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And Yet It Exists: In Defence of the 'Equality of Belligerents' Principle

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Abstract
The equal application of international humanitarian law (*jus in bello*) to all parties to an international armed conflict is a cornerstone principle of *jus in bello*. In his article, Professor Mandel casts doubt on the legal basis of this principle. Reacting to this claim, this contribution demonstrates that the 'equality of belligerents' is a principle firmly grounded in both conventional and customary international law. Moreover, its legal force withstands the test of international jurisprudence, including the International Court of Justice's controversial *Nuclear Weapons* advisory opinion.

Key words
advisory opinion; aggression; equality of belligerents; *jus ad bellum*; *jus in bello*; *Nuclear Weapons*

I. Introduction

The present contribution is a reply to an article by Professor Michael Mandel, entitled 'Aggressors' Rights: The Doctrine of "Equality between Belligerents" and the Legacy of Nuremberg', published in an earlier number of this journal.[1] In his article, Professor Mandel makes a case against the separation between, on the one hand, the rules regulating resort to force by states in their international relations (*jus ad bellum* or *jus contra bellum*)[2] and, on the other hand, the rules regulating the relations between belligerent parties in an armed conflict (*jus in bello*, law of armed conflict or international humanitarian law (IHL)).[3] He pleads, more specifically, against the principle of equality between belligerents. This principle stands for the equal application of *jus in bello* to all belligerent parties of an international armed conflict irrespective of who violated *jus ad bellum* in the first place.[4] Mandel's point of

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1 M. Mandel, 'Aggressors' Rights: The Doctrine of "Equality between Belligerents" and the Legacy of Nuremberg', (2011) 24 LJIL 627.

2 The present author subscribes to the view that the expression '*jus contra bellum*' reflects the content of the legal regime concerning states' use of force more accurately than the expression '*jus ad bellum*'; see O. Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (2010), 2. For a comment, see the review essay by R. van Steenberghe, 'The Law against War or *Jus contra Bellum*: A New Terminology for a Conservative View on the Use of Force?', (2011) 24 LJIL 747. However, since the expression *jus ad bellum* is used in Mandel's article, this contribution will follow the same terminology.

3 In this article, the terms will be used interchangeably.

4 The scope of this analysis is limited to international armed conflicts. Indeed, these are the conflicts traditionally covered by the equality of belligerents principle. The reason for this is that *jus ad bellum* does not

departure is essentially an international criminal-law one and his main issue is with the impunity for the crime of aggression or 'crime against peace'.[5] The author views the equality of belligerents as an element favouring, or at least contributing to, this impunity. From this perspective, he goes on to challenge the existence of the equality of belligerents principle. It should be noted in this respect that the scope of Mandel's thesis is not entirely clear. Despite the fact that he appears to be mostly concerned with aggressor's rights,[6] the author seems to challenge the equality of belligerents principle in general, as the wording of some of his affirmations in relation to the 'equality of belligerents' principle suggests.[7] In any case, the challenge seems to extend not only to the rights of the aggressor but also to the rights of the victim of aggression, something that Mandel explicitly asserts in his article.[8] In what appears to be the central part of his thesis, Mandel argues that 'contrary to the conventional wisdom, the notion of legal equality between belligerents is not supported by the jurisprudence of the Nuremberg era, or developments since, or the arguments usually made for it'.[9] As indicated in the above-quoted passage, Mandel raises three points for rejecting the equality of belligerents principle. The main one concerns the Nuremberg-era jurisprudence (including the Nuremberg and Far East international military tribunals and the national military tribunals created by the Order No. 10 of the Council). Several Nuremberg-era judgments are referred to and analysed throughout the commented article.[10] The second point relates to post-Nuremberg developments.[11] In this regard, Mandel refers to the four Geneva Conventions on the protection of wounded, sick, shipwrecked, prisoners of war and civilians in times of armed conflict, adopted in 1949,[12] as well as to the first

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apply to internal armed conflicts; see Corten, *supra* note 2, at 127–35. However, legal literature acknowledges that there is an emerging *jus ad bellum* even with respect to these conflicts; see E. David, *Principes de droit des conflits armés* (2008), at 83. This has led some scholars to examine the equal application of IHL in the context of non-international armed conflicts; see M. Sassoli, '*Ius ad Bellum* and *Ius in Bello* – The Separation between the Legality of the Use of Force and Humanitarian Rules to Be Respected in Warfare: Crucial or Outdated?', in M. N. Schmitt and J. Pejic (eds.), *International Law and Armed Conflict: Exploring the Faultlines – Essays in Honour of Yoram Dinstein* (2007), 241 at 255–7; F. Bugnion, '*Jus ad Bellum, jus in Bello* and Non-International Armed Conflicts', (2003) 6 YIHL 167; J. Somer, 'Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-International Armed Conflict', (2007) 89 RICR 655, at 659–64. However, since the issue is not specifically raised in the commented article, the present contribution will limit itself to traditional inter-state armed conflicts.

5 Mandel, *supra* note 1, at 627–9 and 649–50.

6 For example, the possibility (or rather the lack thereof) of the aggressor to invoke military necessity; ibid., at 633–4. Cf. 'The' title of the article.

7 Ibid., at 646. Thus, for example, Mandel refers to a passage by Lauterpacht which 'can only be read as a statement contrary to any notion of "equality of belligerents" between aggressor and victim'; ibid., at 648. Along the same lines, he relies on the 1996 *Nuclear Weapons* Advisory Opinion of the International Court of Justice as confirming 'the weak legal status of any notion of "equality of belligerents" between aggressor and victim'; see also the general formulation of the central thesis of Mandel's article in the text accompanying note 9, *infra*.

8 Ibid., at 648, 'A victim of aggression can have wider *jus in bello* rights that an aggressor.'

9 Ibid., at 629.

10 Ibid., at 631–41.

11 Ibid., at 642–8.

12 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 32 ('GC I'); 1949 Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 86 ('GC II'); 1949 Geneva Convention Relative to the Treatment of Prisoners of War, 75 UNTS 136 ('GC III'); 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 288 ('GC IV').

additional protocol to these conventions, adopted in 1977.[13] In Mandel's view, these international treaties 'pose no obstacles'[14] to treating belligerents having violated *jus ad bellum* differently than those that respect it. In connection to this claim, the International Court of Justice's (ICJ) *Nuclear Weapons* advisory opinion[15] is cited as proof against the validity of the equality of belligerents principle.[16] Finally, the third point deals with doctrinal policy arguments invoked in favour of the practical usefulness of the equality of belligerents principle,[17] all rejected by Mandel as unconvincing.[18]

This article will demonstrate that, contrary to what is suggested by Mandel, the equality of belligerents is a principle that rests on solid legal ground. It should be noted from the outset that Mandel's analysis focuses too much on the Nuremberg-era jurisprudence and completely ignores, or, at best, downplays, the conventional and state-practice developments since 1945. However, as will be shown, these developments leave no doubt about the existence and legal force of the equality of belligerents principle in international law. Thus Mandel's main argument according to which the jurisprudence related to the Second World War has not consistently applied the equality of belligerents principle is simply not decisive in this respect. It is incapable of trumping the legal nature of the principle in question. In view of the above, this article will demonstrate the legal force of the equality of belligerents principle (section 2). We will then turn to international jurisprudence in order to evaluate to what extent it reflects the principle (section 3). On the basis of these sources, some basic elements of the scope and content of the principle will be examined (section 4). In conclusion, we will discuss some of the policy arguments raised by Mandel (section 5).

2. The 'equality of belligerents': a legal principle solidly anchored in conventional and customary international law

Contrary to the arguments advanced by Mandel, it will be shown that there is more than sufficient evidence confirming the legal force of the equality of belligerents principle. This section will examine in turn the conventional (2.1) and customary (2.2) sources of the principle.

13 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 4 ('AP I').

14 The expression is used in relation to the Geneva Conventions; Mandel, *supra* note 1, at 644.

15 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep. 226 ('*Nuclear Weapons* Advisory Opinion').

16 Mandel, *supra* note 1, at 647–8.

17 Such as the argument that a differential application of IHL to the aggressor and to the victim of aggression would lead to erosion of IHL because all sides in a conflict claim to have respected *jus ad bellum*; see notes 119–24 and accompanying text, *infra*.

18 Mandel, *supra* note 1, at 644–5 and 648–9.

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2.1. The equality of belligerents principle in conventional international law

This subsection will show that both the 1949 Geneva Conventions (2.1.1) and the 1977 first additional protocol (2.1.2) contain clauses prohibiting a differential application of IHL rules on the basis of *jus ad bellum*. As such, they both constitute conventional sources of the equal application of IHL to all belligerent parties.

2.1.1. The 1949 Geneva Conventions

Articles 1 and 2 common to the four 1949 Geneva Conventions uphold the equal application of the Conventions' rules to all belligerent parties, without any adverse distinction flowing from *jus ad bellum* violations. Indeed, common Article 1 stipulates that states parties 'undertake to respect and ensure respect for the present Convention *in all circumstances*' and common Article 2 states that the Conventions 'apply to *all cases* of declared war or of *any other armed conflict*' as well as to '*all cases* of partial or total occupation of the territory of a High Contracting Party'.[19] These formulations are certainly open enough to offer textual grounding to the equality of belligerents principle. This is confirmed by the International Committee of the Red Cross (ICRC) commentaries to the Geneva Conventions (known also as the 'Pictet commentaries').[20]

This view finds support in the *travaux préparatoires* of the Conventions. Denmark had proposed to include the civilians 'who participate in the defence of their country against illegal aggression or occupation' to the list of persons entitled to prisoner-of-war status.[21] The UK delegation reacted, insisting on the principle of equal application of IHL rules even in case of illegal wars.[22] No delegation opposed these

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19 GC I, *supra* note 12, at 32 (for both articles) (italics added). The articles being identical in all four Geneva Conventions, reference is only made to the text of the GC I.

