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CAN THE ICC CONSIDER QUESTIONS ON *JUS AD BELLUM* IN A WAR CRIMES TRIAL?

*Thomas S. Harris**

War has forever been considered the utmost necessary evil. Nevertheless, international law has for some time sought to limit the right to wage war (jus ad bellum), as well as the means and methods employed amid war (jus in bello). Although these two branches of law now share humanitarian purposes – the prevention of war and its effects – they have generally been kept separate throughout history. However, confronted with widespread violations of jus in bello, resulting in appalling humanitarian disasters, some have suggested amending their relationship. This was notably sought at the Nuremberg Trials, where prosecutors failed to contend that jus in bello was inapplicable due to the illegal use of force by Germany. More recently, calls are being made to grant the “legitimate” belligerent more leeway in their application of jus in bello when responding to terrorism and the increasing use of lawfare (abuse of jus in bello to achieve strategic military or political ends). The ICC, as the only permanent criminal court with potentially worldwide jurisdiction, would be best suited to reconsider the relationship between jus ad bellum and jus in bello, potentially discriminating against the illegal belligerent in its assessment of proportionality in attack. In response to these calls for “aggressor discrimination,” this article will demonstrate that the ICC is prohibited from considering jus ad bellum in a war crimes trial, therefore precluding such discrimination. Suggestions of “fighting fire with fire” ignore the very principles and rationale of the two branches of law and put innocent civilians at risk. Lowering the humanitarian bar can surely not be the answer to ultimate humanitarian concerns.

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I. INTRODUCTION

Jus ad bellum (right to war) and *jus in bello* (law in warfare) are two distinct branches of international law that govern two distinct situations: the initial use of armed force and individual military operations within an armed conflict, respectively. Although they are both motivated by humanity, they do have different aims and have been largely kept separate throughout the history of the law of armed conflict (LOAC).¹ While *jus ad bellum* tries to abolish war altogether, *jus in bello* tries to minimise suffering and destruction, recognizing that war remains an unfortunate reality.

Recently, however, there are increasing calls from certain jurists to allow *jus ad bellum* to influence *jus in bello*.² They contend that, in

1. R. KOLB & R. HYDE, AN INTRODUCTION TO THE INTERNATIONAL LAW OF ARMED CONFLICTS 21-23 (2008).

2. See generally Alexander Orakhelashvili, *Overlap and Convergence: The Interaction Between Jus ad Bellum and Jus in Bello*, 12 J. Conflict &

the face of the increasing practice of ‘lawfare’ (abuse of *jus in bello* to achieve strategic military or political ends)³ and intensifying disregard of LOAC, the legality of the use of force should determine the margin of discretion granted to a belligerent in relation to proportionality in attack. The result grants the legal belligerent a wider margin of discretion or the illegal belligerent a more limited margin of discretion. This concept shall be referred to as “aggressor discrimination.”

The International Criminal Court (ICC) is the only permanent international criminal court with potentially universal jurisdiction that has jurisdiction over war crimes.⁴ The ICC is, therefore, at the very heart of the debate around the relationship between *jus ad bellum* and *jus in bello*. Starting with the belief that the two concepts should be kept separate, I set out to answer the question: Can the ICC consider questions on *jus ad bellum* in a war crimes trial?

Before answering this question, I will first consider the definition and historical development of *jus ad bellum* and *jus in bello* separately, as well as their historical relationship, as this will reveal the rationale behind the two branches of law (Section II). We will then analyse proportionality at the ICC (Section III.B), the ICC’s jurisdiction over aggression (Section III.C), principles of individual criminal responsibility (Section III.D), principles of LOAC (Section III.E), and case law (Section III.F), to determine the answer in conclusion (Section IV).

II. JUS AD BELLUM AND JUS IN BELLO: TWO DISTINCT CONCEPTS

A. *Jus ad bellum* (right to war)

1. History

Just war (500 BC – 1300)

The first recorded allusions to a *right* to wage war date back to classical times. Remarks by theorists including Thucydides, Aristotle,

Security L. 157 (2007) (explaining the differences between *jus ad bellum* and *jus in bello*).

3. See *infra* Part III.F.

4. ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 146 (3rd ed. 2010); see Rome Statute of the International Criminal Court arts. 1, 4, U.N. Doc. A/CONF. 183/3 (1998) (establishing the court’s personal jurisdiction over any state that enters into the agreement, and its subject matter jurisdiction over war crimes).

and Plato did place war within the broader concept of natural law but did not go beyond the occasional observation.⁵

The Romans would go on to establish a formal link between law and war, requiring approval from their *fetials* (priests) before going to war. This developed into the formal concept of *jus bellum* – just war – which would be formalized following the expansion of Christianity within the Roman Empire. It was then significantly developed during the Middle Ages.⁶ Notwithstanding the many interpretations and evolutions it underwent over this time, the overarching theory was that war was a punishment sanctioned and determined by God in response to wrongdoing. Little was said of the means of waging war and they were generally assumed to be unlimited so far as the war was just.⁷

Grotius (1300 – 1900)

During the Middle Ages, it became apparent that the establishment of a unified Christian republic was unlikely, as the former Roman Empire split into independent political states. This raised the issue of determining the just cause of a war when two or more of these unfamiliar entities fought one another; no longer were they fighting on behalf of the Emperor and axiomatically on behalf of God.⁸ The vacuum left by the fall of the Empire was to be filled by positive law which rendered the concept of just war obscure. At this time of great political and religious turmoil, many suggested competing theories of just war; the main point of contention being who would be the authority. It became somewhat tacitly agreed that, lacking a superior authority, any ruler had the right to wage war, as long as he perceived his cause to be just.⁹

The apparent shift towards war as a transnational rather than theocratic issue was stymied by Grotius, considered by some as the “father of international law,”¹⁰ who suggested transposing the fundamental principles of just war theory into international law. The problem for Grotius was the lack of an arbiter; his solution would go no further than to suggest a list of just causes and urge going to war

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5. Joachim Von Elbe, *The Evolution of the Concept of the Just War in International Law*, 33 AM. J. INT’L L. 665, 665-66 (1939).
 6. *Id.* at 666-67.
 7. Jasmine Moussa, *Can jus ad bellum override jus in bello? Reaffirming the separation of the two bodies of law*, 90 INT’L REV. RED CROSS 963, 966 (2008).
 8. Von Elbe, *supra* note 5, at 669-70.
 9. *Id.* at 670-75.
 10. See HAMILTON VREELAND, JR., *HUGO GROTIUS: THE FATHER OF THE MODERN SCIENCE OF INTERNATIONAL LAW* (Oxford University Press 1917).

only when ultimately necessary.¹¹ Despite its glaring flaws, this did represent the first major step towards international codification of *jus ad bellum*.

