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International Criminal Court and Tribunals

Aggressors' Rights: The Doctrine of 'Equality between Belligerents' and the Legacy of Nuremberg

MICHAEL MANDEL*

Abstract

The moral and legal debate over the separation of *jus in bello* from *jus ad bellum* generally assumes that the law of war supports this separation and the concomitant doctrine of 'equality between belligerents', also known as the 'duality' or the 'symmetry' principle. This article examines the Nuremberg-era precedents and legal scholarship, as well as more recent legal and scholarly material, and argues that the general assumption is wrong and that the arguments supporting the radical legal separation of the two *jus*'s are unconvincing.

Key words

aggression; *jus ad bellum*; *jus in bello*; law; Nuremberg; war

I. INTRODUCTION

Despite the International Military Tribunal's famous pronouncement at Nuremberg that aggression is the 'supreme international crime', it is the crime most neglected by a resurgent international criminal law. The International Criminal Tribunals for the Former Yugoslavia and Rwanda omitted it entirely from their jurisdiction and the Rome Statute of the International Criminal Court of 1998 could manage no more than an empty heading, which, when fleshed out as a proposal in 2010, postponed implementation until at least 2017 and demoted aggression to an opt-in crime.¹ NGOs such as Amnesty International and Human Rights Watch, who have made the investigation and denunciation of war crimes a major part of their human-rights repertoire, typically concentrate on crimes against humanity and war crimes (*jus in bello* crimes) to the complete exclusion of crimes against peace (*jus ad bellum* crimes).² Governments blithely invoke self-defence to put down resistance to

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1 The proposal is discussed a little more fully in the text at note 83.

2 See the various Human Rights Watch and Amnesty International press releases issued during the 2003 Iraq War and its aftermath archived on their websites, starting with Human Rights Watch, 'Iraq: Warring Parties Must Uphold Laws of War', 19 March 2003, available online at www.hrw.org/press/2003/03/us031903ltr.htm; and Amnesty International Press Release, 'Iraq: Military Action Could Trigger

their aggressive and, therefore, supremely criminal uses of force and illegal military occupations.³ Courts and prosecutors back them up as long as they respect the Geneva and Hague Conventions on how wars are to be fought.⁴ One example of this was the Israeli Supreme Court's 2005 decision on targeted killings.⁵ The Court avoided all discussion of the legality of Israel's continued occupation of territories it captured in 1967, despite the fact that virtually all of the targeted killings had taken place there, and despite the stamp of illegality placed on it by the International Court of Justice and the illegitimacy with which the occupation has been regarded by the overwhelming majority of states.⁶ The court solved the issue before it as if it were a matter of any cross-border armed conflict between two equally innocent parties.⁷

They used to say you that if you were able to think of something that was related to another thing without thinking about that other thing, then you had the legal mind.

Civilian and Human Rights Catastrophe', AI INDEX: MDE 14/029/2003, 20 March 2003, available online at www.amnesty.org/en/library/info/MDE14/029/2003/en.

