Off Limits? International Law and the Excessive Use of Force

Jan Klabbers[*]

This paper aims to explore whether there are any legal limits to the use of force, in particular when force is used (as it so often is) for political reasons. How plausible is it to expect people to limit their options when they feel that what they're doing paves the way towards paradise? In this light, much of the law of armed conflict would seem to be inadequate, based as much of it is on the premise that force is non-political. To the extent then that limits are conceivable, these may stem from the individual morality of those engaged in battle rather than from any grand legal designs.

INTRODUCTION

In an episode of the television show *Law & Order* recently broadcast in Finland, the setting was as follows: An African American man snatches a taxi away from under the noses of two Caucasian men. The Caucasians hail another taxi, and order it to follow the first. After some twenty minutes, the first taxi stops, and its passenger gets out. Consequently, the other taxi stops as well, and one of the Caucasian men gets out (the other returned home). The Caucasian approaches the black man, and shoots him. Upon arrest, he claims to have acted out of racial hatred, and his lawyer argues before

* Professor of International Organizations Law, University of Helsinki. Thanks to Yuval Shany for helpful comments, and to Eyal Benvenisti and Alon Harel for inviting me to the conference where this paper was first presented.

the court that his client should be in a mental institution for he seriously believes himself to be persecuted by black people in general and thus is clearly delusional. The jury, however, finds the man sane, and convicts him of murder in the second degree.

The episode, fictitious though it is, raises the interesting issue of how to deal with violence that is, actually or ostensibly, politically motivated. While the scriptwriters fail to make the most of it (somehow awkwardly coming up with the notion that for a long time, homosexuality was also considered a mental disorder), nonetheless the main issue resonates: if someone adopts extreme political convictions, does that mean he is insane and cannot be held legally responsible for any resulting actions? How, in more general terms, should the law address politically motivated violence?

The issue is interesting because, of course, much violence is committed in the name of some higher political ideal.[1] Be it ethnic cleansing, suicide bombings, or the occupation of entire countries while toppling their regimes, much of this violence takes place in the name of a greater good. It takes place for what might be called political reasons, if by political reasons we mean the sort of reasons that have little to do with base motives of greed or sheer evil, but are inspired instead by some form of idealism, however perverse the ideal at issue might be.[2] The white South African policeman who enthusiastically enforced apartheid's laws in the sincere belief that it helped protect his country against communism and prevented the erosion of a traditional way of life, is only one example among many of a man who committed crimes not out of base motives, but because he thought he was doing the right thing.[3]

There exists something of a consensus on the awkward circumstance that criminal law (or moral philosophy, for that matter), with its insistence on *mens rea* and individual responsibility, is ill-equipped to address crimes committed within the framework of larger socio-political events that do not

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1 This is not quite the same as Hobsbawm's romantic vision of bandits, which runs the risk of falling victim to the French warning: *tout comprendre est tout pardoner* (to understand everything is to excuse everything). *See generally* Eric Hobsbawm, Bandits (rev. ed. 2001).

2 I would hesitate however to include totalitarian crimes, which are difficult to explain in even the most perverted utilitarian or instrumental terms, and are perhaps even harder to explain plausibly in ordinary criminal law terms. Among the first to grapple with these was Hannah Arendt, Eichmann in Jerusalem: A Report on the Banality of Evil (rev. ed. 1992). A fine, more recent study is Mark J. Osiel, Mass Atrocity, Ordinary Evil, and Hannah Arendt: Criminal Consciousness in Argentina's Dirty War (2001).

3 The policeman is presented in Martha Minow, Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence 130 (1998).

result from evil intentions.[4] Dana Villa puts it succinctly: "the great tradition of Western political thought is not much concerned with political evil — evil as policy — at all."[5]

In international law, this issue becomes particularly acute in the context of genocide, war crimes, crimes against humanity, and gross human rights violations; in other words, what is sometimes referred to as international criminal law. The label is slightly misleading perhaps, as international criminal law essentially aims to address "political" crimes (even crimes committed exclusively within a state's boundaries; the only justification for the label "international" is that the source of the law in many of such cases is international law),[6] as opposed to "normal" crimes with an international dimension, such as drug trafficking, money laundering, counterfeiting, or immigration fraud. And it aims to deal with political crimes essentially by trying to ignore their political element and subjecting political crime to more or less standard criminal procedure.

What I aim to explore in this paper is the political aspect of the use of force: the suggestion that the righteousness of the cause makes it well-nigh impossible to accept that there could be any limits to the use of force.[7] It may well be the case that the distinction between *jus ad bellum* and *jus in bello*[8] facilitates legal and moral analysis;[9] but the distinction would seem to owe a lot to the underlying assumption that war is not really about politics but is instead a technical, rather businesslike, affair embedded within a clearly

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4 *See, e.g.*, Judith Shklar, Legalism: Law, Morals, and Political Trials (rev. ed. 1986); George P. Fletcher, Basic Concepts of Criminal Law (1998).

5 Dana R. Villa, *Terror and Radical Evil, in* Politics, Philosophy, Terror: Essays on the Thought of Hannah Arendt 11, 15 (1999). *See also* Thomas Mertens, *Arendt's Judgement and Eichmann's Evil*, 2 Finnish Y.B. Pol. Thought 58, 70 (1998).

6 The various possible meanings of the term international criminal law have already been subjected to critical scrutiny by Georg Schwarzenberger, *The Problem of International Criminal Law*, 3 Current Legal Probs. 263 (1950), *reprinted in* International Criminal Law 3 (Gerhard O.W. Mueller & Edward M. Wise eds., 1965) (1950).

7 The same thought underlies Judith Gardam, *Proportionality and Force in International Law*, 87 Am. J. Int'l L. 391 (1993).

8 This is, of course, the classic distinction between the right to go to war, and the law applicable during war, and will be discussed in greater detail below, in part II of this paper.

9 Michael Howard suggests the distinction originates with the work of Emeric de Vattel in 1758, who held that the notion of just war was useless if all parties insisted on the justness of their cause and what mattered, therefore, was the justness of their behavior *in bello. See* Michael Howard, The Invention of Peace: Reflections on War and International Order 24-25 (2000).

demarcated set of rules, not unlike a game of chess or cricket.[10] And while it is perfectly okay to strive for victory in chess or cricket, doing so by bending, ignoring or flouting the rules is simply, er, well, not cricket.