Grotius' theories were evidently inspired by his experience of the Eighty Years' War (Dutch Revolt) followed by the Thirty Years' War. Although he would not see the end of the latter, his writings would be hugely influential in the formulation of the treaties which constituted the Peace of Westphalia.¹² Accordingly, Grotius' suggestions would determine several aspects of the new-fangled principle of Westphalian sovereignty which dominated international politics and law until the twentieth century. States had complete freedom to go to war with one another if they so chose and Grotius' principles found expression in the treaties concluded between states. These treaties came to be considered the Law of Nations.¹³

Covenant of the League of Nations (1900-1945)

As Westphalian sovereignty developed, it became rather normal to go to war for the slightest of injuries. It would only be towards the end of the nineteenth century, with advances in technology allowing for immense destruction and suffering coupled with a rise in radical nationalism, that the idea of limiting *jus ad bellum* would return to the fore.¹⁴ Following the "Great War," the League of Nations was established to avoid repetition of such an event and its Covenant contained provisions either limiting or at times outright prohibiting war.¹⁵ With much discord and little support from major powers, the League failed and Europe prepared itself to host the most widespread and deadliest war in history.¹⁶ Amidst the barbaric horrors of World War Two, there was little point in considering principles of *jus ad bellum*.

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11. Von Elbe, *supra* note 5, at 676-80. "Just causes are primarily defence, recovery of property, and punishment; unjust causes, among others, are the desire for richer land, the desire for freedom on the part of a state in political subjection, or the wish to rule others against their will on the pretext that it is for their good. Generally speaking, war is a procedure for the assertion of rights." Von Elbe, *supra* note 5, at 678-79.
 12. Ove Bring, *The Westphalian Peace Tradition in International Law: From Jus ad Bellum to Jus contra Bellum*, 75 INT'L L. STUD. 58, 58-59 (2000).
 13. KOLB & HYDE, *supra* note 1, at 9-10.
 14. KOLB & HYDE, *supra* note 1, at 9-10.
 15. See League of Nations arts. 10 -16.
 16. KOLB & HYDE, *supra* note 1, at 10.

UN Charter framework (1945-Present)

As the dust settled around the globe and the true extent of annihilation became clear, the squabbles surrounding the Covenant of the League of Nations were soon forgotten and fifty-one nations came together to agree on the prohibition of the unilateral use of force.¹⁷ Article 2(4) of the Charter of the United Nations can be considered as the best definition of *jus ad bellum* even today and provides that, “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”¹⁸

This must be read in conjunction with Article 51 and the powers provided for by Articles 39-50 of the Charter, which allow for the use of force in self-defence or following a Chapter VII resolution to that effect, respectively.

2. Proportionality and necessity under *jus ad bellum*

Although the Charter does not define the standards of proportionality or necessity in the exercise of *jus ad bellum*, the International Court of Justice (ICJ) has confirmed that any measures taken in self-defence must be proportionate and necessary to respond to the attack in question. The standard set by the *Nicaragua* case is that “states can unilaterally resort to force only defensively, in the presence of an armed attack and to the extent necessary to repel it.”¹⁹

3. Violation: aggression

Manifest violation of *jus ad bellum* (or rather, violations of the prohibition of the use of force) entails the crime of aggression²⁰.

17. See KOLB & HYDE, *supra* note 1, at 11-12 (discussing how the Charter of the United Nations “prohibit[s] unilateral uses of force” by states that are party to it).

18. U.N. Charter art. 2, ¶ 4.

19. Christian J. Tams, *The Use of Force Against Terrorists*, 20 EUROPEAN J. INT’L L. 359, 370 (2009). “[The Charter] does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.” *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶ 176 (June 27).

20. Rome Statute, *supra* note 4, at art. 8bis:

Crime of aggression

1. For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity

At the inter-state level, this represents a violation of the UN Charter and the potential triggering of Chapter VII powers against the aggressor (as well as the justified use of self-defence by the victim-state). In 1974, the UN General Assembly defined aggression in Resolution 3314, although this has been of very little use.²¹ At an individual level, aggression was made a crime under the jurisdictions of the Nuremberg International Military Tribunal (IMT) and Tokyo IMT but has since not been justiciable.²² Despite being a crime listed

and scale, constitutes a manifest violation of the Charter of the United Nations.

2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) (Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

- 21. Elizabeth Wilmschurst, *Definition of Aggression*, U.N. AUDIOVISUAL LIBR. INT’L L. (2008). available at http://legal.un.org/avl/pdf/ha/da/da_e.pdf [<https://perma.cc/28LZ-S36X>].
- 22. See CRYER ET AL., *supra* note 4, at 309-07 (describing the development of international trials for aggression).

in Article 5 of the Rome Statute of the ICC, aggression was excluded from the jurisdiction of the court until agreement would be reached on its definition. In 2010, agreement was reached and we now have a definition. Activating jurisdiction now depends on a decision taken to that effect, by a two-thirds majority of States Parties after January 2017.²³

B. Jus in bello (law in waging war)

1. History

The law of armed conflict

Although rules and laws regulating war have been recorded since ancient times,²⁴ the formal law of armed conflict (aka *jus in bello*, aka international humanitarian law) has a much shorter history than that of *jus ad bellum*. LOAC materialised rather progressively, responding largely to the shift from limited to total war which occurred between the eighteenth and twentieth centuries.²⁵

From limited to total war (1600-1860)

With the emergence of the nation-state and rulers left more or less to their own devices, war became a general-use political device. A king who felt the need for change (whether it be political, territorial, sectarian etc.) would set his army against the army of his opponent. Civilians were largely left out of war and primitive weaponry limited devastation.²⁶ Although several notable jurists, including Grotius, had made allusion to a *jus in bello*,²⁷ limited war remained common practice for several centuries without the perceived need for LOAC.

The industrial revolution brought with it more destructive and deadlier weapons. This development, coupled with the rise in radical nationalism, gradually led to the practice of total war: widespread

23. CRYER ET AL., *supra* note 4, at 322.

24. *See* CRYER ET AL., *supra* note 4, at 264.

25. *See* KOLB & HYDE, *supra* note 1, at 29-30 (explaining how LOAC can create problems in modern applications and describing issues arising from the necessity to protect civilians during armed conflict).

26. *See* KOLB & HYDE, *supra* note 1, at 29-30 (explaining, “[t]hus, it can be seen that the wars of the seventeenth to the nineteenth centuries were ‘limited wars.’ Direct participation was limited to professional armies of relatively small numbers; they did not drag the whole of the belligerent nation into the war; and they were fought with arms of limited range and destructiveness.”).

27. Moussa, *supra* note 7.

suffering, death, and destruction to the military and civilians alike.²⁸ One man particularly troubled by this clear progression was Henri Dunant, who, having witnessed the battlefield at Solferino in 1859, published an article detailing the horrors he had witnessed. This article would provide the impetus to begin codifying LOAC as we know it today.²⁹

*Hague Conventions, Geneva Conventions, treaties regulating
specific areas and customary law (1860-present)*

Inspired by Dunant's account, the International Committee of the Red Cross (ICRC) was established in 1863, and drafted the first Geneva Convention (GC) a year later, which was later adopted by twelve major European powers. This first treaty protects sick and wounded members of the armed forces in the battlefield and was followed by the 1907 Hague Regulations (HC), regulating the means and methods of warfare.³⁰ The horrors of two world wars would then prompt revision and adaptation of the first GC (already revised in 1906 and 1929)³¹ into four separate treaties in 1949. GCI still protects the sick and wounded in the field, while GCII protects the wounded, sick, and shipwrecked at sea, GCIII protects prisoners-of-war, and GCIV protects civilians. On top of these, since 1977, states may sign and ratify two Additional Protocols (AP). API adds a whole range of regulations in relation to international armed conflicts, whereas APII adapts many of the rules and protections offered in the GCs to non-international conflicts.

