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Anti-Personnel Mines and Peremptory Norms of International Law: Argument and Catalyst

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ABSTRACT

Anti-personnel mines have evolved into the military device of choice in many regional conflicts across the world. The author commences his analysis of this development by considering the impact of anti-personnel mines on civilian populations and the reasons historically articulated for their use. After evaluating their relative costs and benefits, the author proceeds to analyze the problem of anti-personnel mines under the principles of international law. First, the author considers legal principles regarding the permissible use of force by combatants, generally referred to as jus in bello. Next, the author evaluates the use of anti-personnel mines under jus in bello and determines that their use is not justified under that principle. The author then argues that the use of anti-personnel mines violates jus cogens norms of international law. The author concludes that civilized nations of the world should abolish the use of such ordinances as a peremptory norm of international law.

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TABLE OF CONTENTS

> We understand that you have announced a United States goal of the eventual elimination of antipersonnel landmines. We take this to mean that you support a permanent and total international ban on the production, stockpiling, sale and use of this weapon. We view such a ban as not only humane, but also militarily responsible . . . . [T]hey are insidious in that their indiscriminate effects persist long after hostilities have ceased, continuing to cause casualties among innocent people, especially farmers and children . . . . We . . . conclude that [the President of the United States] could responsibly take the lead in efforts to achieve a total and permanent international ban on the production, stockpiling, sale and use of antipersonnel landmines. We strongly urge that you do so.[1]

I. INTRODUCTION: DEATH IN THE PLAYING FIELDS

Within the last three decades, an evolving item of military hardware has become the deterrent of choice in many regional conflicts: anti-personnel mines. This device has been described as "a weapon of mass destruction, in slow motion, because they indiscriminately kill or maim massive numbers of human beings over a long period of time."[2] They are inexpensive to manufacture

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1. *An Open Letter to President Clinton*, N.Y. TIMES, Apr. 3, 1996, at A9. This letter was signed by 15 active or retired flag rank officers of the U.S. Army, Navy, and Air Force.

2. *Moratorium on the Export of Anti-Personnel Land-Mines, Report of the Secretary-General*, U.N. GAOR, 50th Sess., Agenda Item 70, ¶ 5, U.N. Doc. A/50/701 (1995). The U.S. Secretary of State has similarly described anti-personnel mines as "'slow-motion' weapons of mass destruction." WARREN CHRISTOPHER, U.S. DEP'T ST., U.S. PUBLIC DIPLOMACY AGENDA ON ANTI-PERSONNEL LANDMINES (1995).

and relatively easy to deploy.[3] Their individual cost is less than a few dollars; moreover, they can be broadcast across areas of military engagement by aerial seeding from planes and helicopters, artillery shells, or conventional missiles.[4] These devices have been widely used in many regional conflicts which have taken place over the last three decades. In addition, they have become a convenient, but irresponsible, armament found in increasing numbers across the world.[5] Unlike other conventional armaments which follow combatants to their next theater of operations or to storage when hostilities cease, anti-personnel mines are left *in situ* unattended and ready to be detonated by any unsuspecting passerby. As implied in the quoted text of a letter from fifteen U.S. admirals and generals to President Clinton, there are several reasons for this situation.

First, it has traditionally been considered uneconomical to spend hundreds, if not thousands, of dollars to retrieve each device upon conclusion or relocation of hostilities.[6] This expense is largely due to the fact that the location of these devices is uncertain. If records concerning their deployment were kept, they are usually of a general nature and do not accurately plot the exact location on military maps.[7] Thus emerges the second reason for the failure to retrieve these mines: their locations are often unknown. The result of this dilemma is that approximately 25,000 individuals (usually non-combatant farmers and children) become the annual victims of these mines, which no longer serve a role in a lawful military conflict.[8] Like Pharaoh's locusts, frogs, and pestilence, anti-personnel mines have become a plague on the peoples of Bosnia, Afghanistan, Cambodia, Angola, and other regions of the world.[9]

The proponents of these devices have traditionally argued for their use as a conventional military deterrent. Combatants are reluctant, they argue, to travel through particular theaters of military operation once it is known that the areas are protected by these small, hard to detect, and often lethal weapons. Yet, a fatal defect exists with this justification. As U.S. Secretary of State Warren Christopher has noted, anti-personnel mines do not

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3. *See* INTERNATIONAL COMMITTEE OF THE RED CROSS, ANTI-PERSONNEL LANDMINES—FRIEND OR FOE? A STUDY OF THE MILITARY USE AND EFFECTIVENESS OF ANTI-PERSONNEL MINES § 1, ¶ 2 (1996) [hereinafter ICRC STUDY].

4. *Id.* § 7, ¶ 89.

5. *Id.* § 2(2), ¶¶ 33-34.

6. *Id.* § 1, ¶ 7.

7. *Id.* § 7, ¶ 94.

8. *See* ICRC STUDY, *supra* note 3, § 1, ¶ 2.

9. *Id.* § 1, ¶¶ 1-2.

distinguish between civilians and combatants. Indeed, their toll among children is higher than amongst soldiers, and "they do not cease to kill when peace treaties are signed and the guns of war fall silent."[10]

An additional argument for the use of these devices is based on the general principles of the just war theory that extend from the *jus in bello* doctrine—the conventional ethics of armed conflict which direct the moral conduct of war. Reliance on the principles of *jus in bello* might offer some justification for use of anti-personnel mines. For example, one combatant may desire to protect itself through deployment of this type of weapon in order to deter the enemy from entering a particular area of the theater of war. By way of example, a weaker or disadvantaged combatant could, by deploying anti-personnel mines, protect a part of its perimeter which might otherwise be exposed to attack. In this context, one might justify such limited use of these devices. But would the justification continue once the need for this defense ceases upon the conclusion of the conflict (or its relocation to a different theater of operation)? This is the heart of the question posed by those individuals whose daily existence frequently leads to encounters with abandoned anti-personnel mines.

This Article shall attempt to answer the fundamental question of whether the use of anti-personnel land mines can be justified under international law. This Article concludes that further use of anti-personnel mines must be both arrested and discontinued, formalizing the view of the U.S. admirals and generals quoted at the beginning of this Article. This response is, in large part, founded on the principle that the practice of introducing this type of weapon in military theaters which subsequently cease being places of armed conflict unlawfully threatens the welfare of non-combatant civilian populations. Notwithstanding any initial use which may be considered lawful under *jus in bello*, this Article shall make the additional point that the continued employment of anti-personnel mines violates peremptory norms of international law—*jus cogens*.[11] To succeed

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10. *See* CHRISTOPHER, *supra* note 2.

11. The concept of peremptory norms [*jus cogens*] of international law generally applies to rules, obligations, or principles which are considered to be fundamental, inherent, or inalienable, as Professor Brownlie explains, but such classifications are not always successful in explaining the concept or identifying principles which are *jus cogens*. Brownlie has sensibly argued that *jus cogens* have the major distinguishing feature of being "relatively" indelible. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 512-13 (4th ed. 1990). Again, Professor Brownlie acknowledges that there are some principles constituting *jus cogens* that are less controversial, e.g., the prohibition of the use of force, the law

in these arguments, Part I of this Article first examines the primary justification for the deployment of this military hardware. Part II advances the argument that this justification fails to demonstrate the legality of the deployment and use of anti-personnel mines. Part III argues that the use of this particular type of military hardware violates *jus cogens*. In conclusion, this Article contends that the recommendation of the U.S. military officers who wrote to President Clinton is not only correct, but should be implemented and enforced by the civilized nations of the world as a peremptory norm of international law.[12]

II. INTERNATIONAL LAW'S GENERAL JUSTIFICATION FOR THE USE OF FORCE

The issues surrounding the nature and type of force which may be used by combatants in military conflict have been examined and debated for centuries. The evolution of legal principles addressing the permissible use of force by combatants has led to the development of rules of combat generally referred to as *jus in bello*. Some of the earliest commentaries addressing the type of force which may be used by combatants were offered by