20 In relation to common Article 1, the commentary of GC I reads as follows:

> The words 'in all circumstances' mean in short that the application of the Convention does not depend on the character of the conflict. Whether a war is 'just' or 'unjust', whether it is a war of aggression or of resistance to aggression, the protection and care due to the wounded and sick are in no way affected.

J. S. Pictet, *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field: Commentary* (1952), at 27 ('*Commentary GC I*'). The other commentaries are almost identical on this point; see J. S. Pictet, *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea: Commentary* (1960), at 26 ('*Commentary GC II*'); J. S. Pictet, *Geneva Convention Relative to the Treatment of Prisoners of War: Commentary* (1960), at 18 ('*Commentary GC III*'); J. S. Pictet, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War: Commentary* (1958), at 16–17 ('*Commentary GC IV*'). The same reasoning applies to common Article 2. The formulation of the article, according to the Pictet commentaries, excludes the possibility of invoking legitimate self-defence as an argument for eluding the application of the Conventions; see Pictet, *Commentary GC I*, *supra*, at 32; Pictet, *Commentary GC II*, *supra*, at 28; Pictet, *Commentary GC III*, *supra*, at 23; Pictet, *Commentary GC IV*, *supra*, at 20.

21 *Final Record of the Diplomatic Conference of Geneva of 1949* (undated), Federal Political Department, Berne, Vol. 3, annex no. 85, at 59. The Danish delegate explained the reasoning of the proposal in the following terms:

> Today, an aggressive war was considered illegal. It followed that warlike acts committed by civilians against the aggressor could no longer be considered illegal. Civilians who took up arms in good faith for the defence of their country against an invader should therefore, in his opinion, have the benefit of the protection accorded to prisoners of war.

See also *Final Record supra*, Vol. 2-A, at 240 and 425–6.

22 Ibid., at 426: 'To accept the amendment would be tantamount to rejecting the principles generally accepted and recognized in the Prisoners of War Convention. It was essential that war, even illegal war, should be

remarks and the Danish proposal was not included in the relevant article. Moreover, the Danish delegation itself espoused the separation between *jus ad bellum* and *jus in bello* and the principle of equal application of *jus in bello* to all belligerents.[23]

Aside from the Geneva Conventions' *travaux*, and perhaps most importantly, several states themselves regard common Articles 1 and 2 as conventional sources of the equality of belligerents principle. In their written statements to the ICJ in the context of the *Wall* advisory proceedings, Indonesia and Jordan invoked these two articles as sources of the application of the GC IV to all occupations, be they a *jus ad bellum* violation or not.[24] Belgium has taken a similar view, in the context of the 'war against terrorism',[25] a view the US Department of Defense also seems to share. Indeed, during the invasion of Iraq by the US-led coalition in 2003, at a press briefing, the Department's experts asserted that

> the law of war, all of it, has taken the traditional view that it doesn't make any difference who started the war. . . . The four 1949 Geneva Conventions *specifically state* in there that it doesn't make any difference who started the war, who is the party who was first off or what have you; that in any case, the conventions will apply. That's to sort of keep people from saying, 'Well, he started it, and therefore, I don't have to follow the law of war.' Regardless of who started the conflict, each side has an obligation to follow the law of war.[26]

The use of the term 'specifically state' clearly indicates that the equal application of IHL is grounded on the text of the Geneva Conventions. Common Articles 1 and 2 are the obvious reference alluded to by the experts.

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governed by those principles.' The UK delegation made the point perfectly clear in a later discussion on the Danish amendment by stating that, although states starting a war 'commit an international delinquency', 'in all these and similar cases all the laws of warfare must find application, for a war is still a war in the eyes of international law even though it has been illegally commenced'. See *Final Record of the Diplomatic Conference of Geneva of 1949*, *supra* note 21, Vol. 2-B, at 268.

23 *Final Record of the Diplomatic Conference of Geneva of 1949*, *supra* note 21, vol. II-B, at 268:

> It is true that the four Conventions should also be applicable to illegal warfare, since their object is to protect wounded, sick and shipwrecked persons, prisoners of war and civil populations, in all circumstances. It must be borne in mind that this humanitarian task is the object of these Conventions, and unless they serve that purpose, they cannot be considered as an expression of international law or of the laws and customs of war.
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> . . . [A]n illegal war of aggression does not automatically become legal if the aggressor applies the provisions of the Prisoners of War Convention. The aggression is, and must remain, illegal; and it must incur all normal consequences such as sanctions, reparations, and so on.

24 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Proceedings ('*Wall* Advisory Proceedings'), Indonesia, Written Statement of 29 January 2004, at 7, para. 11, and Jordan, Written Statement of 30 January 2004, at 67–8, para. 5.80. See also *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Proceeding (WHO request) ('*Nuclear Weapons* Advisory Proceedings (WHO request)'), Solomon Islands, Further Written Observations submitted by the Government of the Solomon Islands, 20 June 1995, at 60, para. 4.74. All statements are available at www.icj-cij.org.

25 See the declaration by the Belgian foreign minister, quoted in E. David (ed.), 'La pratique du pouvoir exécutif et le contrôle des chambres législatives en matière de droit international (1999–2003)', (2005) XXXVIII RBDI 5, at 270.

26 US Department of Defense, *Briefing on Geneva Convention, EPWs* [i.e. Enemy Prisoners of War] *and War Crimes*, Office of the Assistant Secretary of Defense (Public Affairs), 7 April 2003, available at www.defense.gov/transcripts/ transcript.aspx?transcriptid=2281 (italics added).

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There is therefore sufficient evidence that, contrary to Mandel's position,[27] the Geneva Conventions do not allow for a differentiated application of IHL rules between belligerent parties.

2.1.2. The 1977 first additional protocol

The First Additional Protocol to the Geneva Conventions (AP I or Protocol) in the fifth paragraph of its Preamble 'reaffirms' that

> the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.[28]

Despite this straightforward reaffirmation of the equality of belligerents principle, Mandel refuses to seriously consider AP I as a conventional basis of the principle. In respect to the Protocol, and in a rather cursory manner, Mandel advances two arguments. First, he notes that the Protocol has not been ratified as widely as the Geneva Conventions have been. Second, he suggests that the paragraph cited above 'tries to separate' *jus ad bellum* from *jus in bello* only with respect to protected persons, defined by Mandel as follows:

> 'Protected persons' are defined as 'those who . . . find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power' – in other words, the occupied, not the occupiers, or, if it were to be stretched in any direction at all, those targeted for killing, not the targeters.[29]

Both arguments are unconvincing. First of all, as far as the ratification argument is concerned, the *travaux préparatoires* of AP I confirm that, despite positions to the contrary expressed by the Democratic Republic of Vietnam and Romania,[30] the principle stated in the fifth preambular paragraph of the Protocol was ultimately accepted by all states participating in the negotiations.[31] This includes states that

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27 Mandel, *supra* note 1, at 644. Many scholars support the proposition that the Geneva Conventions offer a textual legal basis to the equality of belligerents principle. See, e.g., C. Greenwood, 'The Relationship between *Ius ad Bellum* and *Ius in Bello*', (1983) 9 RIS 221, at 225; Y. Dinstein, *War, Aggression and Self-Defence* (2005), at 159; F. Bugnion, 'Guerre juste, guerre d'agression et droit international humanitaire', (2002) 84 RICR 523, at 540–1; A. Roberts, 'The Equal Application of the Laws of War: A Principle under Pressure', (2008) 90 RICR 931, at 936–7; J. Moussa, 'Can *Jus ad Bellum* override *Jus in Bello*? Reaffirming the Separation of the Two Bodies of Law', (2008) 90 RICR 963, at 967; R. D. Sloane, 'The Cost of Conflation: Preserving the Dualism of *Jus ad Bellum* and *Jus in Bello* in the Contemporary Law of War', (2009) 34 YJIL 47, at 103; A. Bouvier, 'Assessing the Relationship between *Jus in Bello* and *Jus ad Bellum*: An Orthodox View', (2006) 100 ASIL Proceedings 109, at 110.

28 AP I, *supra* note 13, at 7.

29 Mandel, *supra* note 1, at 643.

30 For the position of the Democratic Republic of Vietnam, see the basic considerations accompanying the amendments deposed by the Democratic Republic of Vietnam to the draft version of AP I at the beginning of the 1974–77 Diplomatic Conference, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974–77), Federal Political Department, Bern, 1978 ('*Acts of the 1974–77 Conference*'), Vol. 4, CDDH/41, at 177–80. For the position of Romania, see, ibid., Vol. 5, CDDH/SR.11, at 103, para. 12; Vol. 6, CDDH/SR.42, at 235–6; Vol. 9, CDDH/I/SR.44, at 31–2, paras. 26–27.