This core LOAC is supplemented by numerous treaties dealing with specific matters, whether it be a particular mean or method of warfare, a certain class of person or object, a certain crime, etc.³² Treaties regulating LOAC conflict are amongst the most widely

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28. See KOLB & HYDE, *supra* note 1, at 30 (describing how nationalism increased the difficulty of protecting civilians, given their participation in hostilities, and how industrialism led to the “deliberat[e] target[ing]” of civilians).
29. See CRYER ET AL., *supra* note 4, at 264-65 (explaining the “codification and progressive development” of international humanitarian law from 1859-1977).
30. CRYER ET AL., *supra* note 4, at 265.
31. *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864*, ICRC, available at <https://www.icrc.org/ihl/INTRO/120?OpenDocument> [<https://perma.cc/6USE-KJYP>].
32. See *generally Treaties and States Parties to such Treaties*, ICRC, <https://www.icrc.org/ihl> [[perma.cc/26QT-NU77](https://www.icrc.org/ihl)] (containing a comprehensive list of LOAC treaties).

signed and ratified;³³ so much so that much of the HCs and GCs are now considered customary.³⁴

2. Principles of LOAC

There are several principles which apply throughout LOAC and give it its distinctively humanitarian character:³⁵

- Proportionality and necessity in attack can be considered as the founding principles which underlie the subsequent more specific principles, and shall be independently considered in the next subsection.

- The principle of distinction requires that “parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.”³⁶

- As the first class of persons protected by formal LOAC, the protection of sick and wounded combatants remains fundamental.

- The use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering is prohibited outright.

- The principle of the equality of belligerents (that LOAC applies equally to all warring parties) is not as certain as those others mentioned here; in fact, it is the fundamental issue underlying this article.³⁷

3. Proportionality and necessity under *jus in bello*

The test of proportionality under *jus in bello* is determined by each individual military action.³⁸ Article 51(5)(b) of API prohibits

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33. *See generally id.* (the list of treaties and parties also identifies parties who have ratified the treaties).
34. *See generally* JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME I: RULES (2005), available at <https://www.icrc.org/customary-ihl/eng/docs/v1/perma.cc/DDZ2-E9BY> (providing a study on customary international humanitarian law).
35. *See* KOLB & HYDE, *supra* note 1, at 15-19 (for a detailed account of the principles of LOAC).
36. HENCKAERTS & DOSWALD-BECK, *supra* note 34, at 3.
37. *See* Adam Roberts, *The equal application of the laws of war: a principle under pressure*, 90 INT’L REV. RED CROSS 931, 932-33 (2008) (explaining the “equal application principle”).
38. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 42 (July 8), <http://www.icj-cij.org/docket/files/95/7495.pdf> [<http://perma.cc/ZWL7-DHTC>] (explaining that the lawful use of proportionate force also incorporates the principles of LOAC).

attacks which “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”³⁹

Necessity, on the other hand, is not explicitly codified but very evidently implied in many LOAC rules. It is best described as permitting “measures which are actually necessary to accomplish a legitimate military purpose and are not otherwise prohibited by international humanitarian law. In the case of an armed conflict the only legitimate military purpose is to weaken the military capacity of the other parties to the conflict.”⁴⁰

4. Violation: War Crimes

Grave breaches of LOAC constitute war crimes.⁴¹ At the state level, this triggers the usual international dispute settlement procedures and possibly, although unlikely, and only ever in response to the most serious war crimes, Security Council intervention.⁴² Some also contend that Common Article 1 to the GCs imposes a duty on states to react to breaches of LOAC as an *erga omnes* obligation.⁴³ There are a few dedicated mechanisms created by LOAC, although these are merely investigatory.⁴⁴ Alternatively, there are indirect

39. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51 ¶5(b), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

40. *Military Necessity*, HOW DOES LAW PROTECT IN WAR? (May 6, 2012), <https://www.icrc.org/casebook/doc/glossary/military-necessity-glossary.htm> [<https://perma.cc/CK27-HWAV>].

41. *See generally* Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, arts. 49-50, Oct. 21, 1950, 75 U.N.T.S. 31 [hereinafter First GC]; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, arts. 50-51, Oct. 21, 1950, 75 U.N.T.S. 85 [hereinafter Second GC]; Geneva Convention (III) Relative to the Treatment of Prisoners of War, arts. 129-30, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Third GC]; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, arts. 146-47, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Fourth GC]; Protocol I, *supra* note 39, at arts. 11, 85 (the GCs require only grave breaches of their provisions to be prosecuted).

42. KOLB & HYDE, *supra* note 1, at 284-85.

43. KOLB & HYDE, *supra* note 1, at 287-88.

44. *See generally* KOLB & HYDE, *supra* note 1, at 284-92 (examples include employing a “protecting power” under Common Articles 8/8/8/9 GCs; using the International Fact Finding Commission provided for by Article 90 API; referring to National Red Cross or Red Crescent Societies. For a detailed account of LOAC enforcement mechanisms).

routes to prosecuting war crimes; for example, by prosecuting war crimes as breaches of human rights obligations or by reporting war crimes as breaches of a state's human rights obligations.

Nevertheless, these mechanisms are sorely underused and the most adequate response to war crimes remains criminal prosecution.⁴⁵ The first and foremost role of states is to incorporate LOAC into their domestic systems and prosecute those within their jurisdiction for war crimes.⁴⁶ Should this be impracticable for whatever reason, there are alternatives, including establishing a hybrid court (e.g. Special Court for Sierra Leone), establishing an international criminal tribunal (e.g. International Criminal Tribunal for the former Yugoslavia), or referring the situation to the ICC.

C. Distinguishing jus ad bellum and jus in bello

1. Historical distinction

As soon as the formal *jus in bello* began to emerge, with the demise of just war theory and the rise of the nation-state, jurists implored its separation from *jus ad bellum*. Grotius would be one of the first to write of these two separate principles, stipulating the need for equality between belligerents in the absence of an arbiter to determine the justness of a war.⁴⁷ It is Kant, however, who is credited with explicitly distinguishing between them in his 1787 work *The Philosophy of Law: An Exposition on the Fundamental Principles of Jurisprudence as the Science of Right*.⁴⁸ As can be readily deduced, calls to distinguish between *jus ad bellum* and *jus in bello* were heard long before the adoption of any of the GCs or HCs. Such was the academic resolve at the time, coupled with the rise in increasingly destructive means and methods of warfare, that the detached approach was adopted (or perhaps never even questioned) when drafting the GCs, HCs, and subsequent LOAC treaties.

The question of whether or not to distinguish between *jus ad bellum* and *jus in bello* was not significantly raised until the use of force was made illegal following WWI.⁴⁹ Following WWII, and with

45. KOLB & HYDE, *supra* note 1, at 284-92.

46. See First GC, *supra* note 41, at art. 49; Second GC, *supra* note 41, at art. 50; Third GC, *supra* note 41, at art. 129; Fourth GC, *supra* note 41, at art. 146; Protocol I, *supra* note 39, at art. 80; HENCKAERTS & DOSWALD-BECK, *supra* note 34, at 558.