I. LIMITS?

Ask international lawyers whether international law will place limits on the use of force, and they will probably answer in the affirmative, citing two main arguments. The first is that aggressive use of force is generally regarded as prohibited, no matter how intense that use of force may get. Thus, by prohibiting aggression, very intense aggression is prohibited as well. By the same token, as the use of some types of weapons is generally prohibited, so too is the excessive use of those weapons.

Second, while international law recognizes a right to self-defense, and used to recognize belligerent reprisals (the latter are generally considered to be prohibited nowadays), both were subject to the idea of proportionality. Proportionality, in this context, signifies that one cannot use force to a greater extent than would be justifiable from a military point of view. Hence, proportionality functions as a ceiling on the acceptable use of force, and therewith on the liberties of states and other belligerents.

Yet, those same international lawyers would probably also acknowledge that should a state use force in a manner that exceeds the bounds of what seems to be proper, there is nothing much the law will have to say about it. This is so, not so much because, as the ancient adage states, *inter arma silent leges* (roughly translatable as, "the law is silent when arms speak"), but, rather, because the law cannot quite make up its mind how to handle what may seem like excessive use of force.[11] As William Fenrick

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10 It is perhaps no coincidence that the law of armed conflict is often thought to derive its persuasiveness from reciprocity: treat me and my soldiers well, and I will treat you and yours well. This too suggests that the standards are flexible and game-like. An example of such a conceptualization is Stanley Hoffmann, *International Systems and International Law, in* The International System: Theoretical Essays 205 (Klaus Knorr & Sydney Verba eds., 1961).

11 Sometimes it is asserted that the lack of judicial enforcement explains the absence of proper limits. Cassese writes, for example, "[h]ow can states suggest interpretations of international rules as suit them best, bending the law to their own personal interests? The answer is quite simple: in the international community there are no judges to 'declare the law' with binding effect on all subjects." *See* Antonio Cassese, *Why States Use Force with Impunity: The "Black Holes" of International Law*, *in* Law and Violence in the Modern Age 30, 39 (Stephen Greenleaves trans., 1988) (1986).

(formerly a prosecutor with the International Criminal Tribunal for the Former Yugoslavia) observed,

> It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. How do you assess the value of innocent human lives as opposed to capturing a particular military objective?[12]

One of the more telling provisions in this respect is to be found in Article 22 of the Regulations Respecting the Laws and Customs of War on Land, annexed to the Fourth Hague Convention of 1907,[13] which provides in wonderfully pithy terms that "[t]he right of belligerents to adopt means of injuring the enemy is not unlimited." The very way this provision is formulated suggests an ambivalence at its core: we sense that there must be limits; that mankind would like there to be limits, but does not really know what these should be or how to impose them. Hence, the right to adopt means of injuring the enemy is "not unlimited."[14]

Other provisions too, focus not on the intensity of force, but on the means and methods of using force. Thus, under Article 23 of the same Regulations, it is prohibited "[t]o employ arms, projectiles, or material calculated to cause unnecessary suffering."[15] Apart from all sorts of interpretive problems surrounding a verb such as "calculated," this is not so much a limit on excessive use of force, as it is a limit on the sort of weapons that can be used.

Many provisions in the law of armed conflict aim to spare the civilian population from the scourge of war, so much so that the ICJ, in 1996, held that the distinction between civilians and belligerents was one of the "intransgressible principles" of international humanitarian law.[16] Still, those

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12 *See* William J. Fenrick, *Attacking the Enemy Civilian as a Punishable Offense*, 7 Duke J. Comp. Int'l L. 539, 545-46 (1997). Walzer, too, notes with fine irony that violating the principle of proportionality "is by no means easy to do ... since the values against which destruction and suffering have to be measured are so readily inflated." *See* Michael Walzer, Just and Unjust Wars 192 (3d ed. 2000).

13 Convention Respecting the Laws and Customs of War on Land, Oct. 18. 1907, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter Hague Convention IV].

14 Interestingly, the ICJ used this very same provision in order to explain (quite literally) why military action is governed by legal rules. *See* Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, para. 77 (July 8).

15 Hague Convention IV, *supra* note 13, art. 23.

16 *See* Legality of the Threat or Use of Noclear Weapons, 1996 I.C.J. 226, para. 79. Elsewhere, the Court uses the slightly less stark term "cardinal principles" (para. 78).

provisions stop short of imposing absolute limits on the use of force; while they generally prohibit the targeting of civilians and civilian objects, they say nothing about military targets, and seem to accept with equanimity the possibility of unrestricted use of force, as long as the target is a proper target.

An example is Article 24 of the 1923 Hague Draft Rules of Aerial Warfare,[17] which stipulates that aerial bombardment is legitimate when the target is a military objective; it places no limits on the amount or intensity of the bombardment. Earlier articles prohibit some forms of bombardment: Article 22 does not allow bombardment for purposes of terrorizing the population, or for the purpose of destroying property, or for the purpose of injuring non-combatants. Likewise, Article 23 does not allow bombardments for the purpose of "enforcing compliance with requisitions." The key to bombardment, then, seems to reside in the purpose it serves: either a legitimate purpose, or an illegitimate one. But no quantitative limits are imposed. As Jean Pictet, one of the architects of today's international humanitarian law, stated in an admirably brief definition: "[The] law of war proper determines the rights and duties of belligerents in the conduct of operations and limits the choice of the means of doing harm."[18]

That would, indeed, seem to be what the law of armed conflict is all about: limiting the variety of available means of doing harm, and only in this way trying to limit actual harm done. The focus, thus, rests squarely on a limitation of the means and methods to be employed, rather than, say, on how these are to be employed, or with what intensity they are to be employed. As yet another author sums it up: the law of war relates to rules on weapons, rules on methods to be employed, and humanitarian rules;[19] the law of war does not, however, have much to say about the intensity of conduct.[20]

This is not to say that the use of force is left without any limitations. "The prime characteristic of the military," wrote the eminent historian Michael Howard, "is not that they use violence...[i]t is that they use that violence with great *deliberation*."[21] Military activities, in other words, are highly organized,

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17 *Reprinted in* Documents on the Laws of War 139 (Adam Roberts & Richard Guelff eds., 3d ed. 2000). The Draft rules never became binding rules.