31 The paragraph was adopted by consensus both in the First Committee and in the Plenary Session of the 1974–77 Diplomatic Conference, see *Acts of the 1974–77 Conference*, ibid., Vol. 11, CDDH/I/SR.76, at 476, para. 15 (First Committee) and Vol. 8, CDDH/SR.54, at 170, para. 43 (Plenary Session).

have decided not to ratify the Protocol, like Israel, the United States, India, and Indonesia.[32] This decision may reflect these states' objection to other provisions of the Protocol,[33] but cannot, in any case, be interpreted as a rejection of the principle enshrined in the Protocol's preamble. For example, India, who has not ratified the AP I, recognized the legally binding force of the equality of belligerents principle, by explicitly referring to the fifth preambular paragraph of the Protocol:

> The legality of war does not release the participants from the application of the rules regulating the conduct of armed conflicts. An aggressor violating the law of the Charter has to comply with limitations on the weapons used. Similar restraint has to be exercised by those fighting in self-defence. The application of rules of law of armed conflicts does not depend on the legality of the defended causes; both aggressor or victim are equally subject to the laws of war – a principle reflected in the fifth preambular paragraph of Protocol I.[34]

Turning to the argument relating to the scope *ratione personae* of the fifth preambular paragraph of AP I, Mandel reads the terms 'persons who are protected by those instruments' mentioned in this paragraph as being basically limited to 'protected persons' in the sense of Article 4(1) of the Fourth Geneva Convention (GC IV). His definition of the term 'protected persons' is based on this article.[35] At most, he accepts that the *ratione personae* scope of the paragraph covers 'those targeted for killing' but not the 'targeters'.[36]

Such limitations to the personal scope of application of the equality of belligerents principle are inconsistent both with the text of the Protocol's preamble and with the states' interpretation of the principle. First, equating the scope of the fifth preambular paragraph to that of GC IV is in clear contradiction with the letter of the paragraph itself. Indeed, the paragraph refers to persons protected by 'those instruments'. The wording of the fifth paragraph of the AP I preamble clearly shows that 'these instruments' are all four 1949 Geneva Conventions as well as AP I.[37] This means that the equality of belligerents principle cannot be interpreted as referring only to the 'occupied', as Mandel suggests. The principle's scope of application *ratione personae* is as diverse as the relevant scope of application of the four Geneva Conventions and the Protocol itself. Thus, this scope of application covers, among others, the wounded, sick, and shipwrecked members of the armed forces of belligerent states;[38] prisoners

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32 As well as Iran, Pakistan, Somalia, Sri Lanka, Thailand, and Turkey. According to the ICRC ratification list, last updated on 10 July 2012, AP I counts 172 state parties; available at www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf; cf. the list of states participating at the 1974–77 Diplomatic Conference, *Acts of the 1974–77 Conference*, *supra* note 30, Vol. 2, at 29 ff.

33 See, e.g., Israel's explanation of vote after the adoption of the two additional protocols at the 1974–77 Diplomatic Conference, *Acts of the 1974–77 Conference*, *supra* note 30, Vol. 7, CDDH/SR.56, at 215 ff, paras. 104 ff. See also US president's letter of transmittal to the Senate, dated 29 January 1987, stating the views of the US administration on AP I, 'Agora: The US Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims', (1987) 81 AJIL 910, at 911–12.

34 *Nuclear Weapons* Advisory Proceedings (WHO Request), *supra* note 24, India, Letter dated 20 June 1995 from the Ambassador of India, together with Written Comments of the Government of India, at 16.

35 GC IV, Art. 4(1), *supra* note 12, at 290.

36 See accompanying text to note 29, *supra*.

37 See accompanying text to note 28, *supra*.

38 GC I, Art. 13, *supra* note 12, at 40; GC II, Art. 13, *supra* note 12, at 94.

of war;[39] and civilians who find themselves in the hands of a party to the conflict who is not an occupying power,[40] as well as civilians in general – that is civilians not necessarily finding themselves in the hands of a party to the conflict, as far as the application of articles listed in Part IV of AP I are concerned.[41] Thus, Mandel's distinction between the 'occupied' and the 'occupier' as far as the application of the 'equality of belligerents' principle is concerned is untenable. The fallacy of such a distinction is revealed by the following example. Mandel argues that in case of a state reacting to an aggressive occupation, the targeting of the occupier's civilians by the occupied state victim of aggression would not be covered by the equality of belligerents principle, since these civilians do not constitute protected persons under the preamble of AP I.[42] This position runs counter to the scope of AP I. Attacks against civilians are prohibited by Article 51 of the Protocol.[43] For the purposes of applying Article 51, a civilian is defined in Article 50 as 'any person' not belonging to the categories listed in Article 4(A)(1), (2), (3), and (6) of GC IV and in Article 43 of AP I.[44] Therefore, the text of AP I itself indicates that, contrary to Mandel's suggestion, all civilians are protected by Article 51 of AP I, including the nationals of an occupying power.[45] This is nothing more than the logical consequence of the normal application of IHL rules relating to the conduct of hostilities. Indeed, in situations where the civilians of the occupying power are targeted by the occupied state, all that matters is that the targeted individuals are civilians and, as such, should not be the object of an attack. The fact that these civilians are nationals of an occupying power, responsible for an occupation illegal under *jus ad bellum* or not, is irrelevant for the application of the principle of distinction laid down in Article 51 of AP I. Thus, the text of AP I leads to the conclusion that all civilians are covered by the equality of belligerents principle. Consequently, again contrary to Mandel's suggestion, the targeting of civilians of an aggressive occupying power by the occupied state is a violation of *jus in bello*, even if it meets 'the criteria of self-defence' and even if it is 'the only means of ousting a militarily superior occupier immune to conventional warfare'.[46]

Second, the persons 'protected by those instruments' to which the fifth preambular paragraph of AP I refers cannot, as Mandel suggests, be limited to 'those targeted for killing' and exclude the 'targeters'.[47] First of all, the personal scopes of application of both GC IV and AP I explicitly include both the population of the 'occupier' and the 'targeter' in general.[48] Indeed, Article 13 of GC IV stipulates that the provisions

39 GC III, Art. 4, *supra* note 12, at 138, 140.

40 GC IV, Art. 4, *supra* note 12, at 290; cf. the titles of Sections I and II of Part III of the Convention. Section I of Part III is entitled 'Provisions common to the territories of the parties to the conflict and to occupied territories' (ibid., at 306). Section II of Part III is entitled 'Aliens in the territory of a party to the conflict' (ibid., at 310). This clearly indicates that the protected persons covered by GC IV are not limited to the 'occupied'.

41 AP I, Art. 50, *supra* note 13, at 26.

42 Mandel, *supra* note 1, at 646–7.

43 AP I, Art. 51, *supra* note 13, at 26.

44 AP I, *supra* note 13, at 26.

45 The same goes for the relevant customary IHL rules; cf. J-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (2005), Vol. 1: Rules, at 17 (Rule 5).

46 Mandel, *supra* note 1, at 646.

47 See text accompanying note 29, *supra*.

48 Although it is rather rare, depending on the relevant rule, this scope of application may even include a state's own nationals. For example, the prohibition of recruiting into the armed forces children who have

of Part II of the Convention 'cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion'.[49] The same applies to persons covered by the provisions of Part II of AP I pursuant to Article 9 of the Protocol.[50] Moreover, some of the most important articles of the Protocol stipulate obligations addressed precisely to the 'targeters' (such as the obligation not to direct attacks against civilians, civilian objects, cultural objects, objects indispensable to the survival of the civilian population, or installations containing dangerous forces, as well as the obligation to take precautionary measures in attack).[51] Distinguishing 'those targeted for the killing' from the 'targeters' is illusory because the provisions concerning the 'targeters' are an indispensable element of the protection accorded to the 'targeted'; they constitute the corollary of this protection.[52] This is also confirmed by the *travaux préparatoires* of the Protocol. Indeed, at no point was it suggested that the separation between *jus ad bellum* and *jus in bello* applied only to the victims of the targeting and not to the 'targeters'.

Therefore, contrary to what is proposed by Mandel, and in conformity with the object and purpose of the separation itself, states have not introduced any limitations as to the personal scope of application of the principle expressed in the fifth preambular paragraph of AP I. This is also evident from state practice supporting the principle's customary character.

2.2. The equality of belligerents principle in customary international law

Apart from its conventional sources, the equality of belligerents principle is firmly established in customary international law. This is supported both by general statements of states and by state practice in relation to particular conflicts.

As far as general statements are concerned, states have repeatedly asserted that IHL applies in the same way both to the aggressor and to the victim of aggression. A number of military manuals state this principle in general terms, leaving no room for limitations or exceptions (of a *ratione personae* character or otherwise). For example, the UK *Manual of the Law of Armed Conflict* states,

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not attained the age of 15, laid down in Art. 77 of AP I, clearly applies to the relations between a state (be it an 'occupier', a 'targeter', or anything else) and its own nationals; AP I, Art. 77, *supra* note 13, at 39. See also Y. Sandoz, C. Swinarski, and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), 902 ('*Commentary AP I*').

49 GC IV, *supra* note 12, at 296–8. See also Pictet, *Commentary GC IV*, *supra* note 20, at 118–19, confirming that these provisions apply also to a belligerent's own nationals and asserting that 'the mere fact of a person residing in a territory belonging to or occupied by a party to the conflict, is sufficient to make Part II of the Convention applicable to him'.

50 AP I, Art. 9(1), *supra* note 13, at 11: This Part, the provisions of which are intended to ameliorate the condition of the wounded, sick and shipwrecked, shall apply to all those affected by a situation referred to in Article 1, without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria.

51 AP I, Arts. 51, 52, 53, 54, 56, 57, *supra* note 13, at 26–9.

52 Moreover, the 'targeter'/'victim of targeting' distinction is not conclusive even for Mandel's line of reasoning. This distinction is different from the distinction between the 'aggressor' and the 'victim of aggression'. The victim of aggression can very well find himself in the place of the 'targeter' when responding to the armed attack in exercise of his right to self-defence. In such a case, the aggressor will be the victim of the targeting and therefore the Protocol's fifth preambular paragraph will apply to him as well, contrary to Mandel's logic.