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of genocide, the principle of racial non-discrimination, crimes against humanity, the principle of self-determination, the acknowledgment of sovereignty over natural resources, and rules prohibiting slavery and piracy. *Id.* at 513. Relevant to the discussion presented here, one concrete example of *jus cogens* is the prohibition of the use of force in the U.N. Charter. This essay will argue that contemporary international law can and must take the view that the continued use and leaving in place of anti-personnel mines is also one of these "indelible" principles. In taking this view, I recognize the point raised by Professor Brownlie and others that I face "a considerable burden of proof." *Id.* at 514. Yet, knowing the consequences of not making the argument, our world cannot afford not to take steps to meet this burden any longer. The Vienna Convention on the Law of Treaties, May 23, 1969, art. 64, 1155 U.N.T.S. 331, 347 (entered into force Jan. 27, 1980; not in force for the U.S.), U.N. Doc. A/Conf. 39/27 (1969) [hereinafter Convention], acknowledges that new peremptory norms of general international law can emerge over time, and when this occurs, any existing treaty which conflicts with the new norm "becomes void and terminates." Article 53 of the Convention further acknowledges that a treaty is automatically void if it conflicts with an existing peremptory norm. This article also defines a peremptory norm as one "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Id.* at 344.

12. *See* Barcelona Traction, Light and Power Co. (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5) (The Court stated that there are particular obligations in contemporary international law which outlaw certain types of aggression and genocide as well as "principles and rules concerning the basic rights of the human person.").

Plato, Aristotle, St. Augustine, and Thomas Aquinas.[13] More recently, nation states have come together to define in treaties, international conventions, and other agreements those military activities in which combatants may or may not engage.[14] A major development in the consideration of general rules of combat was the founding of the United Nations at the conclusion of World War II. While the U.N. Charter declared that the United Nations is "determined to save succeeding generations from the scourge of war,"[15] the U.N. Charter nonetheless acknowledges the right of sovereign states to "individual or collective self-defense if an armed attack occurs against a Member of the United Nations . . . ."[16] Although the right of self-defense is qualified and limited, member states of the United Nations established grounds for endorsing the principle of *jus ad bellum*—the customary law which justifies a sovereign state going to war. By acknowledging the existence of *jus ad bellum*, the U.N. membership tacitly implied that a just war—or at least a justified self-defense necessitating military action—can be furthered only by just means, *i.e.*, *jus in bello*.[17]

As the contemporary international legal community has addressed and further defined *jus in bello*, one important area of evolving legal norms displays the concern of nation states about protecting civilian populations from the injurious effects of armed conflict.[18] In particular, member states of the United Nations

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13. *See* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 3-6 (7th ed. 1991) [hereinafter USE OF FORCE].

14. *See, e.g., The Declaration of St. Petersburg, Nov. 29, 1868*, 1 AM. J. INT'L L. 95, 95-96 (Supp. 1907). Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, *in* 1 THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES, 1907, at 620 (Carnegie Endowment for International Peace trans., 1920).

15. U.N. CHARTER pmbl.

16. *Id.* art. 51.

17. The reader should note that, within the contemporary understanding of international law, self-defense should not be confused with self-help. *See* Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4, 33-35 (Apr. 9) (The I.C.J. noted that the British Navy's Operation Retail was not a legitimate defensive maneuver, but an unlawful intervention in the territorial sovereignty of another state).

18. *See, e.g.*, Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention]; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977*, 72 AM. J. INT'L L. 457 (1978) [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 16 I.L.M. 1442 (1978) [hereinafter Protocol II]; INTERNATIONAL COMMITTEE OF THE RED CROSS, 1978 RED CROSS FUNDAMENTAL RULES OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICT, *reprinted in*

came together in 1980 to prepare an international agreement, 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) [hereinafter the CCW]. Specifically, the CCW addressed the hazards and questionable practices experienced with the use of certain conventional weapons.[19] Although the CCW has been considered largely ineffective to date, Protocol II of this convention enumerates particular restrictions and prohibitions on the use of land mines and booby traps.[20] In spite of its limitations, this protocol gives much needed attention to the lingering problems encountered with the use of this type of ordnance.

The substance of Protocol II provides for: (1) explanatory definitions of the types of mines and booby traps covered;[21] (2) general restrictions on the use of these devices;[22] (3) restrictions where remotely and non-remotely delivered mines can be used;[23] (4) requirements concerning the keeping, maintaining, and publishing of records about the location of anti-personnel mines;[24] and (5) an exhortation urging international cooperation to remove mines, minefields, and booby traps used in military conflicts.[25] Again, notwithstanding the deficiencies of the CCW, the general tenor of Protocol II persuasively argues a general case for the cessation of the use and the quick removal or neutralization of these types of weapons.

At this point, the most fundamental question to be addressed regarding the existence and deployment of anti-personnel mines is whether any justification for their use exists. To find an answer, it is necessary to understand permissible and

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DOCUMENTS ON THE LAWS OF WAR 469 (Adam Roberts & Richard Guelff eds., 2d ed. 1989).

19. 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, and Protocols, Sept. 1981, 20 I.L.M. 1287 (1981).

20. The shortcomings of this Convention have been identified and debated in American legal journals. *See, e.g.*, Kenneth Anderson & Monica Schurtman, *The United Nations Response to the Crisis of Landmines in the Developing World*, 36 HARV. INT'L L.J. 359 (1995); Paul Lightfoot, *The Landmine Conference: Will the Revised Landmine Protocol Protect Civilians*, 18 FORDHAM INT'L L.J. 1526 (1995); Norman B. Smith, *A Plea for the Total Ban of Land Mines by International Treaty*, 17 LOY. L.A. INT'L & COMP. L.J. 507 (1995); Peter J. Ekberg, Note, *Remotely Delivered Landmines and International Law*, 33 COLUM. J. TRANSNAT'L L. 149 (1995).

21. Protocol II, *supra* note 18, art. 2.

22. *Id.* art. 3.

23. *Id.* arts. 4, 5.

24. *Id.* art. 7.

25. *Id.* art. 9.

impermissible warfare in the context of the development of *jus in bello*. Aquinas offered a foundation for answering this question generally when he maintained that war can be justified if three criteria are met: (1) the sovereign who wages war has the authority to do so; (2) once the authority is established, the war is waged for a "just cause"; and (3) the belligerents who pursue this just cause have a "rightful intention" in which they propose to advance good and avoid evil.[26] In the Thomistic context, the belligerents who employ anti-personnel mines would most likely be able to justify their use if all three criteria for the just war are convincingly met.

However, even if the use of such military hardware may be initially justified, the justification will cease if any one of these three essential requirements is no longer satisfied. Again, within the Thomistic realm, a force which may initially be lawful in the conduct of a just war may become unlawful, even though both the just cause and the authority remain, because an aspect of the conflict promotes evil rather than good. Obviously, if none of the three elements established by Aquinas remains, the justification evaporates. Aquinas also offered his own further insight relevant to the deliberation of the legality of anti-personnel mines when he examined whether it is lawful to take the life of the innocent. In recognizing that Abraham was prepared to slay his innocent son, Isaac, at God's request (even though God prevented him from executing the request), [27] Aquinas contended that it is unlawful to "slay the innocent" because the life of the righteous person "preserves and forwards the common good," and furthermore, because each person is a part of the community.[28] In the context of deliberating the legitimacy of anti-personnel mines, farmers and children are in a worse position than Isaac, for the former are indeed being slaughtered by the thousands.[29]

These principal points raise two other important considerations that are both relevant and important in ascertaining whether the means of contemporary warfare in a presumed just war can be justified on moral grounds. These considerations are: (1) is the force used discriminate, and (2) is it

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26. ST. THOMAS AQUINAS, SUMMA THEOLOGIAE, Part II-II, Question 40.

27. *Genesis* 22:1-12.

28. *Summa Theologiae*, Part II-II, Question 64, art. 6.