18 Jean Pictet, Humanitarian Law and the Protection of War Victims 16 (1975).

19 *See* Ingrid Detter de Lupis, The Law of War 129-30 (1987).

20 Indeed, the ICJ's opinion on nuclear weapons too seems to suggest that the law is about methods and means, rather than intensity. *See* Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, para. 95.

21 *See* Michael Howard, *Temperamenta Belli: Can War be Controlled?*, *in* Restraints on War: Studies in the Limitation of Armed Conflict 1, 3 (Michael Howard ed., 1979).

socially complex affairs, and the implication is that restraints are inherent in the conduct of warfare: without restraints, military order and discipline would not exist. As Howard reminds us, when restraints break down (as in the infamous My Lai massacre), it is not just our sense of morality that is offended, but also our sense (or the military's sense) of professionalism.[22] Thus, restraints are inherent in the organized use of force. It is just that these restraints are not overwhelmingly legal in nature; the law of armed conflict is inherently unsuited to its task if that task is to eradicate or minimize the use of force. Instead, the law, through regulation, legitimizes what it regulates.

A brief history of both the *jus ad bellum* and the *jus in bello* would reveal that attempts to place limits on warfare (both the right to go to war, and the right to behave in an unrestrained fashion during war) have been undertaken with increasing seriousness since the second half of the 19th century. That is not to say there were no earlier attempts: Grotius already addressed both topics in his classic *On the Law of War and Peace*.[23]

But attempts at global regulation would only begin in the second half of the 19th century, starting with more or less private initiatives such as the Lieber Code and culminating in the convocations for the first Hague Peace Conference of 1899. This conference, as well as its 1907 successor, is usually taken to be evidence of a humane and humanitarian impulse among statesmen; yet the motives of its convener, Czar Nicholas, may have been pragmatic rather than humane, and many of the more important participating states may have taken part more in order not to be cast as villains than out of a heartfelt desire to place constraints on the waging of war.[24] As some critics have pointed out, with considerable cogency, the 1899 Conference ended up either prohibiting weaponry that had proved to be ineffective at any rate, or building in large margins of appreciation for the military: behavior might be prohibited, unless military necessity would demand such behavior.[25]

But whatever its merits, international law does not say a great deal about the intensity of armed conflict. It prohibits aggression, albeit not without ambivalence. An authoritative definition of aggression does not

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22 *Id.*

23 Hugo Grotius, De Jure Belli ac Pacis (Francis W. Kelsey et al. trans., Oxford 1925) (1625). The *jus ad bellum* was discussed in Book I, ch. 2, with big parts of Book III being devoted to the *jus in bello*.

24 *See* Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 Harv. Int'l L. J. 49, 69-70 (1994). McCoubrey too detects hints of instrumentalism in the czar's initiative. *See* Hilaire McCoubrey, International Humanitarian Law 27 (2d ed. 1998).

25 *See* Jochnick & Normand, *supra* note 24, at 68-75.

exist, unless one counts the document adopted by the General Assembly in 1974 which, as one prominent commentator put it, is filled with hopes and loopholes.[26] Indeed, it is doubtful whether a definition of aggression could exist in any meaningful form, as few of us would wish to exclude completely the possibility that force may on occasion be used for a good reason. Fighting oppression, resisting invasion, and pre-empting imminent armed attacks may all sometimes be sound justifications for using force. But if that is so, we will always have a hard time distinguishing in advance justifiable from not so justifiable uses of force.[27] It surely is no coincidence that the drafters of the ICC Statute did not manage to agree on a definition of aggression, for much the same reason that similar attempts eighty years ago within the League of Nations failed.[28] Moreover, in an intricate irony, the more behavior is outlawed as aggression, the easier it will become to use force in self-defense. To borrow a metaphor, the system functions not unlike an accordion: squeeze at one end, and the other end will bulge.[29]

Likewise, international law prohibits the use of some weapons, and may even be seen, by some measures of success, to do so effectively. Thus, it might be argued that the non-use of nuclear weapons since Hiroshima and Nagasaki may be due to the existence of legal prohibitions on their use: the hope that a legal prohibition would forestall any use certainly must have inspired those who activated the International Court of Justice in 1996.[30] By the same token, there are conventions in place outlawing chemical weapons, bacterial weapons and the like, and it is reasonable to state that such weapons are not often used.

Yet, international law says fairly little about other weapons (giving rise to the argument that anything is allowed that is not prohibited), and

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26 *See* Julius Stone, *Hopes and Loopholes in the 1974 Definition of Aggression*, 71 Am. J. Int'l L. 224 (1977).

27 As Stone once put it: "There [are] concealed ... in this metaphorical use of the term [aggression], all the doubts and disputations surrounding the ideal of justice." Julius Stone, Legal Controls of International Conflict 330 (rev. ed. 1957).

28 For more historical detail, see Bengt Broms, *The Definition of Aggression*, 154 Recueil des Cours 297, 307-12 (1977).

29 I borrow the metaphor from the WTO Appellate Body Report, *Japan — Taxes on Alcoholic Beverages*, AB-1996-2, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at 19 (Oct. 4, 1996), *available at* http://www.wto.org/english/tratop_e/dispu_e/ab_reports_e.htm (last visited Sep. 6, 2005).

30 Whether this was wise is a different matter. *See, e.g.*, Martti Koskenniemi, *Faith, Identity, and the Killing of the Innocent: International Lawyers and Nuclear Weapons*, 10 Leiden J. Int'l L. 137 (1997).

says even less about the intensity of conflict. The only limit is the limit of proportionality which, as noted, is usually taken to refer to military necessity. The basic idea is that the use of force, any use of force, can be justified as long as it is necessary from a military perspective. This presupposes that there is a military perspective, and that it can function as an objective standard for conduct. Nothing could be further from the truth.