47. Moussa, *supra* note 7.

48. Moussa, *supra* note 7, at 966 n.18.

49. See *What are jus ad bellum and jus in bello?*, ICRC RESOURCE CTR. (Jan. 1, 2004), available at <https://www.icrc.org/eng/resources/documents/misc/5kzjjd.htm> [<https://perma.cc/JRQ3-VAQ2>] (discussing how the Covenant of the

the commencement of the many war crimes trials, the issue reached its peak. Time after time tribunals rejected arguments from the prosecutor claiming that Germany could not benefit from LOAC due to its illegal use of force.⁵⁰ In one such confirmation of the distinction between the two principles, the Tribunal stated: “Whatever may be the cause of a war that has broken out, and whether or no[t] the cause be a so-called just cause, the same rules of international law are valid as to what must not be done, may be done, and must be done by the belligerents themselves in making war against each other.”⁵¹

2. Distinction under LOAC

LOAC is drafted in neutral terms, without any reference to aggressor discrimination, already suggesting equal application between belligerents. Furthermore, there are a number of provisions and principles which emphasise equality in various LOAC instruments. It is useful to note that domestic military manuals usually adopt the same disinterested definition of proportionality as provided by Article 51(5)(b) API.⁵²

International Armed Conflicts (IAC)

Article 1 of the GCs and APs require the same undertaking “to respect and to ensure respect for this [Convention/Protocol] in all circumstances.”⁵³ “In all circumstances” strongly suggests the respect does not vary depending on the legality of the use of force. However, API provides the most explicit reiteration of the equality of belligerents. API’s preamble states that it and the GCs “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

League of Nations (1919) and subsequently the Paris Treaty (1928) made the unilateral use of force illegal).

50. Laurie R. Blank, *A New Twist on an Old Story: Lawfare and the Mixing of Proportionalities*, 43 CASE W. RES. J. INT’L L. 707, 720 (2011).
51. U.S. v. List et al., Case No. 7, Trial Judgment, ¶ 3(v) (Nuremberg Mil. Trib. Feb. 19, 1948); U.S. v. Altstötter et al., Case No. 35, Trial Judgment, ¶ 5(x) (Nuremberg Mil. Trib. Dec. 4, 1947) (“If we should adopt the view that by reason of the fact that the war was a criminal war of aggression every act which would have been legal in a defensive war was illegal in this one, we would be forced to the conclusion that every soldier who marched under orders into occupied territory or who fought in the homeland was a criminal and a murderer.”).
52. *Rule 14. Proportionality in Attack*, INT’L COMM. RED CROSS [hereinafter *Rule 14*], available at https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14 [<https://perma.cc/W6H2-YQ6W>].
53. See sources cited *supra* note 41, at arts. 1, 1, 1, 1, 1.1 (respectively).

origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.”⁵⁴

Non-International Armed Conflicts (NIAC)

NIAC law is much less developed than the law for International Armed Conflicts (IAC), and there are no explicit references to the principle of proportionality, much less to the equality of belligerents. However, it has been argued that the principle of proportionality is inextricably linked to the principle of humanity, which is enshrined in the Preamble to APII.⁵⁵

To conclude this section, the absence of aggressor discrimination in LOAC, along with the accordingly neutral approach of Rule 14 of the ICRC Customary Study (proportionality in attack),⁵⁶ demonstrate that, not only is equality of belligerents customary, the possibility of aggressor discrimination had simply not been considered when drafting LOAC (reference to equality of belligerents occurring as late as 1979).

III. CAN THE ICC CONSIDER QUESTIONS ON JUS AD BELLUM IN A WAR CRIMES TRIAL?

A. Introduction

Under Article 5 of the Rome Statute, the ICC has jurisdiction over genocide, crimes against humanity, war crimes, and (pending approval by two-thirds of the Assembly of State Parties (ASP)) aggression. Article 8 provides a definition of war crimes. Furthermore, Article 21 lays out the applicable law as follows:

1. The Court shall apply:

- a. In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
- b. In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
- c. Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as

54. Protocol I, *supra* note 39, at pmbl.

55. *Rule 14*, *supra* note 52.

56. *Rule 14*, *supra* note 52 (“Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.”).

appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognised norms and standards.

2.The Court may apply principles and rules of law as interpreted in its previous decisions.⁵⁷

The Rome Statute does not explicitly prohibit, nor permit, the ICC to consider questions of *jus ad bellum* in a war crimes trial. However, we will now see how such considerations are prohibited elsewhere or implicitly by the Rome Statute, as well as considering general legal principles with the same effect.

B. Proportionality at the ICC

Article 8(2)(b)(vi) of the Rome Statute sets out the standard of proportionality in attack as follows:

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

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

iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated[.]⁵⁸

This is very similar to the definition provided by Article 51 of API, with the addition of “overall.” It may be argued that this qualification permits considerations of *jus ad bellum* (an overall justified use of force being granted a wider degree of freedom with proportionality), however, this is expressly rejected in the Elements of Crimes:

The expression ‘concrete and direct overall military advantage’ refers to a military advantage that is foreseeable by the perpetrator at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack. The fact that this crime admits the possibility of lawful incidental injury and collateral damage does not in any way justify any violation of the law applicable in armed conflict. It

57. Rome Statute, *supra* note 4, at art. 21.

58. Rome Statute, *supra* note 4, at art. 8(2)(b)(vi).

does not address justifications for war or other rules related to *jus ad bellum*. It reflects the proportionality requirement inherent in determining the legality of any military activity undertaken in the context of an armed conflict.⁵⁹

This outright prohibition of *jus ad bellum* considerations was reemphasised by the ICRC.⁶⁰

As the law currently stands, therefore, the ICC cannot consider questions of *jus ad bellum* in a war crimes trial. That said, one may suggest revising the Elements of Crime by removing the explanatory note, just as one may dispute the reasoning of the ICRC. I will accordingly demonstrate that, even if the explanatory note were removed, the ICC would still not be able to consider *jus ad bellum* questions.

C. Jurisdiction over aggression

As previously described, although aggression is defined in the Rome Statute, the ICC still does not have jurisdiction over the crime. This is symptomatic of the high level of discord surrounding the issue (as were the 15 years it took to reach agreement on the definition). Considering this lack of agreement, it would be nonsensical for the ASP to have intended to give jurisdiction over aggression ‘through the back door’ (i.e. via the assessment of proportionality).

D. Principles of individual criminal responsibility

Permitting aggressor bias at the ICC would put three fundamental principles of individual criminal responsibility at risk.