29. The U.S. State Department estimates that anti-personnel mines maim or kill 2,000 people per month. *Treading Gingerly: Landmines*, ECONOMIST (U.K.), Apr. 27, 1996, at 46. *See also* Nomi Morris, *The Hidden Killers: Canada Steps up the Fight for a Global Ban on Land Mines*, MACLEAN'S, June 3, 1996, at 22 (noting that mines kill or maim up to 20,000 civilians annually and stating that children are particularly at risk).

proportional? As one examines the body of international agreements concerning the use of force in armed conflict, these two considerations surface throughout this corpus of international law addressing *jus in bello*. Consequently, a major factor in ascertaining whether the military force is used in self-defense is whether it is discriminate and proportional.

For force to be *discriminate*, it must be directed only against the combatant aggressor. The source of this rubric can be traced back to the Biblical admonition not to slay the righteous and innocent.[30] In a contemporary context, this exhortation can be construed as limiting military engagement and its consequences to those who are combatants, and not extending it to civilian populations of neutrals or citizens of the combatant states. While the distinction between combatant and non-combatant is not always easy to make,[31] certain classes of individuals are readily definable as non-combatants, *i.e.*, children and others whose activities make little or no substantive contribution to the efforts of the combatant.[32] At the heart of the concept of discrimination is the principle that for military action to be lawful it must not be directed against the non-combatant or innocent. While this may not always be an easy norm for the combatants to implement, it is an obligation which invariably attaches to the military pursuits of the combatants if the combatants wish to conduct their military affairs in accordance with *jus in bello*.[33] As Professor Lieber articulated in his instructions to the Union Army during the American Civil War, "the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit."[34]

In the context of the more recent Geneva Conventions of 1949, the subject of discrimination is addressed in the principle that indiscriminate attacks are prohibited.[35] Within the contemporary domain of modern warfare, this principle means

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30. *Exodus* 23:7.

31. *See* JOHN FINNIS ET AL., NUCLEAR DETERRENCE, MORALITY AND REALISM 88-89 (1987).

32. *Id.* at 90.

33. Professor Lieber sheds some insight on this matter; he notes that commanders have the obligation, where "admissible," to alert the enemy to prospective bombardment so that civilian populations could be spared. However, he also recognized that the need for surprise might absolve the commander of the notice requirement. Francis Lieber, *Instructions for the Government of Armies of the United States in the Field, in* NAVAL WAR COLLEGE, INTERNATIONAL LAW DISCUSSIONS, 1903: THE UNITED STATES NAVAL WAR CODE OF 1900 app. II, art. 19, at 118-19 (1904) [hereinafter INSTRUCTIONS].

34. *Id.* art. 22, at 119.

35. Protocol I, *supra* note 18, art. 51.

that certain factors must be considered in determining whether force used in the military exercise is discriminate or indiscriminate. Guidelines for defining whether military conduct is discriminate or not include a determination of whether attacks: (1) can or cannot be directed at a specific military target; (2) employ combat means and methods which can or cannot be restricted to military targets alone; or (3) use means of combat which can or cannot otherwise be restricted as required by the terms of Protocol 1.[36]

Once the evaluator of the conflict determines whether the military action is discriminate or not, an examination of the force actually employed will follow. A helpful way of expressing this point is through the suggestion that the military force employed is only that necessary to accomplish the legitimate purpose of self-defense; therefore, any force extending beyond that necessity would be disproportional and would negate the legitimacy of the force used. As Professor Brownlie has registered, "the force used must be proportionate to the threat."[37] The concept of proportionality is vital to determine whether discriminate military action taken by the combatant may be justified under the doctrine of *jus in bello*. One could analogize the principle of proportionality to the concept in tort law that a person can take only those steps reasonably necessary against the aggressor who threatens the security of the defender. The international law notion of proportionality is akin to the Anglo-American principle that one is entitled to self-defense with that force necessary to repel the unprovoked attack. The force called upon to repel the attack must be proportional to the threat which the defender faces and must continue for only such duration as needed to complete the defense successfully.[38]

By way of example, the question of whether or not the use of nuclear weapons can be justified raises the issue of whether the use of certain weapons of mass destruction violate international legal norms. In an advisory opinion issued on 8 July 1996, the

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36. *Id.* art. 51.4.

37. USE OF FORCE, *supra* note 13, at 261.

38. Professor Lieber addressed the matter of proportionality in his INSTRUCTIONS when he declared that "[u]nnecessary or revengeful destruction of life is not lawful." INSTRUCTIONS, *supra* note 33, art. 68, at 126. As he argued, the infliction of further wounds or the killing of an enemy who is already disabled commits a "misdeed" punishable by death. *Id.* art. 71, at 27. One could reasonably argue from Lieber's point that the intentional maiming or killing of a non-combatant in the conduct of an otherwise just war would also constitute the kind of serious misdeed punishable by death. As he stated in Article 25, "protection of the inoffensive citizen of the hostile country is the rule; privation and disturbance of private relations are the exceptions." *Id.* art. 25.

International Court of Justice raised the possibility that, with the exception of extreme cases of self-defense, the use of such weapons might be contrary to international legal principles regarding the law of war as well as humanitarian law.[39] With regard to the use of conventional weapons such as maritime mines, an overwhelming majority of the International Court of Justice in the case of *Nicaragua v. United States* (Merits) found that the use of sea mines which threatened civilian interests, *i.e.*, peaceful maritime commerce, along with the failure to give notice of the existence and location of mines, violated customary international law.[40]

III. THE *JUS IN BELLO* JUSTIFICATION FOR ANTI-PERSONNEL MINES FAILS

This analysis, concentrating on the effect of anti-personnel mines on non-combatants (most often children and farmers), now examines those norms of international law found in agreements, covenants, and other sources which define the contemporary understanding of *jus in bello.* This concept of *jus in bello* addresses the means of modern warfare and the considerations these legal norms give to civilian populations. The use of anti-personnel mines will then be evaluated in this context. The

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39. *See* Legality of the Threat or Use of Nuclear Weapons, 1995 I.C.J. 3 (July 8). The conclusions of the Court are found in Paragraph 105 of its opinion where if unanimously found: (1) that neither customary nor conventional international law specifically authorizing the threat or use of nuclear weapons; (2) that the threat or use of nuclear weapons contrary to Article 2, Paragraph 4 of the United Nations Charter (the threat or use of force by one state against another state's territorial integrity or political independence) which does not comply with the requirements of Article 51 of the Charter (lawful self-defense) is unlawful; (3) that any threat or use of nuclear weapons must be compatible with those principles of international law regulating armed conflict as well as those principles of humanitarian law; and, (4) that there is an obligation to pursue and "bring to conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control." The Court was evenly split on the issue of whether the threat or use 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." *Id.* ¶ 105.

40. *See* Military and Paramilitary Activities in and against Nicaragua (Nicar. V. U.S.), 1986 I.C.J. 14, 147 (June 27) (The Court, by vote of twelve to three, concluded that the laying of mines in the internal and territorial waters of Nicaragua violated customary international law because such action interrupted peaceful maritime commerce.). Moreover, the Court, by a vote of fourteen to one, concluded that the United States, "by failing to make known the existence and location of the mines laid by it . . . has acted in breach of its obligations under customary international law . . . . " *Id.* at 147-48.

analysis concludes that the introduction of this kind of ordnance fails to comply with *jus in bello*.

In view of the fact that the U.S. Civil War has generally been identified as the first war of modern times, one can begin with the concerns raised during and after that conflict about the protection to be extended to civilian populations by combatants.[41] In 1863, the U.S. Department of War engaged Professor Francis Lieber to draft instructions which would guide the conduct of the Union Army. Although he wrote for those conducting a war in which modern weapons such as aerial surveillance, long-range artillery, and machine (Gatling) guns were being employed for the first time, Lieber's instructions generally reflected the conventional norms of warfare which grew out of the tradition of Augustine,[42] Aquinas, and Grotius.[43] As Professor Waldemar Solf has noted, "Lieber outlined in considerable detail those measures which were permitted and those which were prohibited by customary law."[44] With regard to conduct adversely affecting non-combatant civilians, Lieber cautioned that "protection of the inoffensive citizen of the hostile country is the rule; privation and disturbance of private relations are the exceptions."[45] Lieber's instructions certainly followed the general principles contained within *jus in bello* in this regard. Since the U.S. Civil War, nation states have generally agreed to the principles as refined by Lieber in the several agreements and conventions entered since the 1860's. A brief review of the substance of these agreements and conventions will illustrate and confirm the point he made over one hundred and thirty years ago.