II. DEPOLITICIZATION?

International humanitarian law does recognize that there may be a political dimension to warfare and that accordingly there can be such a thing as a political crime, but it does not embrace the idea with full conviction and is reluctant to accept the consequences.[31] In fact, the international law of armed conflict is based on a terrible, and terrifying, dilemma. On the one hand, much of the law aims to defuse the political aspects of armed conflict, trying to ignore passions and heated opinions by turning armed conflict into a stylized play, symbolized, if nothing else, by speaking of the "theatre of war" and with frequently recurring analogies to sporting events.[32] Aiming to subject combatants to legal rule, and aiming to allow only that which is considered necessary from a military perspective, international humanitarian law attempts to pay tribute to moral considerations; too much suffering, and suffering that is unnecessary, are considered intolerable.[33]

On the other hand (and partly as a result of the desire to have the law regulate armed conflict), the law cannot completely take the politics out of politics either. Most of the rules relating to the use of armed force are open-ended, and are so by necessity. Their very open-endedness invites further political decision-making. The admonition not to cause "unnecessary suffering" invites further political reflection and debate as to what, in any

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31 See generally the discussion of the distinction between combatants and non-combatants in Jan Klabbers, *Rebel With a Cause: Terrorists and Humanitarian Law*, 14 Eur. J. Int'l L. 299 (2003).

32 The reverse is not uncommon either. The legendary coach of Ajax Amsterdam and the Dutch national football squad during the early 1970s, Rinus Michels, will go down in history as having coined the phrase *voetbal is oorlog*, "football is war" (football here refers to soccer). For an insightful study exploring the relationship between football and political animosity, see Simon Kuper, Football Against the Enemy (1994).

33 Nagel traces this to what he calls "a perfectly natural conception of the distinction between fighting clean and fighting dirty." Thomas Nagel, *War and Massacre*, *in* Mortal Questions 53, 65 (1979).

given case, "unnecessary" could possibly mean. Many provisions, moreover, are conditional. They are subject to considerations of military necessity, either explicitly ("as far as military considerations allow," in the words of Article 16 of the 4th Geneva Convention of 1949)[34] or implicitly. As Greenwood aptly put it, the law relating to armed conflicts "is a compromise between military and humanitarian requirements."[35]

The law relating to the use of force works on the basis of a rather grand illusion: that it can take the politics out of the use of force. It presupposes that law can subject behavior to objective, immutable standards, and that those standards derive from two sources. The first of these is, rather straightforwardly, the legal prohibition itself. Thus, the law may posit that certain types of behavior are prohibited, in the expectation, or hope, that states will therefore change their behavior.

Second though, and as a consequence of realizing that simply prohibiting things might not work, the law builds in all sorts of exceptions relating to military necessity, aiming to compromise between considerations of humanity and military exigencies. Yet, in doing so, it adds a second open-ended element to the equation. It is not so much (or not only) the case that the reference to military necessity aims to re-introduce a sophist, political element to the legal standard, because the sophist, political element is itself thought to be a-political.[36] Hence, a twofold act of de-politicization is intended, but works only in appearance, for the notion of military necessity is itself intensely political.

Typically, what the notion of military necessity does is break down a larger conflict into smaller segments, and in doing so it depoliticizes the issue.[37] Ask the question whether there is a military necessity for country A to invade country B, and the most likely answer will be "probably not." After all, invading another country is typically a political decision, made for political reasons (adding to territory perhaps, or securing natural resources, or finally

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34 Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

35 *See* Christopher Greenwood, *Historical Development and Legal Basis*, *in* The Handbook of Humanitarian Law in Armed Conflicts 1, 32 (Dieter Fleck ed., 1995) [hereinafter Handbook of Humanitarian Law].

36 This use of sophist as an adjective is gratefully borrowed from Thomas M. Franck, The Power of Legitimacy Among Nations 74-83 (1990).

37 Dinstein captures this neatly when observing that a distinction ought to be made "between the military war aims and the ulterior motives of war." Yoram Dinstein, War, Aggression and Self-Defence 13 (2d ed. 1994).

taking action on a long-standing animosity). In most cases, there will not be a military necessity to invade.

Things might look differently, though, once the prism is adjusted and the episode is cut into smaller segments. Once state A has made the decision to invade state B, is there a military reason to drop bombs on the capital of B and thereby endanger the lives of civilians? This may well be the case, for example, if the capital harbors military installations and precision bombing is for some reason (cloudy weather, risk of detection) impossible or impracticable.[38]

However, military necessity can be a flexible notion. A classic problem is that of bombing a city so as to undermine the other side's morale.[39] This may not be very commendable behavior perhaps, but if undermining morale is classified as a military advantage (as most would agree it should be), then such bombings would remain within the space allowed by the law.[40]

Likewise, bombing cities and killing civilians might sometimes be considered justified with a view to shortening the war and thereby, ultimately, saving lives: this is often said to be the justification for dropping the atomic bombs on Hiroshima and Nagasaki.[41] While such a calculation might be slightly distasteful, it is nonetheless difficult to argue with. And either way, while the moralist might find it distasteful, the law says nothing about it, and could not possibly begin to address it except in the abstract. Yet, even if deplorable in the abstract, there may always be circumstances justifying such acts in particular contexts. While generally such acts are not laudable, exceptions cannot be excluded completely, and cannot be delineated in any meaningful way until they occur.[42]

At the same time, the depoliticization of armed conflict is stimulated by

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38 As Fenrick remarks in a rather deadpan manner, "actually hitting a target remains a difficult task." Fenrick, *supra* note 12, at 547.

39 For a brief suggestion to this effect, see Sheldon M. Cohen, Arms and Judgment: Law, Morality, and the Conduct of War in the Twentieth Century 110-12 (1989); *see also* Walzer, *supra* note 12, at 256.

40 *See, e.g.*, Nagel, *supra* note 33, at 57. It has, moreover, been suggested (though I have been unable to retrieve the source) that Dresden was bombed merely as a show of force to convince the USSR that it was not alone in fighting the Nazis.