Nullum crimen sine lege

Article 22(1) of the Rome Statute sets out the *nullum crimen sine lege* principle as follows: “A person shall not be criminally responsible

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59. INT’L CRIM. CT., ELEMENTS OF CRIMES, 19 n.36 (2011), <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf> [<https://perma.cc/X472-LBL6>].
60. Knut Dörmann, *Preparatory Commission for the International Criminal Court: The Elements of War Crimes Part II: Other serious violations of the laws and customs applicable in international and non-international armed conflicts*, 83 INT’L REV. RED CROSS 253, 472 (2001) (“The PrepCom’s commentary to the term ‘concrete and direct overall military advantage’ stresses that international humanitarian law applies to armed conflicts regardless of the cause of the conflict or the motives of the parties thereto. It draws attention to the distinct nature of *jus ad bellum*, which is irrelevant in this context, and *jus in bello*, which is alone relevant for assessing whether the proportionality requirement is met. These statements are a correct reflection of existing law. The clarification is certainly very valuable.”).

under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.”⁶¹

To discriminate against the aggressor would effectively make the accused criminally responsible for crimes not yet within the jurisdiction of the ICC. Furthermore, such aggressor discrimination would be a perfect example of extending the definition of war crimes by analogy, as prohibited by the second paragraph.⁶²

Nullum crimen, nulla poena sine praevia lege poenali

Nullum crimen, nulla poena sine praevia lege poenali refers to the principle of non-retroactivity enshrined in Article 24 of the Rome Statute: “No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.”⁶³

There is a possibility that facts relevant to *jus ad bellum* of a conflict occurred prior to the adoption of the Rome Statute by one or more of the belligerents being investigated by the ICC. In such a situation, aggressor discrimination would render an accused criminally responsible for acts that occurred prior to the activation of the jurisdiction of the Court, thereby violating the principle of non-retroactivity. Such potential violation is not that hard to imagine considering that Democratic Republic of the Congo, Uganda, and Côte d’Ivoire ratified the Rome Statute years after the outbreak of conflicts (which have gone through alternating states of peace and war), which are now being investigated by the ICC.⁶⁴

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61. Rome Statute, *supra* note 4, at art. 22 ¶ 1.
 62. Rome Statute, *supra* note 4, at art. 22 ¶ 2 (“The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.”).
 63. Rome Statute, *supra* note 4, at art. 24 ¶ 1.
 64. DR Congo ratified the Rome Statute on April 11, 2002 – the ICC is investigating the conflict which began in 1998. *See States Parties to the Rome Statute*, ICC, https://www.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/democratic%20republic%20of%20the%20congo.aspx [https://perma.cc/CM7T-NWPX]; Press Release, *The Office of the Prosecutor of the International Criminal Court opens its first investigation*, ICC (June 6, 2004), https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/the%20office%20of%20the%20prosecutor%20of%20the%20international%20criminal%20court%20opens%20its%20first%20investigation.aspx [https://perma.cc/X6LB-GNPB]. Uganda ratified the Rome Statute on June 14, 2002 – the ICC is investigating the conflict which began in 1987. *See States Parties to the Rome Statute*, ICC, https://www.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/uganda.aspx [https://perma.cc/2N5F-Z4FE]; Press Release, *Prosecutor of the International Criminal Court opens an investigation into Northern*

Ei incumbit probatio qui dicit, non qui negat

The presumption of innocence principle is prescribed by Article 66 of the Rome Statute.⁶⁵ Proceeding with a presumption of aggressor bias would violate the principle, as it holds individuals criminally responsible for the act of aggression from the outset of the trial, as well as violating the standard of proof required to establish guilt “beyond reasonable doubt.”⁶⁶

E. Principles of LOAC requiring separation between jus ad bellum and jus in bello

There are a number of principles that apply particularly to LOAC as a whole which require distinction between *jus ad bellum* and *jus in bello*, and therefore, apply to the ICC. Since attempts have recently been made to refute some of these principles, I will also try to refute those main counterarguments. Some are also claiming that aggressor bias is necessary in response to the increasing practice of ‘lawfare,’ or, alternatively, that the ICJ expressly permitted aggressor discrimination in its *Nuclear Weapons* advisory opinion; I will also refute these arguments.

The Humanitarian Nature of LOAC

The very purpose of LOAC is, acknowledging the reality of war, to render warfare as humane as possible—hence its alternate designation as International Humanitarian Law (IHL). As described by the ICRC, it “seek[s], for humanitarian reasons, to limit the effects of armed conflict... [and] does not regulate whether a State may

Uganda, ICC (July 29, 2004), https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/prosecutor%20of%20the%20international%20criminal%20court%20opens%20an%20investigation%20into%20nothern%20uganda.aspx [https://perma.cc/6VPR-Q4P2]. Côte d’Ivoire ratified the Rome Statute on February 15, 2013 – the ICC is investigating the conflict which began in 2002. See *States Parties to the Rome Statute*, ICC, https://www.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/Cote_d_Ivoire.aspx [https://perma.cc/2SUA-FQFW]; *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire*, No. ICC-02/11, Pre-Trial (Oct. 3, 2011), <https://www.icc-cpi.int/iccdocs/doc/doc1240553.pdf> [https://perma.cc/6RQ9-72FB].

65. Rome Statute, *supra* note 4, at art. 66 ¶ 1 (“Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.”).
66. Rome Statute, *supra* note 4, at art. 66 ¶ 3 (“In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.”).

actually use force.”⁶⁷ The two branches of law, *jus ad bellum* and *jus in bello*, serve considerably different, albeit related, purposes. To suggest that one influences the other risks undermining one, the other or both. If *jus ad bellum* becomes a factor in determining war crimes, it risks being perceived as just that—a factor of war crimes—rather than an outright prohibition of the unilateral use of force. As for *jus in bello*, it then becomes biased and loses the impartial respect for human personality and dignity on which it is founded.⁶⁸

Identifying the Aggressor

Since the prohibition of unilateral force, aggression has been defined: once by the UN General Assembly in 1974 and once by the ASP in 2010.⁶⁹ It is further contended that, regardless of these definitions (or at least without even mentioning them), the international community has generally been concordant in denouncing illegal use of force.⁷⁰ It could well be argued, therefore, that there are no issues in defining an aggressor as an element of war crimes. However, despite *general* agreement by the international community, there still remain too many instances of contention to allow it to become a commonplace consideration in a war crimes trial, without any political connotations.

In criticising arguments against permitting “aggressor bias,” Orakhelashvili mentions U.S. activities following the September 11th terrorist attacks as examples where attempts to interpret *jus ad bellum* creatively (e.g. pre-emptive self-defence or implicitly authorised humanitarian intervention) have failed due to the restrictive definition now in effect.⁷¹ Theoretically, this is just fine; the dubious legality of U.S. use of force has been widely reported and debated. However,

67. Int’l Comm. Red Cross, *What is International Humanitarian Law?*, (July 2004), https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf [<https://perma.cc/N9MT-8BEH>].

68. INT’L COMM. RED CROSS, THE GENEVA CONVENTIONS OF 12 AUGUST 1949 19, <https://www.icrc.org/eng/assets/files/publications/icrc-002-0173.pdf> [<https://perma.cc/RS5Q-R83F>] (“Each of [the GCs] is inspired by respect for human personality and dignity; together they establish the principle of disinterested aid to all victims of war without discrimination – to all those who, whether through wounds capture or shipwreck, are no longer enemies but merely suffering and defenceless [sic] human beings.”).

69. G.A. Res. 3314 (XXIX) (Mar. 11–Apr. 12, 1974); I.C.C. Res. 6 (June 11, 2010).

70. See Orakhelashvili, *supra* note 2, at 173-78 (discussing the appropriate use of force).

71. Orakhelashvili, *supra* note 2, at 178.

thirteen years after the invasion of Afghanistan, U.S. forces remain active all over the Middle East. The fact that the U.S. continues to wage an illegal “War on Terror,” with intermittent support from a variety of states, suggests that, either we have not yet reached a reliable definition of aggression, or that it is still an ultimately political consideration (and therefore should be left out of criminal courts).

Since Orakhelashvili’s article, we have witnessed Russia’s illegal invasion and annexation of the Crimea, which Russia (as expected) contends was permissible.⁷² The widespread condemnation of both Russia and the U.S.’s activities demonstrates that, in these instances, the issue is one of politics, not legal definition. Nevertheless, such politicisation is reason enough to exclude *jus ad bellum* considerations from a war crimes trial.