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41. It is obvious that the actual treatment of civilian populations by military forces has not always followed the rules of engagement. One need only turn to the events of the American Civil War, the two World Wars, as well as the Korean and Viet Nam conflicts.

42. *See, e.g.*, ST. AUGUSTINE, CONCERNING THE CITY OF GOD AGAINST THE PAGANS Book XIX, Ch. 7 (Henry Bettenson trans., 1972). Augustine acknowledges the horrors of war and implies that human beings ought to desire a world free from armed conflict. However, he sees that in some prescribed circumstances, armed conflict is necessary and justifiable if it is needed to eliminate injustice in the world. *Id.* For a helpful commentary on Augustine's discussion of the just war theory as it relates to the protection of non-combatants, see PAUL RAMSEY, WAR AND THE CHRISTIAN CONSCIENCE: HOW SHALL MODERN WAR BE CONDUCTED JUSTLY? 15-33 (1961).

43. In his *The Rights of War and Peace*, Grotius advocated rules of combat which would protect non-combatants. HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE (William Whewell trans., 1853).

44. Waldemar Solf, *Protection Of Civilians Against The Effects of Hostilities Under Customary International Law and Under Protocol 1*, 1 AM. U.J. INT'L L. & POL'Y 117, 121 (1986).

45. INSTRUCTIONS, *supra* note 33, art. 25, at 119.

An important place to begin a review of the modern adaptation of *jus in bello*, especially with victim-triggered weapons, is with the 1907 Hague Convention VIII Relative to the Laying of Automatic Submarine Contact Mines. Noting that the freedom of peaceful navigation is vital even during times of war, Article 1 of this agreement forbade the use of unanchored automatic contact mines unless they were designed to disarm themselves no more than an hour after being deployed.[46] The same article also forbade the use of anchored automatic contact mines which would not self-disarm if the tether were broken.[47] Articles 2 and 3 refined the general principles of this convention by explaining that the agreement's substantive content was designed to protect commercial (civilian) shipping. Once hostilities prompting the legitimate use of contact mines ceased, states which had laid these mines were obliged "to do their utmost to remove the mines which they had laid . . . ."[48] While the convention was largely ineffective at controlling the tactics employed by belligerents during the First and Second World Wars, it nonetheless provided instruction, reflecting *opinio juris*, which distinguished between discriminate and indiscriminate use of this type of weapon. This convention, moreover, was useful in recognizing some important principles of international law in legal disputes that arose between states after the conclusion of the Second World War. For example, in deciding the *Corfu Channel* case as well as *Nicaragua v. United States*, the International Court of Justice acknowledged and relied upon those two principles of the 1907 Hague Convention: (1) requiring notice of the existence and location of mines in order to protect peaceful shipping, and (2) identifying conduct about the use of certain kinds of ordnance which is impermissible in times of war as well as peace.[49]

At the time that the Convention on the Use of Submarine Contact Mines was being deliberated, many representatives of participating states also addressed in Convention VI the status of enemy merchant ships and the protection to be accorded them at the outbreak of hostilities. Article 1 of Convention VI declared

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46. Convention Relative to the Laying of Automatic Submarine Contact Mines, Oct. 18, 1907, *in* 1 THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCE, 1907, art. 1, at 643 (Carnegie Endowment for International Peace trans., 1920).

47. *Id.*

48. *Id.* art. 5, at 644.

49. *See* Military and Paramilitary Activities, *supra* note 40, at 48 (The Court found that the United States laid mines in the internal and territorial waters of Nicaragua without issuing any notice about the deployment and location of these mines which eventually caused civilian casualties as well as property damage and loss.); *see also Portugal v. Germany (The Cysne)* 30 June 1930 concerning the protection of neutral civilian shipping during World War I.

that it is "desirable" to allow of allowing civilian shipping to leave hostile waters unmolested at the outbreak of the hostilities.[50] The underlying justification of this principle is advanced in Article 3, providing for the safety of civilian personnel on board. Once again, the evolving law of *jus in bello* demonstrated that belligerents must not direct hostile or life-threatening force against non-combatants.

After the hostilities of the First World War ceased, representatives of belligerents came together at the Hague with the hope of developing legally binding principles to address a growing concern—aerial warfare. An aftermath of the First World War was the recognition of the potential destructiveness of aerial warfare against civilians and their property. While the principles then developed did not become legally binding at that time, the 1923 Hague Draft Rules were an attempt to control aerial bombing which can have a significant adverse effect on non-combatants. The most explicit provisions of the Draft Rules addressed and prohibited the use of aerial bombardment to terrorize civilian populations and destroy their property.[51] Ironically, less than two decades later, attacking civilian targets was the specific intention of Imperial Japan in the Second World War when it launched balloons containing cargoes of harmful biological materials and chemical agents and directed them toward the United States.[52]

While the Draft Rules did not become legally binding, they embodied the attempt of several nations to codify what were believed to be the laws of aerial warfare. Articles 24 through 26 of the Draft Rules defined with greater specificity the aerial tactics which would be permitted and those which would be prohibited. Because these Draft Rules were never implemented and enforced, the aerial military actions in the 1930's taken by Nazi Germany during the Spanish Civil War, by Japan against China, and by Italy against Ethiopia intensified the need for regulation of aerial warfare particularly when it compromised the safety and welfare of civilian populations.

The events involving military and other state action against civilian populations during World War II again raised the need for

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50. Convention Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, Oct. 18, 1907, *in* 1 THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCE, 1907, art. 1, at 673 (Carnegie Endowment for International Peace trans., 1920).

51. The 1923 Hague Rules of Aerial Warfare, art. 22, *in* DOCUMENTS ON THE LAWS OF WAR 121 (Adam Roberts & Richard Gueff eds., 2d ed. 1989).

52. *See, e.g.*, Nicholas D. Kristof, *Unmasking Horror, Japan Confronting Gruesome War Atrocity*, N. Y. TIMES, Mar. 17, 1995, at A1.

international regulation designed to increase and reinforce the protection of non-combatants. The International Military Tribunals, convened in 1945 and 1946 at Nuremberg and Tokyo respectively, were instituted to address the atrocities which government officials of Nazi Germany and Imperial Japan perpetrated against non-combatant civilian populations. For example, the Charter of the International Military Tribunal relied on the concept of *jus in bello* to define the term *crimes against humanity* as the "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population . . . ."[53] The efforts of the international military tribunals in defining principles of international law protecting non-combatants in times of war ultimately led the United Nations to draft the 1948 Convention of the Prevention of the Crime of Genocide.

The program of mass extermination devised and implemented by the Nazi government against Jews and other groups prompted the members of the newly formed United Nations to codify a comprehensive body of fundamental principles declaring that such actions contravene customary law.[54] With encouragement from the General Assembly debate that focused on the horrors of World War II, the contracting parties signed the 1948 Convention which entered into force on 12 January 1951. Article 1 of this Convention declares that genocide, whether committed in times of war or peace, is a criminal activity under international law. Article 2 defines genocide as "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group."[55] About 100 nations have ratified, acceded to, or succeeded to this convention. The 1948 Convention quickly paved the way for other international agreements designed to protect civilian populations from the tragedy of war and other armed conflicts.

A year after the drafting of the Genocide Convention, the 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War was signed.[56] While earlier conventions

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53. Charter of the International Military Tribunal, Aug. 8, 1945, art. 6, 82 U.N.T.S. 279, 288.