41 See Walzer, *supra* note 12, at 263-68, for a useful discussion.

42 It is for this reason that the ICJ in its opinion on the legality of nuclear weapons could not but reach its much-maligned conclusion "that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict," but might be "lawful or unlawful in an extreme circumstance of self-defence." Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, para. 95 (July 8).

a move in the other direction. While humanitarian law arguably prescribes that each incident be assessed separately on its proportionality,[43] many hold to the contrary that what matters is the bigger picture, and many would argue that it does not concern a proportionality of means but rather one of result. As Roberto Ago once wrote:

> It would be mistaken ... to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered. What matters in this respect is the result to be achieved by the "defensive" action, and not the forms, substance and strength of the action itself.[44]

Hence, the prism can be shifted from the individual incident to the complete attack and anything in-between, in accordance with the needs and desires of the moment, and by shifting the prism, allegations of disproportionality can always be deflected. In short: military necessity does not provide much of a limit on the use of force, in that many things can be justified on this basis. And if nearly everything can be justified on the basis of military necessity, then all the law ends up doing is legitimizing violence.[45] In short, military necessity is not a concept capable of objective measurement. "Military reality" (but without any overtones of objectivity) would be a better term.[46]

The depoliticization discussed above is facilitated by the circumstance that international lawyers, and others who occupy themselves with the morality of international action, habitually point out that there is a difference between the motivations that underlie actions, and the way those actions are carried

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43 *See* Gardam, *supra* note 7.

44 Roberto Ago, Addendum to Eighth Report on State Responsibility, [1980] 2 Y.B. Int'l L. Comm'n, pt. 2, at 13, 69-70, *quoted in* Dinstein, *supra* note 37, at 232-33. Various states made essentially the same point when signing or ratifying Additional Protocol I. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 [hereinafter Additional Protocol I]. For a brief discussion with references, see Fenrick, *supra* note 12, at 548.

45 Indeed, it has been claimed that moralizing only makes war more vicious: an example is A.J.P. Taylor, Bismarck: The Man and Statesman 79 (1955), as referred to in Gary Jonathan Bass, Stay the Hand of Vengeance: The Politics of War Crimes Tribunals 10 (2000).

46 Cohen, *supra* note 39, at 143.

out.[47] International lawyers traditionally distinguish between the right to wage war, and the proper form of conduct during war: the *jus ad bellum* and the *jus in bello*, respectively. There are, no doubt, sound analytical reasons for doing so, and it may indeed well be perfectly conceivable that a just war is being fought with unjust means while an unjust war may be fought with perfectly proper means. But this distinction masks the possibility that the perceived justness of the cause may influence the sort of behavior that takes place on the battlefield.[48] Indeed, the distinction often collapses,[49] either when authors acknowledge that the distinction has its limits[50] or when they claim that international law's capacity to regulate the *jus ad bellum* proves that it can also regulate the *jus in bello*.[51]

Still, the very possibility of making the distinction implies that there can be such a thing as a just war to begin with. The only significance the very notion of the *jus ad bellum* can possibly have is that, indeed, there must be a right to wage war as long as the cause is a good one. But that obviously raises the difficult question of how to recognize a just cause, and there may have been considerable wisdom in Cicero's insistence on procedure rather than substance: for Cicero, a just war was one preceded by a demand for satisfaction or a warning, and a formal declaration of war.[52]

The very possibility of the concept of a just war, in turn, renders it possible that combatants might be zealots, fanatics, or fundamentalists, rather than enlisted men (and women) merely doing their jobs. It is after all precisely the (perceived) justness of the cause that would justify, in the perpetrators'

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47 *See generally, e.g.*, Walzer, *supra* note 12.

48 In the same vein, Gardam, *supra* note 7.

49 If the distinction is made at all; Nagel, for example, has a hard time accepting its validity in the context of the Vietnam war: "[I]f the participation of the United States in the Indo-Chinese war is entirely wrong to begin with, then that engagement is incapable of providing a justification for *any* measures taken in its pursuit — not only for the measures which are atrocities in every war, however just its aims." Nagel, *supra* note 33, at 53. Nagel's essay was first published when the Vietnam war was still ongoing.

50 To Walzer, for example, the distinction collapses (as he himself acknowledges) when guerrilla warfare and nuclear warfare are under discussion. *See* Walzer, *supra* note 12, at 195, 265. Note also Greenwood's comment that the *jus in bello* cannot be properly understood without some understanding of the *jus ad bellum*. Greenwood, *supra* note 35, at 1.

51 This is Dinstein's position. *See* Dinstein, *supra* note 37, at 71. Dinstein also suggests that the legality of the resort to armed force influences the legality of the specific actions taken. *Id.* at 155 (quoting Glueck with apparent approval).

52 Cicero, The Offices bk. I, xi, 36, 38-39 (W. Miller trans., 1951), as reported in Dinstein, *supra* note 37, at 61.

minds, the resort to excessive means. In other words: if the combatants are not conscripted soldiers doing their duty for their country, but rather, are political fanatics inspired by a vision of the coming paradisiacal bliss if only the enemy is exterminated, it may well be that their behavior will hardly be subject to limitations: why accept limits if those limits make paradise that much harder to reach? If one has the *jus ad bellum* on one's side, then why bother too much about the *jus in bello*?[53]

More specific considerations would also suggest that politics simply cannot be avoided. It has been observed, for instance, with notable regret, that Additional Protocol I of 1977 re-introduced the notion of the just war (and thereby re-introduced an overtly political element) into international law when it ordained that wars of national liberation be treated as international armed conflicts.[54] The law aims to minimize aggression, yet allows for (and arguably even stimulates) aggression if it is done for the right cause.

The famous Martens clause, considered by many to be one of the main achievements of humanitarian law,[55] also carries political overtones; it may well be regarded as a receptacle for politics. The Martens clause holds in essence that in cases not covered by treaties on humanitarian law, "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."[56] While this does suggest that the law is all-embracing (there is no war-time behavior that would not come within the ambit of the law), it also strongly suggests that the

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53 As Nagel puts it, not without a degree of cynicism: "Once the door is opened to calculations of utility and national interest, the usual speculations about the future of freedom, peace, and economic prosperity can be brought to bear to ease the consciences of those responsible for a certain number of charred babies." Nagel, *supra* note 33, at 59.

54 Additional Protocol I, *supra* note 44, art.1, par. 4. *See* G.I.A.D. Draper, *Wars of National Liberation and War Criminality*, *in* Restraints on War: Studies in the Limitation of Armed Conflict, *supra* note 21, at 135.