Alongside this politicisation of *jus ad bellum*, there has been, and continues to be, much discord in defining aggression in relation to individual criminal responsibility. As previously mentioned, although aggression is listed as a crime in the Rome Statute, the ICC will still not have jurisdiction over aggression until, at the earliest, 2017, depending on a decision by the ASP.

These issues of politicisation and indecision lead to the conclusion that aggression is to be considered by the UN, or to be considered as an independent crime with its own elements to be properly examined (once the ICC has jurisdiction); but at very least to be left out of *jus in bello* considerations.

Encouraging Further Violations of the Laws of War

It has been suggested that knowledge of an aggressor discrimination would incite no change in the conduct of warfare (the motivation then being purely punitive), citing to the example of major military powers (e.g. Germany in WWII) having flagrantly violated LOAC despite being well aware of it.⁷³ This is irrelevant as, although countless war crimes did occur, there are a number of circumstances in which the German army did abide by LOAC, notably in relation to allied POWs, though observance varied.⁷⁴

72. See *Crimea Crisis: Russian President Putin’s Speech Annotated*, BBC (Mar. 19. 2014), <http://www.bbc.com/news/world-europe-26652058> [<http://perma.cc/RD3A-6JNL>].

73. Orakhelashvili, *supra* note 2, at 178-79.

74. See *ICRC in WWII: Polish Prisoners of War in Germany: Why the ICRC Was Unable to Keep Track of Polish POWs Captured by German Forces*, INT’L COMM. RED CROSS (Feb. 2, 2005), available at <https://www.icrc.org/eng/resources/documents/misc/57jnwv.htm> [<https://perma.cc/J7UF-RPBN>] (discussing the treatment of “Polish soldiers who became prisoners of war” during WWII).

Furthermore, the German army did interact with the ICRC throughout the war, at times allowing relief to be sent to POWs.⁷⁵ This is not a defence of Germany, but a demonstration of the tangible effect of LOAC, even in a conflict as horrendous as WWII. As affirmed by Jean Pictet, former Vice-President of the ICRC, “if one single individual is saved by the application of the LOAC, the whole exercise would have been worth the expense.”⁷⁶ In addition to a policy commitment to LOAC, in a conflict such as WWII, there will necessarily be a cross-section of an aggressor’s armed force that does not share the same radical ideologies as their leaders and who will, either throughout the conflict or at least in the face of defeat, make efforts to abide by LOAC.

At the policy level, aggression is necessarily backed by very strong conviction and determination to achieve one’s aim in the knowledge that one will be heavily scrutinised internationally. Speeches by terrorist leaders, leaders of radical rebel groups or the heads of state of “isolationist”⁷⁷ countries, as reported in the news, reveal a policy of denouncing “the West,” often with claims of indirect colonialisation. To permit aggressor bias only adds weight to these assertions and risks delegitimising the court.

Alternatively, knowledge of aggressor bias may encourage the victim-state to violate LOAC. Knowing that they have a wider margin of discretion may lead combatants and leaders to be less careful in their assessments of proportionality in attack.

The ‘Innocent Soldier’

An analysis of Nuremberg jurisprudence has determined the following three principles in relation to aggression:

1. [N]on-governmental actors can commit the crime of aggression;
2. [A]ggression is a policy-level crime; and

75. See *The ICRC in WWII: Overview of Activities*, INT’L COMM. RED CROSS (Feb. 2, 2005), available at <https://www.icrc.org/eng/resources/documents/misc/history-world-war-2-overview-020205.htm> [<https://perma.cc/VT3W-CY84>] (discussing how “ICRC delegates visited prisoners of war”).

76. KOLB & HYDE, *supra* note 1, at 283.

77. “Isolationism” means “[a] policy of remaining apart from the affairs or interests of other groups, especially the political affairs of other countries.” *Isolationism*, OXFORD DICTIONARIES, available at <http://www.oxforddictionaries.com/definition/english/isolationism> [<http://perma.cc/4A4M-4DW5>].

3. [A]n individual is at the policy level if he is in a position to “shape or influence” a state’s political or military action.⁷⁸

Moreover, the definition of aggression now provided by the Rome Statute requires “the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression”⁷⁹ What these definitions reflect is the nature of aggression as a “leadership crime;” they both require the accused to have, at least, influence in the military or political planning of the act of aggression. Øverland provides a suitable description of the concept of the innocence of individual soldiers, explaining that “[i]n addition to being young, uneducated, and swayed by their superiors and public authorities, soldiers fight out of loyalty to their country and out of lawful subservience to it.”⁸⁰

To consider aggression in a war crimes trial, therefore, risks punishing combatants who had no, or at least insignificant, roles in the decision to commit the act of aggression and who, under formal *jus ad bellum* regimes, would not be held responsible. The UN already provides mechanisms to respond to aggression at the State level, whilst the ASP is in the tedious process of determining the specific elements required to attribute individual criminal responsibility for the crime of aggression. To that end, not only would it be unjust, but also unnecessary to consider aggression in a war crimes trial.

F. Arguments in favour of aggressor bias
‘Lawfare’ and Asymmetric Warfare

Lawfare, described as “the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational

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78. Kevin Jon Heller, *Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression*, 18 EUR. J. INT’L L. 477, 488 (2007).
79. Review Conference of the Rome Statute, Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, Res. RC/Res.6, Annex I, art. 8 *bis* (June 11, 2010), available at https://www.icc-cpi.int/iccdocs/asp_docs/RC2010/AMENDMENTS/CN.651.2010-ENG-CoA.pdf [<https://perma.cc/3LGV-CANL>].
80. Gerhard Øverland, *Killing Soldiers*, 20 ETHICS & INT’L AFF. 455, 460 (2006).

objective,”⁸¹ is becoming an increasingly prevalent practice, in particular in relation to asymmetric warfare.⁸²

We are seeing increasing use of “hostage-taking, co-location of ... military objects with civilian objects, use of human shields, use of suicide bombers disguised as civilians, indiscriminate attacks, use of proxy forces to engage in unlawful operations while denying all responsibility for their actions and deliberate attacks on civilians.”⁸³

In such a situation, where usually the unlawful belligerent resorts to lawfare, it may be tempting to grant the other belligerent more leeway in their assessment of proportionality to respond to the ensuing difficulties. This is an unconvincing argument, as it simply leads to further victimisation of innocent civilians—an antithetical situation where the very law protecting civilians in fact puts them at risk. Such a possibility has been considered and prohibited by API. The final section of Article 51 (which defines proportionality) provides that, “[a]ny violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.”⁸⁴

As well as being reprehensible, aggressor discrimination in this scenario is unnecessary. There already exists an (albeit controversial) response to violation of LOAC by an opponent: belligerent reprisal – “violations of the LOAC committed in response to violations of the LOAC by the other party, in order to induce that other party to comply with the law.”⁸⁵ It may be said that the highly dubious legality of such reprisals renders them an unsuitable response to asymmetric warfare; however, the concept of belligerent reprisals is nowadays so restricted as to be agreeably humanitarian. Compared to the ambiguous concept of a variable proportionality in attack, belligerent reprisals are strictly defined and heavily limited by LOAC.⁸⁶ They are also prohibited outright against protected persons and objects.⁸⁷