54. G.A. Res. 96(I), U.N. G.A.O.R., U.N. Doc. A/64/Add.1, at 188-89 (1946).

55. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 2, 78 U.N.T.S. 272 (entered into force Jan. 12, 1951). Article II further specified that such acts consist of killing members of the group, causing them serious bodily or mental harm, deliberately inflicting conditions intended by the perpetrator(s) to bring about physical destruction, preventing births, and forcibly transferring children from the group.

56. Geneva Convention, *supra* note 18, art. 147.

and international agreements largely addressed how combatants were to be treated, this convention was the first major agreement to address the protection to be extended to non-combatants.

The need for formal guidance about the conduct of warfare affecting civilian populations becomes all the more pressing when one considers the devastating widespread effect modern means of warfare such as aerial bombardment can and often do have beyond their immediate target areas. The drafters of Convention IV were also conscious of the fact that modern warfare could be used in situations where war has not been formally declared by a combatant. Consequently, Article 2 of this convention announced that its provisions would also apply to cases of armed conflict where a participant has not acknowledged that it is engaged in a state of war. This convention, moreover, was to apply in situations where the conflict was not between states, but was internal and did not have a traditional international character.[57] The class of persons protected by this convention consists of any individuals who find themselves "in the hands of a Party to the conflict or Occupying Power of which they are not nationals."[58] Unfortunately, nationals of states not bound by the convention would not be among those individuals protected.[59] Some amelioration of this problem is given in Part II of the convention. For example, Article 13 declares that the populations of the states in conflict are to receive certain protections; however, this provision grants a great deal of discretion to the combatant state. The safeguards afforded by it generally focus on protecting civilians from the actions of occupying forces.[60]

Within the minds of many who concern themselves with the consequences of both international and internal conflicts that expose innocents to the atrocities of modern warfare, an emerging consensus echoes the point this Article attempts to establish. By way of example, Professor Theodor Meron has noted that there is a growing and solidifying "international consensus on the legitimacy of the Nuremberg principles, the applicability of universal jurisdiction to international crimes, and the need to punish those responsible for egregious violations of international humanitarian law . . . ."[61] The establishment of the Yugoslav and Rawandan war crimes tribunals serves as evidence of Professor Meron's point. But in the realm of armed conflict conventionally

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57. *Id.* art. 3.
58. *Id.* art. 4.
59. *Id.*
60. *See generally id.* at Part III.
61. Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 554 (1995).

known as "internal affairs" into which *jus in bello* and international humanitarian law did not historically interfere, neither "moral justification" nor "persuasive legal reason [exists] for treating perpetrators of atrocities in internal conflicts more leniently than those engaged in international wars."[62]

Thus, some of the shortcomings of the 1949 Geneva Convention have been remedied by the subsequent 1977 Geneva Protocol I Additional to the Geneva Conventions of 1949 (Relating to the Protection of Victims of International Armed Conflicts). The "basic rule" of Protocol I (1977) provides for the "respect for and protection of the civilian population and civilian objects" through the mandate that parties to armed conflict are to at "all times distinguish between the civilian population and combatants and between civilian objects and military objectives" so that all lawful military actions must be directed exclusively against military targets.[63]

Part IV of Protocol I contains the substantive provisions applicable to civilian populations and begins with Article 48 (Basic Rule) mentioned earlier.[64] The heart of this protocol's protection of civilian populations commences with the assertion that both civilian population(s) and individual civilians are to receive the general protections of Protocol I.[65] Fundamentally, those individuals and groups protected by Protocol I "shall not be the object of attack . . . [a]cts or threats of violence" designed to spread terror among civilians.[66] Under the terms of this protocol, civilians are to receive protection from "indiscriminate attacks" which (1) are not directed at specific military targets; (2) use means of combat which cannot be restricted to specific military objectives; or (3) employ a means of combat whose effects cannot be limited as mandated by Protocol I.[67] Of course, civilians would lose the protections of the protocol if they were to "take a direct part in hostilities."[68] As a practical matter, however, the

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62. *Id.* at 561.

63. Protocol I, *supra* note 18, art. 48.

64. The definition of "civilian" essentially includes any person who is not a member of the "armed forces" of a belligerent party. It is important to note that subsection (3) of this same article states that "[t]he presence within the civilian population of individuals who do not come within the definition of civilian(s) does not deprive the population of its civilian character." *Id.* art. 48.3. Moreover, subsection (1) points out that where there is doubt about whether or not a person is a member of the Armed Forces or a civilian, "that person shall be considered to be a civilian." *See id.* art. 50.

65. *Id.* art. 51.1.

66. *Id.* art. 51.2.

67. *Id.* art. 51.4.

68. *Id.* art. 51.3.

application of this last exception becomes increasingly difficult when only some, but not all, individuals from the civilian population participate in hostilities. There is, moreover, ambiguity in what constitutes taking a "direct part in hostilities" because this concept is not defined by the protocol. However, as has been noted earlier, where doubt exists about whether or not a person is a combatant or a civilian, it is presumed that such individual is a civilian.[69]

An element of Protocol I with far-reaching implications is Article 55. The drafters of this protocol understood that environmental modifications to and other activities compromising the integrity of man-made works such as dams, dykes, and nuclear power facilities could unleash damaging forces prejudicial to the health and survival of the civilian populations.[70] Any activity which would lead to such modifications or compromises must be strictly forbidden even though no immediate effects can be perceived. These provisions have special relevance to the principal issue examined by this Article in that the placement and abandonment of anti-personnel mines also adversely affects the environment in which innocent civilians live.[71]

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69. *Id.* art. 50.1.

70. *See* Geoffrey Parker, *Early Modern Europe, in* THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD 40, 46-47 (Michael Howard et al. eds., Yale Press 1994) (discussing the parallels between the plans of the Spanish government in the sixteenth century to flood the lowlands of Holland with the plans of the United States in the twentieth century to flood parts of Viet Nam). In both cases, Phillip II and President Johnson exercised sound moral justification to forbid such tactics. *Id.*

71. Janet E. Lord has argued the connection between the ongoing use of anti-personnel mines and despoliation of the environment. Janet E. Lord, *Legal Restraints in the Use of Landmines: Humanitarian and Environmental Crisis*, 25 CAL. W. INT'L L.J. 311 (1995). Professors Edith Brown Weiss and Anthony D'Amato have engaged in a debate concerning general obligations which the present generation of humanity has to succeeding generations which has application to the more particular questions surrounding the dangers to the human environment posed by the installation of and the failure to remove anti-personnel mines. *See* Edith B. Weiss, *Our Rights and Obligations to Future Generations for the Environment*, 84 AM. J. INT'L L. 198 (1990); Anthony D'Amato, *Do We Owe a Duty to Future Generations to Preserve the Global Environment?*, 84 AM. J. INT'L L. 190 (1990). In 1977, the U.N. membership also drafted the 1977 United Nations Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, which further emphasized the dangers to the human environment posed by either military or other hostile means of environmental modification. *Draft Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques*, [1976] 1 Y.B. on Disarmament 287, U.N. Sales No. E.77.IX.2. The efforts by the United States in its conflict with Viet Nam to use chemical agents to defoliate vegetation for military purposes seems to have been a major catalyst for this convention. Also, there was concern that the United States was also attempting to modify weather

While Protocol I is designed to address international military conflicts, Protocol II of 1977 as previously mentioned is directed at internal conflicts, civil wars, and military activities. A major purpose of the second protocol is to ensure that civilian populations are protected from armed conflict regardless of whether the conflict has an international flavour or whether it is an internal matter not generally subject to regulation by international law. Thus, the preamble of Protocol II notes that its fundamental intent is to apply to internal conflicts the general provisions of Article 3 of the 1949 Geneva Conventions, concerning international conflicts as well as Article 1 of Protocol I. Article 4.2(a) presents the basic prohibition designed to protect civilians from "violence to the life, health, and physical or mental well-being of persons . . . ." Additionally, Article 13 gives expansive protections to "civilian population[s] and individual civilians" from the "dangers arising from military operations."[72] The intent of these protections reflects those found throughout Protocol I.[73]

Moreover, Protocol II extended the principles of Protocol I to the largely internal conduct of guerrilla warfare which, like international conflicts, was producing an increasingly deleterious effect on non-combatant civilians who were often victimized by both guerrilla and state armed forces.[74] In addition to extending international legal principles into traditionally internal matters,

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patterns which would have deleterious effects on life-sustaining as well as life-threatening water bodies. As a consequence of these past events and concern about their repetition in the future, the parties to the Convention in the Preamble acknowledged "that military [or other hostile] use of environmental modification techniques could have widespread, long-lasting or severe effects harmful to human welfare." *Id.* Article II of this convention defined "environmental modification techniques" as any means of modifying "through the deliberate manipulation of natural processes—the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space." *Id.* art. II. Article III recognized that there are some peaceful, man-made environmental modifications which can be beneficial to man and the environment. *Id.* art. III. However, the drafters of the *Assistance in Mine Clearance, Report by the Secretary-General*, U.N. GAOR, 50th Sess., ¶ 2, U.N. Doc. A/50/408 (1995), have noted that anti-personnel mines are a form of pollution. Like all pollution, this dangerous litter threatens human activities and life.