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> One of the most important characteristics of the law of armed conflict is its universal application. It applies with equal force to all parties engaged in an armed conflict, whether or not any party is considered to be 'an aggressor' or 'a victim of aggression'.[53]

This position is confirmed by statements adopted by states in other circumstances, such as in the context of advisory proceedings before the ICJ.[54]

Most importantly, the equality of belligerents principle is confirmed through state practice in the context of specific armed conflicts. Indeed, authors who have examined the *jus ad bellum*/*jus in bello* separation cite only one precedent where a state involved in an international armed conflict made an explicit link between the two legal regimes. This precedent is the Vietnam War and the position referred to is the one adopted by the Democratic Republic of Vietnam, who refused to recognize captured American soldiers as prisoners of war, qualifying them as criminals due to their participation in the war of aggression launched by the US against the Democratic Republic of Vietnam.[55] However, the precedent does not undermine the legal status of the equality of belligerents principle for two main reasons. *Primo*, Vietnam has ratified AP I, thus accepting the principle expressed in its preamble.[56] *Secundo*, the Vietnamese position has been modified by subsequent practice: Vietnam recognized the prisoner-of-war status of captured enemy soldiers despite accusations of aggression against the soldiers' state of nationality.[57]

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53 UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004) ('UK Manual'), 34, para. 3.12. See also New Zealand, *The Law of Armed Conflict at the Operational and Tactical Level*, Office of the Judge Advocate General, B-GG-005-027/AF-020 (8 January 1999), at 2-2, para. 14; Australia, *Operations Law for RAAF Commanders*, Royal Australian Air Force, AAP 1003, 2nd edn (2004), at 53, para. 6.15 and 42, para. 5.5, available online at airpower.airforce.gov.au/publications/Details/156/AAP1003-Operations-Law-for-RAAF-Commanders-2nd-Edition.aspx; Germany, *Humanitarian Law in Armed Conflicts – Manual*, Federal Ministry of Defence, VR II 3 (August 1992), at 11, para. 101 and 24, para. 207; Norway, *Norwegian Armed Forces Joint Operational Doctrine*, Organisation and Instruction Authority, Defence Staff (2007), at 35, para. 0248, available online at www.mil.no/multimedia/archive/00106/FFOD_English_106143a.pdf; Spain, *Orientaciones – El Derecho de los conflictos armados*, Tomo I, Estado Mayor del Ejercito, OR7-004 (18 March 1996), at 1-1; US, *The Commander's Handbook on the Law of Naval Operations*, Department of the Navy, Office of the Chief of Naval Operations and Headquarters, US Marine Corps, Department of Homeland Security, and US Coast Guard, NWP 1-14M, MCWP 5-12.1, COMDTPUB P5800.7A (July 2007), at 5-1, para. 5.1.2, available at www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP); Italy, *Manuale di Diritto Umanitario, Introduzione e Volume I, Usi e Convenzioni di Guerra*, Stato Maggiore della Difesa, I Reparto – Ufficio Addestramento e Regolamenti,SMD-G-014 (1991), at xiv (Introduction).

54 See, e.g, the written statement of the League of Arab States in the context of the *Wall* Advisory Proceedings, according to which 'International humanitarian law as part of the *ius in bello* applies equally to both sides of an international armed conflict, whether it be the aggressor or the victim of aggression.' *Wall* Advisory Proceedings, *supra* note 24, League of Arab States, Written Statement, January 2004, at 84, para. 9.6. See, along the same lines, the written statements by Indonesia and Jordan referred to at note 24 *supra*. The same position was expressed by several states in relation to the two *Nuclear Weapons* advisory proceedings before the ICJ. *Nuclear Weapons* Advisory Proceedings (WHO Request), *supra* note 24, Solomon Islands, Written Statement, 19 June 1995, at 60, para. 4.74; as well as the statement by India cited at the text accompanying note 3 *supra*; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Proceedings (request by the UN General Assembly) ('*Nuclear Weapons* Advisory Proceedings (UNGA request)'), Malaysia, Written Statement, 19 June 1995, at 18; Mexico, Written Statement, 19 June 1995, at 13, para. 77(b); New Zealand, Written Statement, 20 June 1995, at 14, para. 60; Nauru, Written Statement (2nd part), 15 June 1995, at 19–20. All written statements are available at www.icj-cij.org. See also Switzerland, *ABC of International Humanitarian Law*, Federal Department of Foreign Affairs (FDFA), at 3, 28, 32, available at www.eda.admin.ch/etc/medialib/downloads/edazen/doc/publi/publi2.Par.0015.File.tmp/HVR_ENG.pdf.

55 Bugnion, *supra* note 27, at 542–3; J. Freymond, 'Confronting Total War: A "Global" Humanitarian Policy', (1973) 67 AJIL 672, at 677–8.

56 Vietnam has been party to AP I since 19 October 1981; see the ICRC ratification list, *supra* note 32.

57 ICRC, *Rapport d'activités 1979* (1980), at 40–1. See also Bugnion, *supra* note 4, at 543.

Apart from this isolated incident, states have recognized, explicitly or implicitly, the equal application of IHL rules to all parties to an armed conflict irrespective of which party is in breach of *jus ad bellum*. As one would expect, incidents of explicit recognition are rare. An example of such recognition is the position expressed by Cameroon in its memorial deposited to the ICJ in relation to a territorial dispute with Nigeria:

> Même s'il est reconnu que l'occupation militaire en violation du droit international est en soi illégale et que l'utilisation de la force en soi ne peut générer de droits, de telles situations, quand elles se présentent, ne sont pas totalement ignorées du droit international. Tout au contraire, un ensemble de règles juridiques a été élaboré précisément afin de venir en aide aux victimes de conflits armés. . . . Comme le Tribunal militaire des Etats-Unis l'a souligné dans *In re List (Jugement des Otages)*, 'international law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant an population [*sic*] in occupied territory' . . ., puisque l'objectif est la protection des civils.[58]

Cameroon not only recognizes the equal application of IHL to all occupations, irrespective of their legal or illegal nature from a *jus ad bellum* point of view, but it does so by referring explicitly to the *Hostages* judgment, thus reaffirming the relevance of the US military tribunal case law in this respect.[59]

Turning to less explicit precedents, a survey of recent international armed conflicts confirms that, despite the arguments states advance in order to justify their military interventions under *jus ad bellum*, they recognize that they are bound by *jus in bello*. Indeed, states do not argue that the legality of their actions under *jus ad bellum* absolves them from their obligation to respect IHL.[60] An example can be found in the US position in relation to the 1983 military intervention in Grenada.[61] The US defended the legality of their actions under *jus ad bellum* and recognized the applicability of the four Geneva Conventions in the hostilities resulting from the intervention.[62] Significantly, in a memorandum explaining the US position on IHL

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58 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria, Equatorial Guinea intervening)*, Contentious Proceedings, Cameroon, Mémoire de la République du Cameroun, livre I, 16 March 1995, at 612, para. 6.152 ('Even if it is recognised that military occupation in violation of international law is in itself illegal, and that the use of force *per se* cannot generate rights, such situations, when they occur, are not completely ignored by international law. On the contrary, a group of legal rules has been elaborated precisely in order to provide assistance to victims of armed conflicts. . . . As the US Military Tribunal has underlined in *In re List (Hostages judgment)*, "international law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant an population [*sic*] in occupied territory" . . ., since the objective is the protection of civilians') (author's translation).

59 The ICJ did not deal with Cameroon's relevant submission and therefore did not express any opinion on the argument cited above; cf. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria, Equatorial Guinea intervening)*, Judgment of 10 October 2002, [2002] ICJ Rep. 303, at 458.

60 Indeed, in a number of international armed conflicts states have made no explicit link between the legality of the intervention under *jus ad bellum* and the application of *jus in bello*. See, e.g., with respect to the intervention of the US-led coalition in Iraq in 1991, S. J. Cummins and D. P. Stewart (eds.), *Digest of United States Practice in International Law 1991–1999* (2005), US Department of State, Office of the Legal Adviser, International Law Institute, at 2057 ff, and 'US: Department of Defense Report to Congress on the Conduct of the Persian Gulf War – Appendix on the Role of the Law of War', (1992) 31 ILM 612 ff.

61 For the facts of the operation see 'Grenada – Military Coup – Intervention by US and Caribbean Forces', (1984) XXX *Keesing's Contemporary Archives*, at 32614 ff.

62 M. Nash Leigh, 'Contemporary Practice of the United States Relating to International Law', (1984) 78 AJIL 200, at 201–4; M. Nash Leigh (ed.), *Cumulative Digest of United States Practice in International Law 1981–1988* (1995), Book III, Office of the Legal Adviser, Department of State, at 3454–6.

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application in this conflict, the Judge Advocate General affirms that mere de facto hostilities suffice to trigger the application of the Geneva Conventions and that arguments relating to self-defence do not alter that conclusion.[63] In the same vein, in relation to the 2008 hostilities with Georgia, the Russian Federation affirmed that 'because an armed conflict existed between the Russian Federation and Georgia . . ., both parties were bound by humanitarian law provisions governing such situations and conflicts',[64] making no allegation that the legality of the Russian resort to force would alter the scope of these provisions.

Even in relation to the 2001 intervention in Afghanistan and the 2003 intervention in Iraq, which are usually viewed as being problematic in this respect, states have not explicitly argued that the legality of the operation under *jus ad bellum* created exceptions in IHL application. Concerning the 2001 intervention in Afghanistan, the ICRC affirmed that it had received assurances from all parties to the conflict that IHL rules applicable in international armed conflicts would be respected.[65] In the same vein, the US White House Fact Sheet on the status of detainees at Guantánamo excluded Taliban and al Qaeda detainees from prisoner-of-war status based on (questionable) interpretations of the Geneva Conventions themselves and not on the legality under *jus ad bellum* of the US intervention in Afghanistan.[66] As far as the 2003 intervention in Iraq is concerned, both the UK and the US voted in favour of Security Council Resolution 1472 (2003) inviting all parties to the conflict to respect IHL.[67]

Therefore, there is sufficient state practice to substantiate the customary status of the equality of belligerents principle.