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81. Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, 3 YALE J. INT’L AFF. 146, 146 (2008).
82. “[Asymmetric warfare is population-centric nontraditional warfare] [*sic*] waged between a militarily superior power and one or more inferior powers,” see David L. Buffaloe, *Defining Asymmetric Warfare*, 58 LAND WARFARE PAPERS 1, 17 (2006), http://www.ausa.org/SiteCollectionDocuments/ILW%20Web-ExclusivePubs/Land%20Warfare%20Papers/LWP_58.pdf [<http://perma.cc/E433-3BZX>].
83. Roberts, *supra* note 37, at 949.
84. Protocol I, *supra* note 39, at art. 51(8).
85. KOLB & HYDE, *supra* note 1, at 173.
86. Kolb and Hyde have identified the following restrictions applying to belligerent reprisals:

Nevertheless, I also disagree with the practice of belligerent reprisals, if only for their prohibition in the Vienna Convention on the Law of Treaties.⁸⁸ Article 60 prohibits terminating or suspending treaties of humanitarian character in response to material breach by the other party.⁸⁹ This provision likewise prohibits aggressor discrimination.

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- a) The purpose of reprisals may only be to secure future law-compliance, not, for example, to punish for a violation of the war;
 - b) Reprisals must be a measure of last resort (*ultima ratio*); no other, less intrusive, means for securing law-compliance must be available;
 - c) Reprisals must be proportionate to the wrong suffered;
 - d) The decision to take reprisals must be made at the highest level of government; and
 - e) Reprisals must cease as soon as the adversary complied with the law.

KOLB & HYDE, *supra* note 1, at 176.

87. KOLB & HYDE, *supra* note 1, at 174.
88. The VCLT is considered by many to reflect customary law. See Karl Zemanek, *Vienna Convention on the Law of Treaties*, U.N. AUDIOVISUAL LIBR. INT'L L., <http://legal.un.org/avl/pdf/ha/vclt/vclt-e.pdf> [<http://perma.cc/UZ87-REC9>] (discussing the influence of the Vienna Convention on the Law of Treaties).
89. See Vienna Convention on the Law of Treaties art. 60, May 23, 1969, 1155 U.N.T.S. 331, http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf [<http://perma.cc/AMB6-VHYJ>]. According to art. 60:
 1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.
 2. A material breach of a multilateral treaty by one of the parties entitles:
 - (a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:
 - (i) in the relations between themselves and the defaulting State; or
 - (ii) as between all the parties;
 - (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;
 - (c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

The ‘War on Terror’ is an interesting example of asymmetric conflict which has provoked claims by the U.S. that LOAC either doesn’t or shouldn’t apply equally between belligerents. To begin with, it is highly questionable that the U.S. did have *jus ad bellum* in invading Afghanistan. Not only did the 9/11 attacks not qualify as aggression under *jus ad bellum*,⁹⁰ there also exists no right to “pre-emptive self-defence” in international law.⁹¹ That said, even if the War on Terror is a legitimate armed conflict, arguments in favour of aggressor discrimination have nevertheless been negated—LOAC is still able to respond to such a conflict; POWs may be tried for war crimes and violations of the criminal law applicable to combatants, and at any rate, most terrorists are not captured during combat but during law enforcement operations (the legality of which is also highly dubious).⁹²

Rather than provide justifications for aggressor discrimination, the War on Terror has shown the inherent dangers of conflating *jus ad bellum* and *jus in bello* – hundreds of thousands of civilians have died in military operations targeting a very small number of terrorists in self-defence of an anticipated, albeit unidentified, attack. Furthermore, the U.S.’s attempts to circumvent LOAC⁹³ have

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3. A material breach of a treaty, for the purposes of this article, consists in:
 - (a) a repudiation of the treaty not sanctioned by the present Convention; or
 - (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.
 4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.
 5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.
 90. See Carsten Stahn, *Terrorist Acts as “Armed Attack”: The Right to Self-Defence, Article 51(1/2) of the UN Charter, and International Terrorism*, 27 FLETCHER F. WORLD AFF. 35, 43 (2003) (explaining the qualifications under the Definition of Aggression).
 91. Cryer et al., *supra* note 4, at 318 (referenced in the discussion on “aggression”).
 92. KOLB & HYDE, *supra* note 1, at 27.
 93. For example, by claiming that captured terror suspects are “unlawful combatants” and therefore not entitled to POW status, or by establishing a detention camp outside US jurisdiction in order to torture said suspects. See generally, Knut Dörmann, *The Legal Situation of “Unlawful/Unprivileged Combatants”*, 85 INT’L REV. RED CROSS 45 (2003), https://www.icrc.org/eng/assets/files/other/irrc_849_dorman.pdf

returned very little in thirteen years, with increasing claims that the War on Terror has in fact encouraged further radicalisation and terrorism.⁹⁴ It seems likely that aggressor discrimination would have a similar effect. As the ICRC puts it, “it is generally not the rules that are at fault, but the will or sometimes the ability of the parties to an armed conflict—and of the international community—to enforce them”⁹⁵.

Nuclear Weapons and ‘Extreme Self-Defence’

In the *Nuclear Weapons* Advisory Opinion, the ICJ determined that, “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.”⁹⁶

It may be argued that this conclusion has created a definitive link between *jus ad bellum* and *jus in bello*, allowing aggressor discrimination in “extreme” circumstances of State survival. It may further be argued that, without defining “an extreme circumstance of self-defence in which the very survival of a State would be at stake,” States are free to interpret the standard themselves (one can imagine the U.S. qualifying the 9/11 attacks as such). However, this would be an incorrect interpretation of the Advisory Opinion. The Court made clear that such use would still have to comply with the principles of proportionality and necessity.⁹⁷ This is not replacing *jus in bello* with *jus ad bellum*, this is simply applying LOAC to nuclear weapons.

[<https://perma.cc/L75S-LPRT>]; Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 AM. J. INT’L L. 345 (2002).

94. See, e.g., Mark Mazzetti, *Spy Agencies Say Iraq War Worsens Terrorism Threat*, N.Y. TIMES (Sept. 24, 2006), http://www.nytimes.com/2006/09/24/world/middleeast/24terror.html?_r=0 [<http://perma.cc/TH8S-DVA6>].
95. Int’l Comm. Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Document Prepared by the International Committee of the Red Cross for the 30th International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 26-30 November 2007*, 89 INT’L REV. RED CROSS 719, 734 (2007), <https://www.icrc.org/eng/assets/files/other/irrc-867-ihl-challenges.pdf> [<https://perma.cc/BTY2-9CGV>].
96. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 2E (July 8), available at <http://www.icj-cij.org/docket/files/95/7497.pdf> [<http://perma.cc/ZWL7-DHTC>].
97. Moussa, *supra* note 7, at 969-72.