72. Protocol II, *supra* note 18, art. 18.

73. *See id.* arts. 13-15; *see also Assistance In Mine Clearance: Report by the Secretary-General, supra* note 70, ¶ 2.

74. Concern about the civilian victims of non-international conflicts also received attention when the Swiss government convened the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts in 1974. Representatives of then-existing guerrilla forces and national liberation movements were invited to participate in the deliberations, although only states were allowed to vote.

the two 1977 protocols related evolving human rights law with the law of war for the first time.[75] As Article 1.2 of Protocol I states, "civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."[76]

These international agreements, along with the general tradition of *jus in bello*, set the foundation for the 1981 United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons (CCW). Although the Diplomatic Conference which drafted the 1977 Protocols I and II for the 1949 Geneva Conventions attempted to address the question of certain kinds of conventional weapons, no consensus was reached on these matters by the time Protocols I and II were completed for signature. Consequently, the United Nations in December 1977 voted that a specific international conference would be convened to address the use of such conventional weapons as (1) those which imbed fragments into human beings not detectable by x-ray [Protocol I]; (2) mines, booby traps, and related devices [Protocol II]; and (3) incendiary devices [Protocol III]. Shortly after passage of this general resolution, U.N. member states convened to address these three categories of conventional weapons. A major focus of this convention was to prohibit the deployment and use of weapons which cause unnecessary suffering—especially by non-combatant civilians.[77]

Protocol II of the CCW deals with landmines and booby traps and is most pertinent to this study. This protocol defines a mine as "any munition placed under, on or near the ground . . . and designed to be detonated . . . by the presence, proximity, or

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75. *See* DOCUMENTS ON THE LAWS OF WAR, *supra* note 51, at 388, where the authors suggest that:

> the distinction between the two areas [human rights law and the laws of war] began to be blurred. On the one hand, the provisions of the 1949 Geneva Conventions came to be seen as embodying individual rights of protected persons; and on the other hand, certain human rights conventions included provisions for at least their partial application in time of war.

76. Protocol I, *supra* note 18, art. 1(2) defined "rules of international law applicable in armed conflict" as not only those principles set forth in international agreements applicable to specific conflicts, but also "the generally recognized principles and rules of international law which are applicable to armed conflict." *Id.* art. 2(b).

77. *See* United Nations Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons: Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps, and Other Devices (Protocol II), Apr. 10, 1981, 19 I.L.M. 1523, 1530 (1980) [hereinafter CCW Protocol II].

contact of a person. . . ."[78] Article 2.1 of this Protocol also defines a "remotely delivered mine" as "any mine so defined [previously] delivered by artillery, rocket, mortar, or similar means or dropped from an aircraft."[79] A booby trap for the purposes of this convention is "any device . . . which is designed, constructed or adapted to kill or injure and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act."[80] Article 3's general restrictions prohibit the use of mines or booby traps "in *all circumstances* . . . either in *offence*, *defense* or by way of *reprisals*, against the *civilian population* . . . or against *individual civilians*."[81] This protocol, furthermore, reiterates traditional *jus in bello* principles and outlaws the indiscriminate use of conventional weapons (1) which are not directed against a military objective, (2) which use delivery methods that cannot be directed at specific military targets, or (3) which, when employed, "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."[82] In addition, use of such weapons in areas of civilian concentration is also prohibited once combat ceases in these areas, or it "does not appear imminent."[83]

Unfortunately, combatants responsible for deployment of these weapons may still avoid liability for violation of the provisions if they: (1) issue appropriate warnings, or (2) cordon the areas of deployment from civilian access.[84] A further problem with Protocol II is that it provides for the opportunity to deploy remotely delivered ordnance if deployment is directed toward military objectives and the location can be accurately recorded. However, if this is not possible, the weapons may still be used if they will be effectively neutralized when they "no longer serve the military purpose for which [they were deployed]."[85] Other safeguards mandate the recording and publication of locations of anti-personnel mine deployment as well as taking those steps necessary to protect civilians from the "effects of minefields, mines, and booby traps."[86] In addition, the Convention provides

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78. *Id.* art. 2.1.
79. *Id.*
80. *Id.* art. 2.2.
81. *Id.* art. 3.3 (emphasis added).
82. *Id.* art. 3.3.
83. *Id.* art. 4.2.
84. *Id.* art. 4.2(b).
85. *Id.* art. 5.
86. *Id.* art. 7.3(I).

for international co-operation in the removal of minefields, mines, and booby traps.[87] Protocol II also incorporated a technical annex which provided specific guidelines for recording the location of the buried conventional weapons.

Notwithstanding these provisions, some of which constitute enforceable international law and others of which suggest the direction in which international law may be evolving, the current deployment and abandonment of anti-personnel mines are inconsistent with the most fundamental principles of *jus in bello*. This position becomes more certain as one considers the long tradition of law of war as well as humanitarian laws which preclude the employment of any weapon that indiscriminately harms tens of thousands of innocent non-combatants every year. Moreover, the use of anti-personnel mines is disproportion to accomplishment of permissible military goals. Therefore, their continued deployment cannot be justified under *jus in bello* since their introduction and abandonment fail to abide by traditional norms regulating the waging of war which adversely affects civilian populations.

IV. THE *JUS COGENS* ARGUMENT AGAINST ANTI-PERSONNEL MINES

Up to the present day, members of the international community continue to labor for the banning of anti-personnel mines. This campaign is consistent with the conclusion of the previous section that the *jus in bello* justification for anti-personnel mines fails. The movement to eliminate these mines is taking place on several fronts, including proposals for the (1) discontinuance of their use in all military theaters, (2) clearing of existing mine fields, and (3) eradicating of the international trade of this military hardware.[88] On 15 December 1994, the U.N. General Assembly in Resolution 49/75 urged member states which had not already taken steps to do so to declare a moratorium on the export of anti-personnel mines. Paragraph 4 of this general resolution tied its principal concerns with Protocol II of the 1980 CCW. With the United Nations reiterating in 1994 concerns which were raised earlier in the CCW, renewed hope emerged concerning the possibility of reducing or even eliminating the ever-growing threat posed by anti-personnel mines.

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87. *Id.* art. 9.

88. *See generally Moratorium on the Export of Anti-Personnel Land-Mines, Report of the Secretary-General, supra* note 2 (discussing the steps taken by several U.N. member countries).

Regrettably, the Secretary-General noted in his 23 June 1995 correspondence to the foreign ministers of states which were not party to the 1980 CCW that approximately four to ten million additional anti-personnel mines had been deployed since 1993. As a counterpoint to these new problems, a number of member states did take unilateral action by adopting their own moratoria on the use and proliferation of anti-personnel mines.[89] But much work remains to be done in eliminating this monstrous ordnance from the farms and play areas where virtually all of the victims of anti-personnel mines are claimed today. As the International Committee of the Red Cross (ICRC) has recently noted, the toll of civilian casualties—such as the innocent civilians identified by the American flag officers—continues at the alarming rate of approximately 25,000 casualties per year.[90] While this number is appalling, only one civilian casualty per year would still be too great. The question now becomes whether the world of international law has done everything it can to stop the slaughter and maiming of innocents caused by these diabolical weapons.