3. Jurisprudence

The fact that the equality of belligerents principle is solidly anchored in both conventional and customary international law places international and national jurisprudence in a new perspective. Indeed, since the principle's solid legal basis in international law has been confirmed, jurisprudential precedents lose their key role in establishing the principle. In other words, proving that in some cases courts have not applied the *jus ad bellum*/*jus in bello* separation is not in itself sufficient to prove

63 Nash Leigh, *Cumulative Digest of United States Practice in International Law 1981–1988*, *supra* note 62, at 3453.

64 'Responses to additional questions posited by the European Union Fact-Finding Mission on the events that took place in the Caucasus in August 2008 (Legal Aspects)', Independent International Fact-Finding Mission on the Conflict in Georgia (September 2009), Report, Vol. 3 – Views of the Sides on the Conflict, Chronologies and Responses to Questionnaires, at 438, available at www.ceiig.ch ('2008 Conflict in Georgia Report').

65 'ICRC, Afghanistan: ICRC Position on Alleged Ill-Treatment of Prisoners', News Release 01/69, 12 December 2001, available at www.icrc.org/eng/resources/documents/misc/57jrhs.htm.

66 *Status of Detainees at Guantanamo*, Fact Sheet, 7 February 2002, available at www.presidency.ucsb.edu/ws/?pid=79402.

67 UN Doc. S/RES/1472 (2003), at 2, para. 1. See also the statement of the UK representative, UN Doc. S/PV.4726 (Resumption 1), 27 March 2003, at 23. In connection, in particular, to occupation law, elements of *jus ad bellum* and *jus in bello* confusion can be found in arguments advanced not by states but by scholars; see, e.g., R. Giladi, 'The *Jus Ad Bellum*/*Jus In Bello* Distinction and the Law of Occupation', (2008) 41 *Israel Law Review* 246, at 269, 279–81; D. J. Scheffer, 'Beyond Occupation Law', (2003) 97 AJIL 842, at 843–4, 849, 851. For a reply to these arguments, see V. Koutroulis, 'Mythes et réalités de l'application du droit international humanitaire aux occupations dites "transformatives"', (2007) XL RBDI 365, at 377–97.

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that the separation is devoid of legal force in international law. That being said, as a brief survey of the jurisprudential precedents shows, in the majority of cases the separation has been respected by international courts and tribunals. We will start off by examining the Nuremberg-era jurisprudence, which forms the basis of Mandel's argument (subsection 3.1). We will then proceed to recent international case law, namely that of the ICJ and the International Criminal Tribunal for the Former Yugoslavia (ICTY) (subsection 3.2).

3.1. The Nuremberg-era jurisprudence

The fact that the jurisprudence after the Second World War was not unanimous in applying a strict separation between *jus ad bellum* and *jus in bello* is not new in legal doctrine. Already back in 1970, in his seminal work on the equality of belligerents principle, Henri Meyrowitz identified judgments that are problematic in this respect.[68] More recently, Alexander Orakhelashvili has also examined case-law precedents after the Second World War. Insisting for the most part on the same cases as those cited by Mandel, he has reached the conclusion that 'judicial practice is divided, some decisions are not so straightforward and may even uphold the principle of aggressor discrimination'.[69] On the other hand, after thorough analysis of all the Nuremberg-era case law, Meyrowitz concluded that it confirms the solid character of the equality of belligerents principle.[70]

Even if there have been some questionable precedents from the point of view of the equality of belligerents principle, the present author agrees with Meyrowitz's conclusion that the jurisprudence in question, for the most part, confirms the principle. Leaving aside unconvincing parts in Mandel's analysis of certain judgments,[71] even if part of the Nuremberg-era jurisprudence can be read as conflating *jus ad bellum* and *jus in bello*, this is only valid for that part of the jurisprudence.[72] It does not diminish the value of precedents confirming the equality of belligerents principle. This is even more so as some states' declarations in support of the principle do so by explicitly referring to the *Hostages* trial judgment.[73] Moreover, as will be seen next, the principle has also been confirmed in recent case law.

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68 H. Meyrowitz, *Le principe de l'égalité des belligérants devant le droit de la guerre* (1970), 53–76; See, e.g., the pronouncement of the International Military Tribunal for the Far East, B. V. A. Röling and C. F. Rüter (eds.), *The Tokyo Judgment*, The International Military Tribunal for the Far East, 29 April 1946–12 November 1948 (1977), Vol. 1, at 32–3.

69 A. Orakhelashvili, 'Overlap and Convergence: The Interaction between *Jus ad Bellum* and *Jus in Bello*', (2007) 12 JCSL 157, at 168 (and at 168–170 for the author's complete analysis).

70 Meyrowitz, *supra* note 68, at 53; see also I. Brownlie, *International Law and the Use of Force by States* (1968), 406–7 (note 3).

71 One example is the 'controversy' raised after the *Hostages* judgment between one of the judges and the prosecutor; Mandel, *supra* note 1, at 639–40. The confrontation is of a general character and does not refer to the part of the *Hostages* judgment confirming the 'equality of belligerents' principle. Therefore, it is not evident why this incident is relevant in the analysis of the principle as such.

72 As the nuanced conclusion of Orakhelashvili confirms; see note 69 and accompanying text, *supra*.

73 See, e.g., the position adopted by Cameroon, note 58 and accompanying text, *supra*. See also, *Nuclear Weapons* Advisory Proceedings (UNGA request), Malaysia, Written Statement, 19 June 1995, at 18 (note 99) and Nauru, Written Statement (1st part), 15 June 1995, at 26 (note 115).

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3.2. International jurisprudence confirming the equality of belligerents principle

Very few cases have obliged the ICJ look into to the *jus ad bellum*/*jus in bello* separation. The Court has clearly upheld the separation in the judgment handed down in the *Armed Activities* case opposing the Democratic Republic of the Congo to Uganda.[74] The case involved violations of both *jus ad bellum* and *jus in bello*, the Court ultimately finding that Uganda had violated both legal regimes.[75] In this judgment, the ICJ analysed each regime separately, with no indication that the violation of *jus ad bellum* by Uganda had any impact on the interpretation of *jus in bello*. The declarations and opinions of certain judges confirm that the equality of belligerents principle had not escaped the Court's mind when dealing with the legal issues of the case.[76]

The *Nuclear Weapons* advisory opinion is the notorious ICJ precedent on the *jus ad bellum*/*jus in bello* separation.[77] This opinion is invoked by Mandel as proof of the doubts concerning the legal status and scope of the equality of belligerents principle.[78] The opinion has been the object of exhaustive legal analysis that need not be reproduced here.[79] Suffice it to say that, if the Court missed an opportunity to affirm the separation between *jus ad bellum* and *jus in bello*, the opinion does not have 'far-reaching implications'[80] for the equality of belligerents principle, nor can it carry all the anti-*jus ad bellum*/*jus in bello* separation expectations that have been attributed to it. There are three main reasons for this.

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74 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, [2005] ICJ Rep. 168 ('*Armed Activities* judgment (*DRC v. Uganda*)').

75 Ibid., at 280, para. 345(1), (2) and (3).

76 Ibid., at 321, para. 58 (Judge Kooijmans, Separate Opinion) and at 358–9, para. 4 (Judge ad hoc Verhoeven, Declaration).

77 We are referring to the opinion's operative part according to which:

> It follows from the above-mentioned requirements that the threat or use of force of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;
>
> However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.

Nuclear Weapons Advisory Opinion, *supra* note 15, at 266, para. 105(2)(E).

78 Mandel, *supra* note 1, at 647–8. The situation of a nuclear war is in many respects an exceptional one and on this basis one could oppose generalizing the positions adopted in this respect and transposing them to conventional warfare. Mandel, however, is making such a transposition. He states at 648: 'When the International Court of Justice holds that self-defence could well trump *jus in bello*, even in the case of nuclear weapons, or even that the clash between the two *jures* is irresolvable in such a case, the weak legal status of any notion of 'equality of belligerents' between aggressor and victim is hard to miss.'

79 See, among many, L. Boisson de Chazournes and P. Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (1999), 620; E. David, 'L'avis de la Cour internationale de justice sur la licéité de l'emploi des armes nucléaires', (1997) 79 RICR 264; H. Fujita, 'Au sujet de l'avis consultatif de la Cour internationale de justice rendu sur la licéité des armes nucléaires', (1997) 79 RICR 60; T. L. H. McCormack, 'Un *non liquet* sur les armes nucléaires – La Cour internationale de justice élude l'application des principes généraux du droit international humanitaire', (1997) 79 RICR 82; M. Mohr, 'Avis consultatif de la Cour internationale de justice sur la licéité de l'emploi d'armes nucléaires – Quelques réflexions sur ses points forts et ses points faibles', (1997) 79 RICR 99; T. Gill, 'The Nuclear Weapons Advisory Opinion of the International Court of Justice and the Fundamental Distinction between the *Jus ad Bellum* and the *Jus in Bello*', (1999) 12 LJIL 613.