G. Case Law

Under Article 21(1)(c) of the Rome Statute, the ICC can apply “general principles of law derived by the Court from national laws of legal systems of the world . . .”⁹⁸ As part of its Customary IHL Study, the ICRC reviewed national practice in relation to proportionality in attack. A quick look through their findings reveals the same neutral definition of proportionality throughout national legislation and jurisprudence as found in international law; there are no references to aggressor bias.⁹⁹

International judicial decisions may also be useful as “they often elaborate, with varying focus or precision, on the content and development of the legal standards relevant”¹⁰⁰ to LOAC. As will be seen, a variety of tribunals have reaffirmed the separation between *jus ad bellum* and *jus in bello*. Furthermore, according to Article 21(2) of the Rome Statute, the ICC can “apply principles and rules of law as interpreted in its previous decisions.”¹⁰¹

The Special Court for Sierra Leone

In *Fofana & Kondewa*, when rejecting a reduction of sentence handed down by the Trial Chamber based on the “just and defensible”¹⁰² cause of the defendants, the Appeals Chamber reaffirmed the distinction between *jus ad bellum* and *jus in bello*, describing it as a “bedrock principle”¹⁰³ of LOAC. It went on to state that conflation of the principles “provides implicit legitimacy to conduct that unequivocally violates the law—the precise conduct this Special Court was established to punish.”¹⁰⁴

In *Taylor*, the Defence tried to argue that the Trial Chamber had not taken into account the neutral nature of the war crimes in question, as well as the legitimacy of the use of force commissioned by

98. Rome Statute, *supra* note 4, at art. 21(1)(c).

99. See *Customary IHL: Practice Relating to Rule 14. Proportionality in Attack*, INT’L COMM. RED CROSS, available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14_SectionA [<https://perma.cc/8GRJ-EYRB>].

100. Orakhelashvili, *supra* note 2, at 167.

101. Rome Statute, *supra* note 4, at art. 21(2).

102. Prosecutor v. Fofana & Kondewa, Case No. SCSL-04-14-T, Judgment on the Sentencing of Moinina Fofana and Allieu Kondewa, ¶ 86 (Trial Chamber I Oct. 9, 2007).

103. Prosecutor v. Fofana & Kondewa, Case No. SCSL-04-14-A, Judgment, ¶ 531 (Appeals Chamber May 28, 2008).

104. *Id.* at ¶ 534.

Taylor.¹⁰⁵ The Appeals Chamber upheld the Prosecution's claim that the Defence "conflate[d] *jus ad bellum* and *jus in bello*, since an accused can be held criminally responsible for crimes committed in otherwise lawful activity,"¹⁰⁶ asserting that "[t]he distinction between criminal and non-criminal acts of assistance is not drawn on the basis of the act in the abstract, but on its effect in fact."¹⁰⁷

The International Criminal Tribunal for Yugoslavia

In *Kordic and Cerkez*, the Trial Chamber, in applying the ground for excluding criminal responsibility of self-defence provided for by Article 31(1)(c) of the Rome Statute, emphasised that "military operations in self-defence do not provide a justification for serious violations of international humanitarian law."¹⁰⁸ Although this was in reference to grounds for excluding criminal liability, it is applicable to proportionality. More explicitly, the Appeals Chamber noted that, "[t]he unfortunate legacy of wars shows that until today many perpetrators believe that violations of binding international norms can be lawfully committed, because they are fighting for a "just cause." Those people have to understand that international law is applicable to everybody, in particular during times of war."¹⁰⁹

In its Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, the Office of the Prosecutor (OTP) addressed allegations that, since NATO's recourse to armed force was unlawful, all subsequent measures taken by NATO were also illegal.¹¹⁰ Having defined both *jus ad bellum* and *jus in bello* in the traditional sense, the OTP concluded that:

As a matter of practice, which [the OTP] consider to be in accord with the most widely accepted and reputable legal opinion, ... the OTP have deliberately refrained from assessing

105. Prosecutor v. Taylor, Case No. SCSL-03-01-A, Judgment, ¶ 393 (Appeals Chamber Sept. 26, 2013).

106. *Id.* at ¶ 394.

107. *Id.* at ¶ 395.

108. Prosecutor v. Kordić & Cerkez, Case No. IT-95-14/2-T, Judgment, ¶ 452 (Int'l Crim. Trib. for the Former Yugoslavia, Trial Chamber Feb. 26, 2001).

109. Prosecutor v. Kordić & Cerkez, Case No. IT-95-14/2-A, Judgment, ¶ 1082 (Int'l Crim. Trib. for the Former Yugoslavia, Appeals Chamber Dec. 17, 2004).

110. Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, ¶¶ 30-34, U.N. Doc. PR/P.I.S./510-E (June 13, 2000).

jus ad bellum issues in [their] work and focused exclusively on whether or not individuals have committed serious violations of international humanitarian law as assessed within the confines of the jus in bello.¹¹¹

The South African Truth and Reconciliation Committee (TRC)

The TRC is not a court; however, as a reputable alternative to criminal prosecution, its proclamations do provide support to general principles of law. On the point of proportionality, it “rejected the African National Congress’ claim ‘that it should be judged differently than the apartheid government because it was engaged in a just war against apartheid.’”¹¹²

The International Criminal Court

In *Lubanga Dyilo*, the Chamber dismissed a personal statement from Mr. Lubanga claiming that he had accepted his “position of responsibility not for power but for peace, and he submitted that the UPC was created, and the FPLC soldiers were trained, in order to pursue this objective.”¹¹³ Accepting his motivations, the Chamber stated that it was “only of limited relevance given the persistent recruitment of child soldiers during the period covered by the charges. The critical factor is that, in order to achieve his goals, he used children as part of the armed forces over which he had control.”¹¹⁴

In *Germain Katanga*, Judge Van den Wyngaert (dissenting) resolved that:

[T]he Court’s success or failure cannot be measured just in terms of ‘bad guys’ being convicted and innocent victims receiving reparation. Success or failure is determined first and foremost by whether or not the proceedings, as a whole, have been fair and just.¹¹⁵

This is a very fitting conclusion to this section, which demonstrates that the practice of the ICC and other international criminal courts is to reject *jus ad bellum* considerations.

111. *Id.* at ¶ 34.

112. Blank, *supra* note 50, at 720.

113. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-2901, Decision on Sentence Pursuant to Article 76 of the Statute, ¶ 86 (Trial Chamber I July 10, 2012).

114. *Id.* at ¶ 87.

115. Prosecutor v. Katanga, Case No. ICC-01/04-01/07-3436-AnxI, Minority Opinion of Judge Christine Van den Wyngaert, ¶ 310 (Trial Chamber II Mar. 7, 2014).

IV. CONCLUSION

Can the ICC consider questions on *jus ad bellum* in a war crimes trial? The answer is no. Aside from being explicitly prohibited by the explanatory note in the Elements of Crimes (a primary source of law), such consideration would violate:

- provisions of LOAC;
- principles of LOAC;
- the very humanitarian nature of LOAC;
- principles of individual criminal responsibility; and
- general principles of law, as reflected in national and international case-law.

Arguments in favour of allowing such *jus ad bellum* considerations in response to lawfare are weak; the two branches of law, *jus ad bellum* and *jus in bello*, are suited to address illegal use of force and war crimes respectively. Failures within the two branches are by reason of political will and lack of enforcement and it is these issues which should be addressed. As to the *lex ferenda*, it seems very unlikely that the ICC will be able to consider *jus ad bellum* prior to its jurisdiction being activated by the ASP, and rightly so; once the ASP votes in favour of activating jurisdiction, the ICC will be able to prosecute those actually responsible for the act of aggression, determined according to the principles of criminal law in the course of a proper and thorough examination.