This author's response, as suggested at the outset of this Article, is that an argument can be made that the continued use and trade of these devices as well as the failure to remove them constitute violations of peremptory norms of international law. A crucial purpose for making this argument is to facilitate the ability for international organizations as well as sovereign states to take whatever actions are available and consistent with the enforcement of *jus cogens* to curtail if not eliminate the ongoing, unjustifiable casualties claimed by anti-personnel mines.[91] While many individuals recognize that there are difficulties in enforcing peremptory norms of international law, it remains essential to demonstrate why the use of anti-personnel mines which causes so many unnecessary and unreasonable casualties every year must be halted as quickly as possible.[92] The *jus cogens* argument offers a strong, and perhaps the strongest, incentive for those combatants who continue to deploy anti-personnel mines to

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89. *Id.* ¶¶ 7-8.

90. *See* ICRC STUDY, *supra* note 3, § 1, ¶ 2.

91. *See, e.g.*, Richard Baxter, *The Municipal and International Law Basis of Jurisdiction over War Crimes*, 28 BRIT. Y.B. INT'L L. 382 (1951).

92. *See* Marlise Simons, *Italian Issues a Warning at War Crimes Tribunal*, N.Y. TIMES, July 26, 1996, at A12 (pointing out that the Yugoslav War Crime Tribunal provides another example of the difficulty in enforcing norms of international law). Professor Antonio Cassese, President of the Yugoslav War Crimes Tribunal, allowed his calm judicial and professorial temperament to be interrupted by his disgust with the prospect of the tribunal's failure. *Id.* He expressed his objection with the outburst, "Go ahead! Kill, torture, maim! Commit acts of genocide!" *Id.*

desist once and for all. There are, as Professor Meron has argued, tools at the disposal of the international community as well as individual sovereign states to stop atrocities which are "a matter of major international concern."[93] As Professor Schachter has further noted, *jus cogens* are "rules of necessity" which cannot be derogated by multiple states' practices or by international agreement.[94] While a high burden must be satisfied in arguing that a particular principle is *jus cogens*,[95] substantial evidence satisfies this burden and demonstrates that the use or failure to remove or otherwise neutralize anti-personnel mines violates *jus cogens*. One need only reflect for a moment on the uninterrupted daily maiming and slaughter of innocents. These statistics mount a persuasive body of evidence which illustrates, as Professor Schachter implies, the necessity for rules banning further deployment and punishing persistent users of these obnoxious devices.[96]

While it is difficult to identify comprehensively peremptory norms of international law, certain norms emerge with little difficulty, *i.e.*, those rules prohibiting piracy and slavery, those supporting national self-determination and the equality amongst states, those prohibiting the use of force and genocide, those concerning crimes against humanity, and those addressing racial non-discrimination.[97] If it is the nature of fundamental necessity and the quality of anti-derogation that contribute to making a principle of international law into a peremptory norm, the norm advocated by this Article should also possess this nature and quality. If there is a "considerable burden of proof" which must be met to identify the peremptory norm, this Article advances the evidence in support of this proposition that will amply demonstrate its necessity and its non-derogable nature. If *jus cogens* are non-derogable norms which emerge from international law, the sources of the norm advocated by this Article have their roots in custom and international agreement—or a synthesis of the two.

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93. *See* Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 554 (1995) (arguing that an international consensus exists which is built upon the "legitimacy of the Nuremberg Principles, the applicability of universal jurisdiction to international crimes, and the need to punish those responsible for egregious violations of international humanitarian law . . . . ").

94. OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 30-31 (1991).

95. *See* BROWNLIE, *supra* note 11, at 514.

96. *See* SCHACHTER, *supra* note 94, at 30-31 (discussing as a basic rule of necessity "the duty to observe basic humanitarian rules of warfare").

97. *See* BROWNLIE, *supra* note 11, at 513.

A synthesis of the applicable sources of international law shows that norms regarding warfare in general, and anti-personnel mines in particular, overlap with the essential content of existing peremptory norms involving human rights. In substantial part, the legal principles concerned with the regulation of mines have surfaced time and again in the evolution of "human rights " over the past century. The concerns of human rights law demonstrate the necessity to protect human life; moreover, these concerns are surrounded by the non-derogable norm that innocent human life is to be protected rather than threatened. This synthesis emerges, furthermore, from the consistent and growing global concern for the security of every person's life and well-being. If the actions of slavery and piracy—both of which have extremely adverse effects on human life—are deemed to violate peremptory norms of international law, one can logically argue that the use of anti-personnel mines raises substantial, parallel concerns about very real and unjustifiable threats to human life. Acts of slavery, piracy, genocide, and racial discrimination, like the deployment of anti-personnel mines, arbitrarily and unjustifiably interfere with normal human actions which the civilized nations of the world have agreed are essential to the most basic of human existence.[98]

This argument is further warranted by the pertinent international agreements, dealing with the universal concern to preserve and protect human rights and life, which have entered into force during the past half century. The first of these covenants would be the *Charter of the United Nations*. The Charter's preamble declares the affirmation of individual and collective "faith in fundamental human rights, in the dignity and worth of the human person" in order "to promote social progress and better standards of life in larger freedom."[99] Arguably, these are very broad statements declaring noble goals. Yet, notwithstanding their generality, these broad, but important, principles set the stage for norms that delineate that the human life of each person is to be protected from unreasonable, unnecessary, and arbitrary interference. With the conclusion of the hostilities of the Second World War and with the evidence demonstrating the brutality of the Holocaust mounting, members of the international legal community increasingly understood that the right to life is one of the greatest, most fundamental human rights. Refinement of this general principle continued in the *Universal Declaration of Human Rights*.

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98. *Id.*
99. U.N. CHARTER pmbl.

The Declaration's Preamble notes that there exist "inalienable rights of all members of the human family" which include "the right to life, liberty, and security of person."[100] If any person or any state takes action which adversely interferes with such inalienable rights—including the rights to life and security of person—without justification, such action would be in violation of this inalienable guarantee. Arguendo, the use of a force that arbitrarily and indiscriminately takes life or invades the security of people in ways which cannot be supported by some principle of international law of equal or greater importance would constitute an unwarranted intrusion into these inalienable rights.

The principles of the Universal Declaration of Human Rights were renewed and reinforced eighteen years later in several provisions of the *International Covenant of Civil and Political Rights* of 1966. Once again, the preamble of this important covenant reiterates unwavering concern for the "inalienable rights of all members of the human family."[101] The Covenant reflected and intensified international concern about the numerous threats that challenge human life. In particular, Article 6.1 of the Covenant not only acknowledges that "[e]very human being has the inherent right to life," but further states that this inherent right to life cannot be arbitrarily deprived by anyone else.[102] If there were any question that some of the rights contained within the Covenant are derogable, Article 4.2 unambiguously expresses the view of the civilized nations that "[n]o derogation from Article 6 . . . may be made . . . ."[103]

Once life is secured in accordance with the Covenant, it must be able to do something. One activity identified by the Covenant is that every person who is lawfully within a territory of a state shall "have the right to liberty of movement."[104] Yet, the arbitrary and indiscriminate effects which anti-personnel mines have had and continue to have constitute unwarranted and unjustifiable denials of the inalienable right to life and to its related liberty of freedom of movement. These Covenant principles generally

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100. *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3rd Sess., pt. 1, at 11, U.N. Doc. A/810 (1948).

101. International Covenant of Civil and Political Rights, *opened for signature* Dec. 19, 1996, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force, Mar. 23, 1976) [hereinafter Covenant].

102. *Id.* at 999 U.N.T.S. at 174, 6 I.L.M. at 370.