80 Mandel, *supra* note 1, at 647.

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First, the opinion itself is ambiguous and offers ample support to the equality of belligerents principle. Indeed, in the text of the opinion, the ICJ affirms that 'a weapon that is already unlawful *per se*, whether by treaty or custom, does not become lawful by reason of its being used for a legitimate purpose under the Charter'.[81] In the same vein, the Court goes on to admit that 'a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law'.[82] Thus, alongside its problematic operative part, the opinion includes statements explicitly upholding the separation between *jus ad bellum* and *jus in bello*.[83]

Second, a reading of the operative part as challenging the *jus ad bellum*/*jus in bello* separation would be going further than the submissions of all the states that participated in the advisory proceedings. Indeed, no state, not even the so-called 'nuclear states', argued that the legality of the use of nuclear weapons under *jus ad bellum* could influence the legality of their use under *jus in bello*.[84] In his separate opinion, while claiming that *jus ad bellum* may exercise some influence over *jus in bello*,[85] Judge Guillaume admits that all the states which appeared before the Court 'argued as if these two types of prescription [i.e. *jus ad bellum* and *jus in bello*] were independent, in other words as if the *jus ad bellum* and the *jus in bello* constituted two entities having no relation with each other'.[86] This admission places the judge's claim in favour of a *jus ad bellum* influence over *jus in bello* in the realm of *lex ferenda*.

Third, it is also important to note that the *Nuclear Weapons* advisory opinion has not triggered any change in state practice with respect to the *jus ad bellum*/*jus in bello* separation. Indeed, there is no evidence that, following the pronouncement of the opinion, states have moved to adopt the position espoused by Judge Guillaume in favour of the *jus ad bellum* influence over *jus in bello*. At best, some states reproduced the opinion's operative part in the section of their military manuals referring to nuclear weapons, without indicating that it might constitute an exception to the equality of belligerents principle.[87] More importantly, the conventions regulating

81 *Nuclear Weapons* Advisory Opinion, *supra* note 15, at 244, para. 39.

82 Ibid., at 245, para. 42.

83 The need to reconcile the two has led two prominent legal scholars to suggest that the two parts of the dispositif of the advisory opinion should not be read as having a 'principle–exception' relationship and that the term 'generally' in the first line of paragraph 105(2)E should not be read as assuming that all uses of nuclear weapons would be contrary to IHL; see C. Greenwood, 'L'avis consultatif sur les armes nucléaires et la contribution de la Cour internationale de justice au droit international humanitaire', (1997) 79 RICR 70, at 79; C. Greenwood, '*Jus ad Bellum* and *Jus in Bello* in the Nuclear Weapons Advisory Opinion', in Boisson de Chazournes and Sands, *supra* note 79, 247, at 264; L. Condorelli, 'Le droit international humanitaire, ou de l'exploration par la Cour d'une *terra* à peu près *incognita* pour elle', in ibid., *supra* note 79, 228, at 241–2. The ambiguity of the term 'generally' has also been noted by Judge Higgins in her dissenting opinion, *Nuclear Weapons* Advisory Opinion, *supra* note 15, at 589, para. 25.

84 Cf. the submissions of states and organizations participating in the two advisory proceedings related to nuclear weapons, available at www.icj-cij.org.

85 Whose opinion is cited favourably by Mandel, *supra* note 1, at 647.

86 *Nuclear Weapons* Advisory Opinion, *supra* note 15, at 290, para. 8 (Judge Guillaume, Separate Opinion).

87 Canada, Office of the Judge Advocate General, *The Law of Armed Conflict at the Operational and Tactical Level*, B-GG-005-027/AF-020 (8 January 1999), at 5–6, para. 55; UK Manual, *supra* note 53, at 117, paras. 6.17, 6.17.1 (and note 85); US Judge Advocate General's Legal Centre and School, Maj. K. E. Puls (ed.), *Law of War Handbook 2005*, at 187; US Judge Advocate General's Legal Centre and School, Maj. J. Rawcliffe (ed.), *Operational Law*

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the use of arms that were concluded after 1996 do not contain any exception along the lines suggested by Judge Guillaume.[88] Moreover, none of the states that have ratified these conventions has made a reservation invoking the *Nuclear Weapons* advisory opinion in order to introduce an exception to the assumed obligations in circumstances of extreme self-defence.[89] On the contrary, the advisory opinion has been cited by both states and international tribunals as confirming the equality of belligerents principle. In this regard, reference is made to the opinion's paragraphs that confirm the principle and the problematic pronouncement of the Court has been completely discarded.[90] These are strong indications that the exceptions to the equality of belligerents principle suggested by Judge Guillaume are not confirmed in state practice. In view of the foregoing, the importance of the *Nuclear Weapons* advisory opinion should not be overestimated and its impact in undermining the solid legal foundations of the equality of belligerents principle should not be exaggerated.

Contrary to the ICJ, the ICTY has explicitly asserted the independence of *jus in bello* from *jus ad bellum*. The Statute of the Tribunal does not include the crime of aggression among the crimes falling under the ICTY's *ratione materiae* competence. Thus the question of the *jus ad bellum*/*jus in bello* separation has not arisen before the ICTY in the same manner as it did, for example, before the Nuremberg International Military Tribunal. However, in some cases, the ICTY has referred to the equality of belligerents principle explicitly, in order to reject arguments raised by the defence of the accused.[91] In this respect, it should be noted that these reaffirmations have occurred in cases concerning either situations of non-international armed conflict or situations of armed conflict that the Tribunal has not qualified as being international or non-international. Despite this, the Tribunal's case law remains relevant for two reasons. *Primo*, the ICTY's reaffirmation of the equality of belligerents principle is made in general terms, and in some cases by citing sources applicable in

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Handbook 2007, at 20; Israel, Military Advocate General Headquarters, *Laws of War in the Battlefield* (1998), at 29.

88 Cf., e.g., 1997 Oslo Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 2056 UNTS 211; 2003 Geneva Protocol on Explosive Remnants of War to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (Protocol V), 2399 UNTS 100; 2008 Dublin Convention on Cluster Munitions (not yet in force), text available at www.icrc.org.

89 The declarations and reservations by state parties to IHL related treaties are available online at the ICRC site, under the section 'International Humanitarian Law – Treaties & Documents', at www.icrc.org.

90 See the third paragraph of New Zealand's Declaration to the Statute of the International Criminal Court, available at treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-10.en.pdf:

> The Government of New Zealand further notes that international humanitarian law applies equally to aggressor and defender states and its application in a particular context is not dependent on a determination of whether or not a state is acting in self-defence. In this respect it refers to paragraphs 40–42 of the Advisory Opinion in the Nuclear Weapons Case.

See also *Prosecutor v. Boskoski and Tarculovski*, Judgement, Case No. IT-04-82-A, Appeals Chamber, 19 May 2010, at 13, para. 31 (note 116).

91 *Prosecutor v. Boskoski and Tarculovski*, *supra* note 90, at 13, para. 31 (note 116) and at 18, para. 44; *Prosecutor v. Martić*, Judgement, Case No. IT-95-11-A, Appeals Chamber, 8 October 2008, at 96–7, para. 268 (see also references cited at note 720 of the judgment). See also, implicitly, *Prosecutor v. Kordić and Čerkez*, Judgement, Case No. IT-95-14/2-T, Trial Chamber, 26 February 2001, at 147, para. 452. All judgements are available at www.icty.org.

international armed conflicts, such as the AP I preamble.[92] *Secundo*, these precedents indicate that the *jus ad bellum*/*jus in bello* separation is invoked in relation to a non-international armed conflict; that is, in relation to a conflict not covered by *jus ad bellum* rules and therefore, a priori, not falling under the scope of the equality of belligerents principle.[93] This invocation confirms a fortiori the principle's legal force concerning international armed conflicts, which are traditionally regulated by the *jus ad bellum*/*jus in bello* separation.

Similarly, the Special Court for Sierra Leone has also reaffirmed the equality of belligerents principle, by referring explicitly to the AP I preamble.[94] Along the same lines, the Eritrea–Ethiopia Claims Commission has confirmed the principle by dealing separately with claims resulting from *jus ad bellum* and *jus in bello* violations.[95]

4. Scope and content of the equality of belligerents principle

After demonstrating that equality of belligerents is a principle binding upon states, under both conventional and customary international law, it is important to present briefly some aspects of its content. The cornerstone of the analysis is that both *jus ad bellum* and *jus in bello* apply simultaneously to international armed conflicts. As a result of the independence between *jus ad bellum* and *jus in bello*, once a state engages in hostilities, its actions are subject to and will be evaluated under the prism of both legal regimes.[96] This simultaneous application of *jus ad bellum* and *jus in bello* can have four possible outcomes: first, state actions can be legal under IHL, while violating *jus ad bellum*; second, state actions can be legal under *jus ad bellum*, while violating IHL; third, state actions can be legal under both *jus ad bellum* and *jus in bello*; and fourth, state actions can constitute violations of both *jus ad bellum* and *jus in bello*.[97] The equality of belligerents principle reflects the independence between *jus ad bellum* and *jus in bello* by stipulating that IHL rules will be applied in the same manner irrespectively of whether the state party concerned has violated *jus ad bellum* or not. In this context, it should be kept in mind that *jus in bello* does not strictly speaking 'justify' actions of a belligerent party which are illegal under *jus ad bellum*. Even if they are in conformity with *jus in bello* rules, such actions will remain illegal under *jus ad bellum*.

Much of the problem with the equal application of IHL to all parties to an international armed conflict lies with the 'belligerent rights' recognized by IHL provisions. In this respect, scholars usually advance a distinction between IHL provisions that are of a 'humanitarian' character and others that are not, pleading for respect of

92 See, e.g., *Prosecutor v. Boskoski and Tarculovski*, *supra* note 90, at 13, para. 31 (note 116).
93 See the text and references at note 4, *supra*.
94 *Prosecutor v. Fofana and Kondewa*, Judgment, Case No. SCSL-04-14-A, Appeals Chamber, 28 May 2008, at 85, para. 247 and at 183, paras. 530–531, available at www.sc-sl.org.
95 The sentences are available online at www.pca-cpa.org. See also notes 110–12 and accompanying text, *infra*.
96 Greenwood, *supra* note 27, at 222, 230–1; Moussa, *supra* note 27, at 968.
97 See V. Koutroulis, 'Of Occupation, *Jus ad Bellum* and *Jus in Bello*: A Reply to Solon Solomon's "The Great Oxymoron: *Jus in Bello* Violations as Legitimate Non-Forcible Measures of Self-Defense: The Post-Disengagement Israeli Measures towards Gaza as a Case Study"', (2011) 10 Chinese JIL 897, at 912–13.