- 3 E.g., the Committee to Protect Journalists reports this response to its attempts to elicit information from the US Defense Department about the killing of journalists at the Palestine Hotel during the American attack on Baghdad in 2003: 'In response to CPJ's letter to Secretary of Defense Rumsfeld, Pentagon spokeswoman Victoria Clarke wrote to CPJ acting director Joel Simon on April 14 stating that "coalition forces were fired upon and acted in self-defense by returning fire." She acknowledged the Pentagon's responsibility to exert caution on the battlefield but noted that news organizations had been warned that Baghdad would be a "particularly dangerous" place and should pull their reporters from the city'; J. Campagna and R. Roumani, 'Permission to Fire? CPJ Investigates the Attack on the Palestine Hotel', available online at <http://cpj.org/reports/2003/05/attack-on-the-palestine-hotel.php>.
- 4 In an attempt to prosecute NATO leaders before the ICTY for murder during the Kosovo War on the grounds of the war's illegality, the lack of a crime of aggression in the ICTY statute was turned against the complainants in this way: 'Allegations have been made that, as NATO's resort to force was not authorized by the Security Council or in self-defense, that the resort to force was illegal and, consequently, all forceful measures taken by NATO were unlawful. . . . That being said, as noted in paragraph 4 above, the crime related to an unlawful decision to use force is the crime against peace or aggression. . . . [T]he ICTY does not have jurisdiction over crimes against peace. . . . The ICTY has jurisdiction over serious violations of international humanitarian law as specified in Articles 2-5 of the Statute. These are *jus in bello* offences'; *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia*, UN Doc. PR/ATIS./510-E (2000), para. 30, available online at www.un.org/icty/pressreal/natoo61300.htm. The full story of this attempted prosecution may be found in M. Mandel, *How America Gets Away with Murder: Illegal Wars, Collateral Damage and Crimes against Humanity* (2004), Chapter 6.
- 5 *The Public Committee against Torture in Israel et al. v. The Government of Israel et al.*, Supreme Court of Israel, 11 December 2005, available online at www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/HCI%20judgment%20200n%20preventative%20strikes%20against%20terrorists%2011-Dec-2005.
- 6 The most important holding of the International Court of Justice in this regard was the unanimous one that all of the settlements built by Israel over the Green Line and populated in the hundreds of thousands since 1967 were violations of Art. 49(6) of the Fourth Geneva Convention: 'the information provided to the Court shows that, since 1977, Israel has conducted a policy and developed practices involving the establishment of settlements in the Occupied Palestinian Territory, contrary to the terms of Article 49, paragraph 6, just cited. . . . The court concludes that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law'; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, [2004] ICJ Rep. 183 (Majority). Paragraph 6 of Article 49 of the Fourth Geneva Convention also does not admit for exceptions on grounds of military or security exigencies. . . . I agree that this provision applies to the Israeli settlements in the West Bank and that their existence violates Article 49, paragraph 6. It follows that the segments of the wall being built by Israel to protect the settlements are *ipso facto* in violation of international humanitarian law', *ibid.*, Declaration of Judge Buergenthal, at 244 (Dissent). The General Assembly of the United Nations endorsed the Court's judgment by a vote of 150 to six, with ten abstentions: United Nations General Assembly, Tenth Emergency Special Session, 27th Meeting, 20 July 2004, A/ES-10/PV.27, at 5-6.
- 7 A more recent example of the same thing can be found in the Israeli *Report of the Public Commission to Examine the Maritime Incident of 31 May 2010*, The Turkel Commission, January 2011, available online at www.turkel-committee.gov.il/files/wordocs/7896summary-eng.PDF.

In the law of war, it is said that we are not to think of *jus ad bellum* when we think of *jus in bello*. The central concept is 'equality between belligerents' as between aggressor and victim of aggression, sometimes referred to as the 'symmetry' principle or the 'duality' principle. Though a lively and sophisticated debate has recently broken out over the moral bases for this distinction, it seems to be assumed by philosophers and lawyers alike that the law of war favours the concept and that whatever moral objections can be made to it, there are at least good practical legal reasons for it.⁸ Combined with the general refusal to exercise jurisdiction over crimes against peace in their own right, the result of this notion is the rather significant one of complete impunity for the most serious violations of the law of war and the practical irrelevance of the *jus ad bellum*. In this article, I argue that, contrary to the conventional wisdom, the notion of legal equality between belligerents is not supported by the jurisprudence of the Nuremberg era, or developments since, or the arguments usually made for it.

2. THE CRIME AGAINST PEACE AS THE SUPREME INTERNATIONAL CRIME

Certainly, there is no place for the doctrine of equality between belligerents in the category of crimes against peace itself, one of the great innovations of the London Charter of the International Military Tribunal of 8 August 1945. 'Crimes against peace' were defined in that Charter as the 'planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances'. This was the first count against the Nazi defendants, taking precedence over 'war crimes' and 'crimes against humanity'. In a famous passage from their judgment of the following year, the four-power judges of the Tribunal (American, British, French, and Russian) declared the crime of aggressive war to be the 'supreme international crime':

War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.⁹

That the crime of aggression should be deemed the worst of the crimes the Nazis committed, the Holocaust included, might seem hard to accept at first, but, in fact, it helps to prove the rule, because approximately 95 per cent of the six million Jews murdered by the Nazis, just like tens of millions of other victims of the war, lived in the countries invaded by the German armies. And almost all of even the German Jewish victims were murdered *during* the war, the great majority of these having been deported to death camps in occupied Poland.¹⁰ In other words, no war, no Holocaust – and, naturally, no aggression, no war.