103. *Id.* *See* MYRES MCDOUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 340 (1980) (emphasizing this theme by indicating that "some policies are so intensely demanded, and so fundamental to the common interest of the community, that private parties cannot be permitted to deviate from such policies by agreement").

104. Covenant, *supra* note 101, at 999 U.N.T.S. at 176, 6 I.L.M. at 372.

accord with the earlier customary principles of *jus in bello* regarding protections to be afforded non-combatants.[105]

With the evolution of international agreements over the past century, an increasing and renewed awareness has emerged regarding these basic principles which trace back to Augustine and Aquinas and which acknowledge that innocent civilians are to be protected in times of armed conflict and that combatants have an undisputed duty to avoid harming them. Accompanying this development has been the growing attention given to the development of human rights law. The evolution of human rights law has occurred in the emergence of legal principles addressing both periods of armed conflict and times of peace.

In the examination of customary law, identifiable justifications exist for conducting a legitimate war or other armed conflict. On the other hand, a belligerent does not have unlimited license to conduct warfare in any manner it alone deems suitable and acceptable. For any armed conflict to be considered legitimate, it must, as demonstrated earlier, be both discriminate and proportional. As these points were developed, it became evident that for military action to be proportional, it must rely only on that force necessary to achieve legitimate military objectives. Any force extending beyond this would be considered disproportional, such as when aerial carpet bombing surpasses the force reasonably necessary to achieve the specific and permissible military objectives. Thus, civilians and the places that they inhabit are generally not considered military objectives and are typically not the center of military activity. This becomes more evident when the military actions of the combatants cease, but the anti-personnel ordnance remains. Any military force or action which interferes with civilians and their places of habitation is disproportional because it extends beyond that needed to accomplish the legitimate military mission, such as neutralizing specific military targets. The abandonment of anti-personnel mines unquestionably represents a use of disproportional force because such military action plays no further role in a legitimate military activity, yet still threatens the lives and security of innocent people who wish simply to farm or play—to flourish, as any person ought to.

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105. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1986) (stating that a violation of international law occurs if a state "practices, encourages, or condones" genocide, slavery or its trade, murdering or "causing the disappearance of individuals," torture and other inhuman and degrading punishment, "prolonged arbitrary detention," "systematic racial discrimination," or "a consistent pattern of gross violations of internationally recognized human rights").

As stated earlier, any exercise of military force must also pass the test of being discriminate, *i.e.*, it must be confined to a specific military target or objective, and its effects must not venture beyond such targets into the civilian realm. Even if the military force is proportional, it may risk being found indiscriminate if its otherwise legitimate effects extend beyond the specific military target or objective. Again, in the case of aerial bombing in which civilian residences are annihilated along with neighboring military objectives, such force is indiscriminate because its legitimate effects (the neutralization of the military targets) also adversely affect civilians who are not legitimate military objectives. Even though the force is proportional (that needed to accomplish a permitted objective), its effects are indiscriminate because they extend beyond the target and adversely affect innocents.

The case of anti-personnel mines graphically raises questions about proportionality and discrimination. A strong argument exists that this type of ordnance is not proportional because the force goes beyond that reasonably necessary to achieve legitimate military goals. For example, these mines are typically deployed when a military engagement is taking place; however, they are invariably left behind after the conclusion or relocation of the conflict. As a result, civilians, and not the combatants who were the intended targets, eventually and predictably detonate these mines. Even if it could be argued that anti-personnel mines are essential to achieve some specific military objective, the force which they release as well as their effects expand beyond the legitimate target.[106] Reinforcing the claim that the use of anti-personnel mines fails both the proportionality and discrimination tests is the fact that many, if not all, of the casualties occur long after the areas in which the mines are deployed cease to be legitimate military theaters. Since these weapons are not designed to self-neutralize with the cessation or relocation of the legitimate military conflict, they cease being proportional because no military force is needed. They become indiscriminate because

106. *See generally* Judith G. Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 394 (1993) (discussing the protection afforded the citizens of countries involved in armed conflict by the "requirement that proportionality be exercised in . . . response to a grievenace"); Judith G. Gardam, *Noncombatant Immunity and the Gulf Conflict*, 32 VA. J. INT'L L. 813, 814 (1992) (discussing the principle of noncombatant immunity as a "cornerstone of humanitarian law").

innocent non-targets are adversely affected and often become the only victims of the ordnance.[107]

When the examination of the use of anti-personnel mines takes account of the evolution of international agreements and customary law, continued employment of these devices is incompatible with the agreements and customary law which have historically offered protection to innocent civilians. As was demonstrated in the previous section, the general covenants—such as the 1949 Geneva Conventions, the 1977 protocols, and the 1948 Genocide Convention—identify undisputed principles of international law designed to protect: (1) civilians in times of international and local armed conflict, as well as (2) their fundamental rights as human beings and as citizens of the world to life and the security of the person. These international legal principles provide a distinct framework in which irrefutable and non-derogable protections must be afforded to non-combatants from the direct as well as the indirect effects of armed conflict. At their most fundamental level, these conventions and customary principles identify necessary norms by which the military actions of belligerents are to be conducted if they are to be found *jus in bello*. Essentially, under the terms of these applicable conventions and custom, military actions which commence on the footing of legitimacy become illegitimate *erga omnes* when they adversely affect civilians who become either the direct or indirect targets of this weapon.

But even if an argument could be made that the military action which adversely affects civilian populations may be considered legitimate with regard to general military actions, the 1980 CCW poses a revealing counterpoint. Even though the CCW has been considered a flawed agreement that has had difficulty in attracting support, it nonetheless identifies the dangers that anti-personnel mines pose to civilian populations. When the protective theory underlying the CCW is viewed in light of the actual statistics of the number of annual civilian casualties caused by the maiming or killing generated by this hardware, any and all justification for continued use of these devices evaporates. Customary law has demonstrated that anti-personnel mines

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107. A most graphic example of this was witnessed by Dr. Andrew Pearson who was on holiday with his family in Zimbabwe in 1989. While he was out with his 18 year old son, his son accidentally stepped on a mine and was killed. The mine's emplacement could have been made years earlier, or it could have been recently deployed. No one really knew. *See* Esther Oxford, *My Son Lay Dying, Cradled In My Arms; How Could a Student be Blown Up by a Land-Mine in Zimbabwe and then Left to Die for 78 Hours?*, THE INDEPENDENT (London), May 18, 1995, *available in* LEXIS, News Library, CURNWS File.

cannot be legitimated on grounds of being proportional and discriminate. Covenant law has similarly illustrated that ongoing use of anti-personnel mines has escaped beyond any and all justifications that might exist under these agreements and unduly threatens non-derogable human rights. The conclusion is inescapable: in order to protect the potential victims from this unreasonable threat of harm, international law necessitates the immediate elimination of anti-personnel mines from military arsenals and from theaters of military activity.

V. CONCLUSION

When the entire corpus of international law addressing both the legitimate means of war and the body of non-derogable human rights is taken into account, the emerging legal picture is that of a universal and fundamental legal norm, the essence of which is that both the trading in, as well as the use of, anti-personnel mines cannot be justified on any legitimate military ground.[108] With the evaporation of any justification for their deployment and use comes the inescapable conclusion that these devices are the new holocaust, a menace to the human race. The pointless and tragic civilian toll which these mines continue to take every day of every year brings the lament of the victims to the ears of the civilized nations of the world.

If *jus cogens* is a norm of international law that proclaims to all in the world that certain actions, regardless of their motivations, are prohibited, then surely there is sufficient evidence to meet the burden of proclaiming the norm that any further use of anti-personnel mines, as they now exist and are used, is prohibited under the most fundamental, necessary, and incontestable principles of international law.

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108. Mr. Brian Owsley, a member of the Human Rights Watch, has argued the case for holding manufacturers of anti-personnel mines liable for the waste of human life and livelihood which they cause. Brian Owsley, *Landmines and Human Rights: Holding Producers Accountable*, 21 SYRACUSE J. INT'L L. & COM. 203 (1995).