55 Kalshoven describes it as "having become justly famous" ("terecht beroemd geworden"); Frits Kalshoven, Zwijgt het recht als de wapens spreken? 18 (1985). To Kalshoven, the Martens clause refers to general principles of law. Green treats it as referring to the continued validity of customary rules, even when technically conventional rules remain inapplicable, for example due to the working (in earlier times) of the dreaded clause that humanitarian treaties would only apply between parties to them (the so-called *si omnes* clause). *See* L.C. Green, The Contemporary Law of Armed Conflict 32 (1993).

56 Additional Protocol I, *supra* note 44, art. 1.

law is not, on this point, self-referential or autopoietic.[57] The Martens clause imports all sorts of considerations that the law itself never thought of, or, more practically, about which agreement between states turned out hard to find.

This then, is the dilemma relating to the use of force in international law: how to acknowledge the political nature of violence without giving in to the idea that might is right, thereby stimulating unbridled, unlimited violence? In the end, the law aims at a double act of depoliticization, and is frustrated on both counts. It aims at depoliticizing by subjecting armed conflict to legal rules, while at the same time it acknowledges that the scope within which states and soldiers are permitted to act is determined by military necessity. Yet, both the law as such and the notion of military necessity are open-ended, and thus incapable of providing many limits.

III. THE END JUSTIFIES THE END

What makes things worse, perhaps, is that the law can only be open-ended: we simply cannot agree, at least not in advance, on which actions should be condemned in which precise circumstances. And this in turn owes much to our inclination to be soft on means when the means are utilized for ends we tend to favor. Well-nigh the entire history of Western political theory conceives of politics as a means to an end.[58] The end may be justice, or peace, or order. The end may be left-wing or right-wing; it may be the worker's paradise or the socialism of yesteryear, or the limited state invoked by libertarians. The end may even be, in modern discourse theory, the reaching of agreement, but in each and every case the idea is that politics are a means to an end. We debate not because we cherish debate, but because we hope to convince or, if necessary, outvote or outmuscle others. Indeed, it is this circumstance that allowed Clausewitz to present his famous dictum of war being the continuation of politics by other means: different means, same end.[59]

It is the very existence of a tangible (however elusive) goal at the end of the rainbow or beyond the horizon that will justify much of the means we employ, and it is precisely this connection that goes unnoticed when we all

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57 On autopoiesis in law, see in particular Gunther Teubner, Law as an Autopoietic System (Ruth Adler & Anna Bankowska trans., 1993) (1988).

58 *See* Dana R. Villa, Arendt and Heidegger: The Fate of the Political (1996).

59 Arendt formulated a more pessimistic version, making the point that war is the rule rather than the exception: "peace is the continuation of war by other means." *See* Hannah Arendt, *On Violence*, *in* Crises of the Republic 105, 111 (1972).

too neatly separate the *jus ad bellum* from the *jus in bello*. Killing people for money is not a good idea; killing people for country and fatherland is already better; and killing people because they stand between us and the good life is better yet, as long as our conception of the good life itself can withstand scrutiny.

The problem then is, quite obviously, that people are not likely to agree on the worthiness of these goals: often, both sides to a conflict can invoke some higher goal that justifies their particular behavior, or at least explains it in their own eyes. The goals invoked might be silly or even highly perverse, but still heartfelt or serious. And in an important sense, their veracity is practically irrelevant: whoever considers himself a soldier fanatically fighting for a just cause, or even for civilization as we know it, might not be easily convinced to back down.

And to generally rely on values as providing a buffer against criminal thought may be all too easy: the example of Nazi Germany suggests that values can be easily changed overnight; values often seem to exercise a hold merely on the surface, and may be traded in for new values, often in light of a political goal.[60] Moreover, the problem may well be in part that values held dear in peacetime are not necessarily applicable in wartime. Dagmar Barnouw observed that during conflict "normal standards of civilized behavior are ‘inverted’: even the most ‘humane’ (in intention) laws of war as international agreements meant to regulate behavior in the extraordinary situation of war clearly contradict what is approved as decent, moral social behavior in peacetime."[61]

Nonetheless, even if it is the case that the law has little to contribute to limit the use of force, that does not mean that there are no possible limits. One possible source of limits resides in what the old-fashioned may refer to as the code of honor among statesmen and the military. As Howard intimated, warfare is a highly organized and restrained activity; it is just that the restraints do not easily stem from detailed legal instructions. Indeed, one might well suggest that the highly detailed law of armed conflict we have at present could easily be replaced by a single commandment: thou shalt treat

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60 *See* Elizabeth M. Meade, *The Commodification of Values, in* Hannah Arendt: Twenty Years Later 107 (Larry May & Jerome Kohn eds., 1996). *See also* Robert Fine, *Understanding Evil: Arendt and the Final Solution, in* Rethinking Evil: Contemporary Perspectives 131 (Maria Pía Lara ed., 2001).

61 *See* Dagmar Barnouw, Visible Spaces: Hannah Arendt and the German-Jewish Experience 140 (1990).

others decently. Admittedly, that is as open-ended as the present regime, but at least it is a lot more transparent[62] and, arguably, no less workable.[63]

Similarly, it may well be the case that being engaged in battle creates something of a community of fate (a feeling of a shared predicament, or *lotsverbondenheid*, in Dutch) on both sides of the divide. This, at least, emerges from Axelrod's discussion of the trench warfare of the First World War,[64] although it would seem fair to suggest that such restraints would be facilitated if the combatants themselves did not have much of an emotional stake in the outcome of the conflict.

Others, most of all perhaps Todorov, have pointed out that restraints (or generally doing good) need not necessarily be the result of good intentions: pragmatic considerations of self-interest may well end up saving lives.[65] It might also be the case that the possibility of future prosecution will deter some would-be evil-doers from actually doing evil.[66] While there is no particular reason for great optimism here (precisely because much evil action will be unaccompanied by *mens rea*, but will instead be motivated by some higher ideal),[67] the possibility cannot be completely excluded either.[68] And at the very least, the open-ended nature of the applicable law has not prevented prosecutions from taking place.[69]

The philosophically more interesting option, however, is to somehow

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62 It may well be too much to ask for the commander in the field (never mind the private) to memorize all the rules. The lay-out of the self-styled handbook for the German armed forces is telling: it contains key statements (in essence, the rules concerned) printed in bold that take up quite a few of the almost 600 pages of the volume. Handbook of Humanitarian Law, *supra* note 35.