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the equality of belligerents principle only with regard to the former.[98] It is submitted that this approach should be rejected for two main reasons. First, the premise upon which the approach rests, the distinction between 'humanitarian' and 'non-humanitarian' IHL provisions, is problematic. Second, there is no support in state practice and case law for the contention that IHL provisions establishing 'belligerent rights' are excluded from the scope of the equality of belligerents principle.

As to the first point, distinguishing between 'humanitarian' and non-humanitarian' IHL is less easy than is usually suggested. 'Humanitarian' provisions cannot be limited to rules prohibiting torture, pillage, or hostage taking.[99] For example, the definition of international armed conflict laid down in common Article 2 of the GCs[100] or the definition of belligerent occupation provided for in Article 42 of the 1907 Hague Regulations[101] do not strictly speaking set out any protection in favour of individuals. They do, however, have a 'humanitarian' character since they define the scope of application of the relevant IHL rules. Even 'substantial' IHL rules do not easily fit in the proposed distinction. Take, for example, Article 51(2) of GC IV. This provision stipulates that

> The Occupying Power may not compel protected persons to work unless they are over eighteen years of age, and then only on work which is necessary either for the needs of the army of occupation, or for the public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country.[102]

This provision is one of a 'humanitarian' character for protected persons who are under 18 years of age since it prohibits their compulsory labour. On the other hand, it gives the 'right' to the occupying power to compel protected persons aged over 18 years to work. Thus, for these protected persons, the provision's 'humanitarian' character can be put to doubt. Things are further complicated depending on the nature of work protected persons are compelled to do. Indeed, aside from working for the needs of the occupying army, protected persons may also be compelled to work for the feeding, sheltering, etc. of the occupied population. In such a case, at least from the point of view of the occupied population benefiting from the forced labour, the provision can be seen as having a 'humanitarian' character. These examples reveal the illusory character of distinguishing 'humanitarian' IHL provisions from 'non-humanitarian' ones. In fact, all IHL provisions are born from and form part of the same fundamental balance that lies at the origin of *jus in bello* itself: the balance

98 H. Lauterpacht (ed.), *L. Oppenheim – International Law – A Treatise* (1952), 218–19; Orakhelashvili, *supra* note 69, at 162. Given Mandel's focus on belligerent rights, he may be seen as subscribing to this theory, although, as was explained in the introduction of this contribution, his thesis is formulated in more general terms.

99 GC IV, Arts. 32, 33(2) and 34, *supra* note 12, at 308–10.

100 See GC I, *supra* note 12, at 32.

101 Regulations concerning the Laws and Customs of War on Land, Art. 42, Annex to the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land, available at www.icrc.org/ihl.nsf/WebART/195-200053?OpenDocument.

102 GC IV, Art. 51(2), *supra* note 12, at 320.

between humanitarian and military considerations.[103] In this respect, all IHL rules have a humanitarian character to some extent.

Turning to the second point, contrary to what Mandel seems to suggest, the equal application of IHL also covers provisions establishing 'belligerent rights'. Exceptions founded on military necessity constitute a useful example in this regard. Article 53 of GC IV prohibits destruction of private property in occupied territory 'except where such destruction is rendered absolutely necessary by military operations'.[104] Mandel seems to oppose the idea of allowing an aggressor occupant the possibility to invoke such an exception.[105] Mandel's approach finds no support in state practice. This is confirmed by the positions adopted by states in the context of the *Wall* advisory proceedings, where no state advanced a view similar to Mandel's. On the contrary, the positions adopted by several states prove that aggressors are allowed to invoke necessity exceptions laid down in IHL provisions. For example, in its written statement, the League of Arab States qualified Israel as an aggressor and affirmed that the Wall constitutes a violation of *jus ad bellum*.[106] Were the approach defended by Mandel an accurate reflection of international law, this qualification would exclude the invocation of military necessity by Israel under *jus in bello*. Therefore, the League of Arab States should not engage in a discussion of whether Israel's actions are covered by IHL military-necessity exceptions. Nevertheless, this is exactly what the League did in its written statement. After affirming that Israel had violated *jus ad bellum*, the League went on to examine whether actions by Israel also violated IHL or whether they fell under the relevant military-necessity exceptions and were thus legal from a *jus in bello* point of view.[107] The same reasoning was followed by other states intervening in these proceedings.[108] The same

103 According to the Preamble of the 1907 Hague Convention IV respecting the Laws and Customs of War on Land, the wording of the Convention's provisions 'has been inspired by the desire to diminish the evils of war, as far as military requirements permit'; see *supra* note 101. See also the Preamble of the 1868 Saint Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, available at www.icrc.org/ihl.nsf/FULL/130?OpenDocument. Among legal doctrine, see, e.g., Sandoz, Swinarski and Zimmermann, *supra* note 48, at 392–3, para. 1389; M. N. Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance', (2010) 50 *Virginia Journal of International Law* 795, at 798 ff.

104 GC IV, Art. 53, *supra* note 12, at 322.

105 Mandel, *supra* note 1, at 633–4. Orakhelashvili has made a similar point; Orakhelashvili, *supra* note 69, at 182–4.

106 *Wall* Advisory Proceedings, League of Arab States, *supra* note 54, at 36, para. 5.19, at 38, para. 5.21, and at 79–80, paras. 8.40–3.

107 Ibid., at 86, para. 9.13. See, e.g., the analysis concerning specifically Art. 53 of the GC IV.

108 *Wall* Advisory Proceedings, Saudi Arabia, Written Statement, 30 January 2004, at 6, para. 11 (violation of *jus ad bellum*), and at 11, para. 18 (the military-necessity exception laid down in IHL is not rejected outright as a result of the *jus ad bellum* violation); *Wall* Advisory Proceedings, Jordan, Written Statement, 30 January 2004, at 12, para. 2.22 (Israel is qualified as an aggressor) and at 143–4, paras. 5.279–81 (affirmation that 'in modern humanitarian law exceptions such as military necessity are subject to strict interpretation'; this implicitly confirms that such exceptions are not excluded for a belligerent having violated *jus ad bellum*); *Wall* Advisory Proceedings, Morocco, Written Statement, 30 January 2004, at 5 (illegality under *jus ad bellum*) and at 11 (reference to Art. 53 of the GC IV and affirmation that the construction of the Wall 'is not a case of an absolute requirement of military operations', thereby confirming that the exception is applicable to Israel). See also *Wall* Advisory Proceedings, Organisation of the Islamic Conference, Written Statement, January 2004, at 7–8, paras. 28–29 (violation of *jus ad bellum* by Israel), and at 10, paras. 34–35 (military necessity exceptions in *jus in bello* rules cannot justify the construction of the Wall and reference to the 'disproportion between the size of the areas confiscated and military necessities'). Along the same lines, see the position of Cameroon voiced

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holds true also in relation to the legal effects of the exercise of such rights. Thus, for example, even in case of an occupation which is illegal under *jus ad bellum*, the occupying power acting in conformity with IHL occupation provisions will validly acquire and transfer title to property.[109] The aforementioned analysis shows that the equality of belligerents principle comprises two main facets: *primo*, the belligerent party that violated *jus ad bellum* does not have fewer rights or more obligations than the one that did not violate *jus ad bellum*; *secundo*, conversely, the belligerent party that did not violate *jus ad bellum* does not have more rights or fewer obligations than the one that did.

It should be recalled here that, as was explained before, the legality of these acts under *jus in bello* leaves their illegality under *jus ad bellum* unaffected. The case law of the Eritrea–Ethiopia Claims Commission is highly instructive in this regard. The Commission had concluded that Eritrea's actions had violated *jus ad bellum*.[110] In one of the partial awards, it had also concluded that the bombing by Eritrea of the Mekele airport in Ethiopia was not a violation of IHL since the airport constituted a legitimate military target.[111] Nevertheless, in its final award, the Commission awarded compensation to Ethiopia for casualties and damage resulting from this attack. This compensation was founded upon Eritrea's *jus ad bellum* violation.[112] This finding unequivocally confirms both the parallel application of and the separation between *jus ad bellum* and *jus in bello*.

5. In conclusion: two policy considerations

Having demonstrated the legal force of the equality of belligerents principle, its confirmation by international case law, and its content, we will now turn to two policy considerations raised by Mandel's article. The first concerns the argument that making the application of IHL dependent on *jus ad bellum* leads to an erosion of *jus in bello* rules (section 4.1). This argument is rejected by Mandel. The second is Mandel's suggestion that the equality of belligerents principle ends up legitimizing aggression (section 4.2).

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in the context of its land and maritime boundary case with Nigeria cited at the text accompanying note 58, *supra*.

109 See L. McNair and A. D. Watts, *The Legal Effects of War* (1966), 393–6 and 412–14; Y. Dinstein, *The International Law of Belligerent Occupation* (2009), 219, 231; Y. Arai-Takahashi, *The Law of Occupation* (2009), 198–200 and 228–9; W. G. Downey Jr, 'Captured Enemy Property: Booty of War and Seized Enemy Property', (1950) 44 AJIL 488, at 499–500; F. Morgenstern, 'Validity of the Acts of the Belligerent Occupant', (1951) 28 BYIL 291, at 321 (note 1), and the case law cited by these authors.

