means and ends. Why recognise, we may thus ask, the legitimate security concerns of, or any ratio of, civilian lives lost caused by the authors of wars fought for criminal purposes such as ethnic cleansing or genocide? Developments in international criminal law underscore the limits of persuasion; there may be moral points beyond which the end entirely vitiates the means employed to pursue it. To argue that the principle of equality of belligerents holds the authors of such criminal designs bound to a minimum standard of restraint, or that what would keep them from resorting to atrocities (which they are already committing) is the fact that the standards they are violating apply to all verges on the tragically nonsensical.

I am not suggesting that none of the justifications for separating means and ends ever holds water, or that we need to discard entirely the *jus ad bellum/jus in bello* distinction or the principles of necessity or proportionality. I am suggesting, however, that we can no longer assume – if we ever could – the correctness and propriety of the fictions employed by IHL doctrine. Reciting the common view, the prevalent understanding, about the goals of law, its characteristics, and how it operates does not encourage asking such questions. Orthodox doctrine, in the nature of orthodoxy, militates against innovative explorations. The answers it provides may be valid, but they require constant validation based on reason and evidence that rest on more than, and are external to, the assertions of orthodox doctrine.

Thus, we could find import in the fact that public opinion sometimes refuses to accept the verdict IHL has to offer on the acceptability of large-scale civilian casualties in attacks, campaigns and wars, as mandated by the rules. We could, rather than dismiss inexpert public opinion, find lessons in its insistence to infer from such unacceptable outcomes the unacceptability of the attack itself, the campaign or the war. If we are to take seriously our own claim that the law ought to draw from 'the requirements of the public conscience' – and include the public at large in that reference in the Martens Clause[73] – we may come to understand

[72] Michael J Matheson, C*ouncil Unbound: The Growth of UN Decision Making on Conflict and Postconflict Issues after the Cold War* (United States Institute of Peace Press 2006).

[73] Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (entered into force 4 September 1900) 187 CTS 429, Preamble. On lawyers as the authoritative speakers of public conscience, see Martti Koskenniemi, *The Gentle Civilizer of*

that public opinion is telling us, perhaps, that such 'legal' but inhumane outcomes are simply no longer good enough.[74]

It may be, to pursue another unorthodox line of exploration, that the irrelevance of the legitimacy of means to that of ends is no longer tenable, if it had ever been, and that the legitimacy of the decision to use force ought to be contingent, *ex ante* and *ex post*, on the manner in which that force is actually employed. *Jus ad bellum* legitimacy, perhaps, ought to be preconditioned to a significant degree on legitimacy *jus in bello.* Such a novel proposition, and others, deserves separate treatment, which I hope to pursue elsewhere.

8. CONCLUSION

In IHL, as in other legal systems, proportionality measures the means in relation to the end. The principle presupposes the legitimacy of the end itself. In the case of IHL, the legitimacy of ends appears to reference military necessity. As formulated by the St Petersburg Declaration, the only legitimate end *jus in bello* is 'to weaken the military forces of the enemy'. This implies, in accordance with the orthodox doctrine on the distinction between *jus ad bellum* and *jus in bello*, that IHL norms do not reference *jus ad bellum* legitimacy.

The instrumental construction of war by Carl von Clausewitz, which considers war as a military means to a political end, challenges these assertions. It suggests that weakening the military forces of the enemy is instrumental to imposing the victor's war aims – political, *jus ad bellum* ends – on the vanquished. For Clausewitz, political ends dominate the military conduct of belligerents, and the military means cannot be considered in isolation from the political ends. This indicates that, contrary to doctrinal assertions, IHL proportionality and military necessity presuppose the *jus ad bellum* legitimacy of the conduct of belligerents. This shaky analytical grounding of key IHL doctrines helps to identify a series of pertinent questions about the goals, characteristics, techniques, operational strategies and achievements of IHL.

Nations: The Rise and Fall of International Law 1870–1960 (Cambridge University Press 2004) 41 and Giladi (n 61).

[74] cf Laurie R Blank, 'A New Twist on an Old Story: Lawfare and the Mixing of Proportionalities' (2011) 43 Case Western Reserve Journal of International Law 707.