63 Michael Walzer observes that as it is, the laws of armed conflict "leave the cruelest decisions to be made by the men on the spot with reference only to their ordinary moral notions or the military traditions of the army in which they serve." *See* Walzer, *supra* note 12, at 152.

64 *See* Robert Axelrod, The Evolution of Cooperation 73-87 (1984).

65 *See* Tzvetan Todorov, The Fragility of Goodness: Why Bulgaria's Jews Survived the Holocaust (Arthur Denner trans., 2001) (1999).

66 *See, e.g.*, Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 Am. J. Int'l L. 7 (2001).

67 It is perhaps no coincidence that instead of pointing to deterrence, some commentators suggest that the greatest instrumental value of post-conflict trials resides in their contributing to the writing of history. *See, e.g.*, Lawrence Douglas, The Memory of Judgment: Making Law and History in the Trials of the Holocaust (2001); *see also* Bass, *supra* note 45.

68 There is, indeed, sufficient reason to be skeptical. *See* Jan Klabbers, *Just Revenge? The Deterrence Argument in International Criminal Law*, 12 Finn. Y.B. Int'l L. 249 (2001).

69 Indeed, there is consensus that where prosecutions do not take place, this is usually

disconnect the means from the ends. That is, arguably, precisely what the time-honored distinction between *jus ad bellum* and *jus in bello* aims to achieve, but it fails in its mission because it is not radical enough. The *jus ad bellum/jus in bello* distinction does not affect the possibility of violence being employed for a just cause; in fact, it derives its very existence from this basis. The thing to do then, is to be more radical, and strive for a system of politics which does not recognize ends or goals, where the very conduct of politics is itself the highest goal.[70]

Such a system (for want of a better term) is present, albeit in scattered form, in the work of the German-American political theorist Hannah Arendt.[71] For her, participation in a political community was itself the ultimate goal citizens could strive for. Starting from the point of view that the world is characterized by plurality and that we have no rights unless we can participate in a political community (that is, unless we have the "right to have rights"),[72] she reached the radical conclusion that the only way in which this plurality can be honored without oppression is to do away with all political ideals or, rather, to turn politics itself into the highest ideal: man reaches his ultimate moment when engaged in political debate. It is in the public realm where we can shine and excel, and politics is the only thing capable of protecting us from evil (supplemented perhaps by thinking in private).[73] In popular terms: it is not about the destination, but about the journey.[74]

This approach has encountered a good deal of criticism, from a variety of angles. One thing often criticized is Arendt's notion of politics, which drastically excluded all things economic and social. In particular, the left argued that a conception of politics that excluded economics and social

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for reasons unrelated to the contents of the law. Usually, politics are accused of intervening with the course of justice. *See, e.g.*, Bass, *supra* note 45.

70 This insistence on politics distinguishes it from the apolitical utopia of much human rights discourse.

71 Arendt's views on the matter are most comprehensively set out in Hannah Arendt, The Human Condition (1958).

72 *See* Hannah Arendt, The Origins of Totalitarianism 296-98. I tend to interpret this as a proceduralist view on human rights, not unlike the view proposed by John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980). *See* Jan Klabbers, *Glorified Esperanto? Rethinking Human Rights*, 13 Finn. Y.B. Int'l L. 63 (2002). A seemingly similar interpretation of Arendt on this point is offered by Bonnie Honig, Democracy and the Foreigner 149 n.53 (2001).

73 *See* John McGowan, Hannah Arendt: An Introduction (1998).

74 As Barnouw nicely quips, Arendt made "political models that were clearly not meant to make policy." Barnouw, *supra* note 61, at 26.

issues would not be of much value,[75] and would lead to highly suspect results. Arendt's views on the elimination of racial segregation in the United States[76] are often used as an example of how dangerous, perhaps deranged, a concept of politics can be that excludes social and economic affairs from its proper scope.[77] Feminists, by the same token, felt compelled to underline that the personal too is political, thus also departing from Arendt's vision of politics.[78]

Another criticism (often directed generally at republicanism and neo-republicanism, the streams of thought with which Arendt's somewhat idiosyncratic work can most easily be affiliated)[79] holds that a focus on the conduct of politics places those who are talented or trained in civic virtues in an advantageous position. Political debate, without more, would thereby create, or at least sustain, power differences.[80] More importantly perhaps, Arendt's work contains an inherent puzzle: precisely by separating politics from everything else, it becomes unclear why people should be interested in politics to begin with. Politics for politics' sake, rather than for some higher ideal, would, to many, not sound like a highly attractive option.[81]

And yet, as Dana Villa has argued, this is precisely the point: the only way in which human plurality, or human existence itself, can be rescued, so to speak, would be by disconnecting the ends from the means and discarding the ends.[82] Attempts at putting goals in the foreground, no matter

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75 *See, e.g.*, Hanna Fenichel Pitkin, The Attack of the Blob: Hannah Arendt's Concept of the Social (1998).

76 This refers to her paper *Reflections on Little Rock*, 6 Dissent 45 (1959), *reproduced in* The Portable Hannah Arendt 231 (Peter Baehr ed., 2000). It is also reprinted in Hannah Arendt, Responsibility and Judgment 193 (Jerome Kohn ed., 2003).

77 This is, indeed, an almost automatic critique of Arendt these days, so automatic as to warrant little further discussion. I am not familiar with any work defending Arendt's conception explicitly (with the exception of Villa, *supra* note 58); some theorists come close enough, however, to a similar conception. *See, e.g.*, Benjamin Barber, The Conquest of Politics (1988); Zygmunt Bauman, In Search of Politics (1999).

78 A reappraisal of sorts has set in, however. *See, e.g.*, Julia Kristeva, Hannah Arendt (Ross Guberman trans., 2001) (1999).

79 For a useful discussion on this point, see Margaret Canovan, Hannah Arendt: A Reinterpretation of her Political Thought 201-52 (1992).