110 Eritrea–Ethiopia Claims Commission, Jus ad Bellum – *Ethiopia's Claims 1–8*, Partial Award, 19 December 2005, at 5, para. 16 and at 7, para. B1.

111 Eritrea–Ethiopia Claims Commission, *Central Front – Ethiopia's Claim 2*, Partial Award, 28 April 2004, at 24–5, para. 101.

112 Eritrea–Ethiopia Claims Commission, *Ethiopia's Damages Claims*, Final Award, 17 August 2009, at 93, paras. 426–427.

5.1. Making *jus in bello* dependent on *jus ad bellum* would erode the application of *jus in bello*

One of the arguments frequently advanced by legal scholars in favour of the equality of belligerents principle is that making *jus in bello* application dependent on *jus ad bellum* would inevitably lead to the erosion of the application of *jus in bello*,[113] since, in every international conflict, every side claims to have respected *jus ad bellum* and accuses the other side of having committed acts of aggression. Mandel finds it hard to see the basis for the argument:

> All sides usually claim they respect the *jus in bello*, too. It is not a question of what each side *claims*, but what they are *proven* to have done. . . . There seems no reason to suppose that *jus in bello* crimes are easier to prove than *jus ad bellum* ones. . . . Nor is it a question of 'denying the enemy the benefits of the *jus in bello* on the ground that it is the aggressor state', but rather one of how to apply the law of war to distinguish between the aggressor and victim.[114]

Mandel's reservations seem to stem from the fact that he is looking at the issue from an international criminal-law point of view. One can, of course, assume that, in front of an international criminal tribunal, *jus in bello* crimes are not easier to prove than *jus ad bellum* ones. However, this argument relates to the issue of international criminal responsibility, which will arise *ex post*; that is, after the commission of the acts and, usually, after the end of the hostilities. Aside from that issue, there is also the equally crucial one of the respect for *jus in bello* in the course of hostilities. In this case, if a link is accepted between *jus ad bellum* and *jus in bello*, claims regarding the respect for the first will influence respect for the second. The 2008 conflict between Georgia and the Russian Federation can serve as a case study in this regard. During this conflict, both countries exchanged accusations of aggression and claimed that their own military actions were taken in exercise of their right to self-defence and were thus justified under *jus ad bellum*.[115] According to Mandel's position, a state that is a victim of aggression 'has wider *jus in bello* rights', meaning that 'violations of *jus in bello* may be legitimate if they meet the criteria of self-defence'.[116] Were this position to be applied during the 2008 hostilities by the parties to the conflict, it would mean that Georgia could directly target Russian civilians, claiming that there is no possibility of a *jus in bello* violation because its actions are a response to Russian aggression. At the same time, the same line of reasoning would be invoked by the Russian Federation, given its allegations on *jus ad bellum*. On this basis, the Russian side could equally target Georgian civilians, claiming that it is not bound by related *jus in bello* obligations. This would lead inevitably to a complete disregard for *jus in*

113 H. Lauterpacht, 'The Limits of the Operation of the Law of War', (1953) 30 BYIL 206, at 243; Dinstein, *supra* note 27, at 157–8; Roberts, *supra* note 27, at 961; Sassoli, *supra* note 4, at 246; Sloane, *supra* note 27, at 103; Moussa, *supra* note 27, at 967; Bugnion, *supra* note 27, at 535–6; Bouvier, *supra* note 27, at 112.

114 Mandel, *supra* note 1, at 649 (emphases in original).

115 Georgia, 'Use of Force Issues Arising out of the Russian Federation Invasion of Georgia, August, 2008', 2008 Conflict in Georgia Report, Vol. 3, *supra* note 64, at 228–67; Russian Federation, 'On Georgia's Aggression against South Ossetia in August 2008', ibid., at 336–8 and 'Responses to Additional Questions Posited by the European Union Fact-Finding Mission on the Events that Took Place in the Caucasus in August 2008 (Legal aspects)', ibid., at 437–8.

116 Mandel, *supra* note 1, at 646 and 648.

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bello, during the conduct of hostilities, since all sides to the conflict would consider themselves as 'having wider *jus in bello* rights' and, *in fine*, as not being bound by *jus in bello* obligations that would limit their allegedly defensive operations. Thus, it is clear that linking *jus in bello* with respect to the legality of military operations under *jus ad bellum* erodes the application of *jus in bello*.

These considerations illustrate a crucial point: allowing for *jus ad bellum* to trump *jus in bello* obligations wil lead states to claim that *jus in bello* obligations have not been violated because they are not applicable to the victim of aggression in the first place. It is true, as Mandel points out,[117] that states already claim that they have not violated *jus in bello*. But these claims are based on an analysis of the rules and limitations of *jus in bello* itself. In other words, they are based on the assumption that *jus in bello* applies – and applies equally – to all parties to the conflict. Referring, for example, to the targeting of civilians, states will try to justify such attacks by invoking exceptions to the prohibition of targeting civilian population, such as direct participation in hostilities or casualties that are not excessive in view of the concrete military advantage anticipated.[118] This line of reasoning presupposes that the prohibition of targeting civilians is applicable both to the aggressor and to the victim of aggression. Such arguments are fundamentally different from Mandel's position which offers to the victim of aggression (that is, as the Russia/Georgia example shows, in reality to both states) the possibility to argue that the prohibition to target civilians is not applicable at all, due to the state's status as the victim of aggression. The second line of reasoning empties *jus in bello* of its substance, inter alia by abolishing any deterrent effect IHL rules may have over the way belligerent parties act when involved in an armed conflict.

5.2. The equality of belligerents principle does not legitimate aggression

We will conclude this reply by responding to one last argument advanced by Mandel, according to which the equality of belligerents principle ends up legitimizing aggression.[119] The argument is hardly a new one and can be traced back to, at least, 1949, when the UN International Law Commission refused to embark on the codification of IHL rules for fear that

> if the Commission, at the very beginning of its work, were to undertake this study, public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace.[120]

117 Ibid., at 649.
118 AP I, Art. 51(3) and (5)(b), *supra* note 13, at 26.
119 Mandel, *supra* note 1, at 650: the obvious tendency of the doctrine of equality between belligerents, coupled with aggressor impunity, is to legitimate aggression by making it legally irrelevant and, indeed, to justify it as a perfectly acceptable response to real or invented *jus in bello* criminality by the various enemies of the big powers, thus to legitimate war itself.
120 International Law Commission, 'Report to the General Assembly', 1949 YILC, at 281, para. 18.

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The same reasoning motivated the negative stance taken by the Democratic Republic of Vietnam and Romania on the equality of belligerents during the AP I negotiations.[121]

States were conscious of the possibility of abusively perceiving the equality of belligerents principle as making aggression legally irrelevant and sought to eliminate it by explicitly stating in many IHL-related instruments that their rules cannot be 'construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations'.[122] Article 89 of AP I excludes the possibility of invoking violations of the Protocol or of the four Geneva Conventions in order to legalize military operations:

> In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act jointly or individually, in co-operation with the United Nations and *in conformity with the United Nations Charter*.[123]

Consequently, from a legal point of view, it is clear that *jus in bello* violations cannot be invoked as a legal basis for a military intervention not justified under *jus ad bellum*. Therefore, irrespective of any violations of IHL, respect for *jus ad bellum* will always be relevant. In view of the above, neither the equality of belligerents principle nor, more generally, the development of *jus in bello* rules can be seen as undermining the prohibition to resort to force in international relations and legitimizing aggression. Moreover, in the words of Christopher Greenwood:

> The argument that the existence of the *ius in bello* merely encourages conflict by displaying a lack of confidence in the *ius ad bellum* and by making war more palatable simply does not hold good. It is not the existence of rules for the conduct of war which causes states to resort to force but more fundamental factors in international relations. Nor is there any evidence that if there were no humanitarian restraints on war states would be more likely to avoid it . . . .[124]

This last argument reveals the problem at the heart of Mandel's approach. Indeed, as has already been noted at the introduction of this contribution,[125] Mandel's core issue lies with impunity for the crime of aggression. His main concern is that, contrary to the development of war crimes and crimes against humanity, the crime of aggression has long been neglected by international criminal law. In his pleading

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121 See note 30 and accompanying text, *supra*. However, both states have aligned themselves to the equality of belligerents principle by voting in favour of the preamble of AP I and by ratifying the Protocol with no declaration or reservation regarding its fifth preambular paragraph.

122 AP I, Preamble, para. 4, *supra* note 13, at 7. See also 1998 Rome Statute of the International Criminal Court, Preamble, paras. 7 and 8, 2187 UNTS 90, at 91; Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999, Art. 22(5), 2253 UNTS 172, at 221; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II as amended on 3 May 1996) annexed to the 1996 Geneva Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 3 May 1996, Art. 1(5), 2048 UNTS 93, at 133; Amendment to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 21 December 2001, Art. 5, 2260 UNTS 82, at 89.

123 AP I, Art. 89, *supra* note 13, at 43 (italics added). See the explanation of vote by Italy, *Acts of the 1974–77 Conference*, *supra* note 30, Vol. 6, CDDH/SR.46, at 376.

124 Greenwood, *supra* note 27, at 233. Along the same lines, see Sassoli, *supra* note 4, at 245.

125 See note 5 and accompanying text, *supra*.

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for an evolution towards activating international criminal responsibility for this crime, he takes on the equality of belligerents principle. In that, Mandel has the wrong target. Whatever the reasons for the deficiencies in international criminal responsibility for aggression, respect for *jus in bello* and the equality of belligerents are not part of them. And, whatever the means of effectively reinvigorating international criminal responsibility for the crime of aggression may be, they cannot, nor need they, involve the undermining of the equality of belligerents principle and the separation between *jus ad bellum* and *jus in bello*.

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