80 *See, e.g.*, Ido de Haan, Zelfbestuur en staatsbeheer: Het politieke debat over burgerschap en rechtsstaat in de twintigste eeuw 138 (1993).

81 *Id.* at 165.

82 Arendt herself put it as follows: "The very substance of violent action is ruled by the means-end category, whose chief characteristic, if applied to human affairs, has always been that the end is in danger of being overwhelmed by the means which it justifies and which are needed to reach it." Arendt, *supra* note 59, at 106.

how substantive the goals, aim merely to overcome the uncertainties and anxieties that human plurality carries in its wake. For Arendt, as Villa writes: "[T]he Western tradition of political thought represents a sustained and deeply rooted effort to escape the 'frailty' of human affairs, the hazards of political action, and the relativity of the realm of plurality."[83] Indeed, according to Villa, Arendt's political theory "attempts nothing less than the rethinking of action and judgment in light of the collapse of the tradition and the closure of metaphysics (the 'death of God')."[84]

It may be the case then, that the most obvious way to limit excessive use of force is to tone down our political goals, and try to formulate these always with a view to accommodating disagreement in the spirit of compromise rather than through fundamentalism. And yet, the worrying thing to note is that precisely in attempting to outlaw force and the excessive use thereof, international law itself resorts to a fundamentalism of sorts. It creates international criminal tribunals to prosecute political crimes and generally advocates the prosecution of human rights violators.[85] It tries individuals responsible for participation in collective acts.[86] It advocates bringing an end to a perceived culture of impunity,[87] and it cranks up the "punishing machine."[88] All this suggests the preponderance of a sentiment that certain values are fundamental and should be enforced no matter what; if necessary, by harsh means. Indeed, the proverbial war on terror suggests much the same, and in the same breath raises the suggestion that some causes are just.[89]

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83 Villa, *supra* note 58, at 166.

84 *Id.* at 157.

85 For a brief but telling plea, see Manfred Nowak, *New Challenges to the International Law of Human Rights*, 21 Mennesker & Rettigheter: Nord. J. Hum. Rts. 3 (2003). Very vocal (but generating more heat than light, perhaps) is Geoffrey Robertson, Crimes Against Humanity: The Struggle for Global Justice (1999).

86 It is this conflation of individual responsibility with state responsibility, rather than any inherent sense of exceptionalism, that informs much of the American resistance to the International Criminal Court. *See* Jan Klabbers, *The Spectre of International Criminal Justice: Third States and the ICC*, *in* International Criminal Law and the Current Development of Public International Law 49 (Andreas Zimmermann ed., 2003).

87 *See, e.g.*, Dominic McGoldrick, *The Permanent International Criminal Court: An End to the Culture of Impunity?*, 1999 Crim. L. Rev. 627.

88 The term is Tallgren's (who, to be sure, approaches the matter critically). *See* Immi Tallgren, *We Did It? The Vertigo of Law and Everyday Life at the Diplomatic Conference on the Establishment of an International Criminal Court*, 12 Leiden J. Int'l L. 683, 686 (1999).

89 For a scathing critique, see Jarna Petman, *The Problem of Evil and International Law*, *in* Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi 111 (Jarna Petman & Jan Klabbers eds., 2003).

CONCLUSION

In her recent study *Democracy and the Foreigner*, the American political theorist Bonnie Honig suggests that even in democracies, people are fundamentally ambivalent about law. On the one hand, democracy would imply that people themselves are responsible for making law; as a result, one would expect the law's prescriptions and proscriptions to be internal, the result of a community's debate with itself. This however, as Honig points out, is only half the story, for law is also something external, something imposed upon us, even in democracies. In her words: "Democracy is always about living with strangers under a law that is therefore alien (because it is the mongrel product of political action — often gone awry — taken with and among strangers)."[90] Perhaps as a result, no matter how involved we may have been in making the law, no matter how legitimate we may perceive the law to be, there is also always the temptation to resist it, to evade it, to circumvent it, to flout it.[91]

If this is true with respect to democratically established law, it must hold *a fortiori* with respect to law that cannot boast a democratic pedigree. The law relating to the use of force would, on most accounts, fall into this category: as international law, it is made by states, not all of which are democracies (however precisely defined), and it is generally made by diplomats and politicians, and may thus well be perceived by the military, by civilians, and most assuredly by political fanatics of all persuasions, as something imposed upon them. Given these circumstances, perhaps not too much should be expected from the law: there is only so much it can do.

International law, it would seem, has hitherto been unable to impose any firm limits on the use of force. I have argued in this paper that this is not simply a matter of a temporary lack of agreement among the responsible law-makers to be rectified whenever those who are blinded finally see the light, but that its causes may be more structural. This is not to say that no limits are possible. Individual moralities may well pose limits, as may factors such as military discipline, order and honor. It is just that the type

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90 Honig, *supra* note 72, at 39.

91 It is no great help that deliberative democracy often ends up in a paradox: though representatives vote rationally, the aggregate result may nonetheless be irrational, in the sense that the collective outcome may not be what one would predict on the basis of individual preferences. For a useful discussion, see Philip Pettit, *A Dilemma for Deliberative Democrats*, *in* Deliberation and Decision: Economics, Constitutional Theory and Deliberative Democracy 91 (Anne van Aaken et al. eds., 2004).

of moral sentiment that imposes limits is difficult, perhaps impossible, to legislate, and that any attempt to carve in stone what would otherwise be left to individual morality runs the risk of legitimizing that which remains unregulated. Especially where the ends to which force is used are held to be blissful enough to justify any means, there is fairly little reason to suppose that actors would live up to possible legal restraints different from their inner moral convictions.[92] Perhaps, then, we might just as well leave matters to a single commandment, which would have the benefit of being relatively transparent and which does not end up, unlike the current law of armed conflict, legitimizing violence: thou shalt treat thy adversary decently.

92 It may well be that the law of armed conflict is made up of the types of goals that cannot be realized merely by wanting them, much like human beings cannot force themselves to be spontaneous. For a brief discussion (not focusing on armed conflict), see Avishai Margalit, The Ethics of Memory 115-16 (2002).