8 All sides in the philosophical debate over symmetry are well represented in D. Rodin and H. Shue (eds.), *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (2008).

9 Judgment of the International Military Tribunal for the Trial of Major War Criminals, 30 September 1946, *The Judgement of Nuremberg, 1946* (1999), 26.

10 L. S. Dawidowicz, *The War against the Jews 1933–45* (1987), 447–8, 480.

Justice Robert Jackson, the head of the American delegation to Nuremberg and the Chief US Prosecutor at the trial, claimed the charge of aggressive war as the most significant achievement of the whole enterprise. In his report to President Truman a week after the verdicts had been delivered, he wrote:

What has been accomplished may be summarized as follows:

1. We negotiated and concluded an Agreement with the four dominant powers of the earth, signed at London on August 8, 1945, which for the first time made explicit and unambiguous what was theretofore, as the Tribunal has declared, implicit in International Law, namely that to prepare, incite, or wage a war of aggression, or to conspire with others to do so, is a crime against international society.¹¹

And, on reflection one year later, he wrote: ‘The most significant results of applying these definitions as the law of nations are to outlaw wars of aggression.’ He immediately added ‘and to lift to the level of an international offense the persecution of minorities’ but, in the London Charter’s famous formulation, *only* when committed ‘for the purpose of clearing the road to war’.¹² And, finally, ‘all who have shared in this work have been united and inspired in the belief that at long last the law is now unequivocal in classifying armed aggression as an international crime instead of a national right’.¹³

Though it was the Soviets and not the Americans who were actually responsible for making aggression the first count of the London Charter and even for giving it the title of ‘crimes against peace’,¹⁴ it was the Americans, Jackson to be specific, who insisted from the beginning that aggressive war be a free-standing charge¹⁵ – this over the strong opposition of the French delegation, sometimes supported by the Soviets. The French delegation objected to the last that the charge of aggression was *ex post facto* law:

We think that would be morally and politically desirable but that it is not international law . . . My difficulty is that this charter is not made to declare new international law; it is made to punish war criminals and the basis must be a safe one.¹⁶

The Russians initially supported the French in this:

From our point of view the form of article 6 . . . is not agreeable thus. It gives a very wide field of interpretation to acts which in one case might be an international crime and in another case might not be so. That is why from our point of view the formula proposed by the French delegation is better.¹⁷

But Jackson was firm:

our view is that this isn’t merely a case of showing that the Nazi Hitlerite people failed to be gentlemen in war; it is a matter of their having designed an illegal attack on the

11 *Report of Robert H. Jackson United States Representative to the International Conference on Military Trials, London 1945* (1949), 437.

12 *Ibid.*, at ix.

13 *Ibid.*, at xii.

14 *Ibid.*, at 374, 392, 416–17.

15 *Ibid.*, at 24.

16 *Ibid.*, at 297.

17 *Ibid.*, at 298.

international peace, which to our mind is a criminal offense by common-law tests, at least, and the other atrocities were all preparatory to it or done in execution of it.¹⁸

And, objecting to another draft list of charges, 'this redraft leaves out the launching of aggressive war, which is a subject of great interest to us'.¹⁹

The *ex post facto* objection was made forcefully by the lawyers for the Nazi defendants. On the eve of the trial, they submitted a motion in the following terms:

Humanity insists that this idea should in the future be more than a demand, that it should be valid international law. However, today it is not as yet valid international law. . . . The present Trial can, therefore, as far as Crimes against Peace shall be avenged, not invoke existing international law, it is rather a proceeding pursuant to a new penal law, a penal law enacted only after the crime. This is repugnant to a principle of jurisprudence sacred to the civilized world, the partial violation of which by Hitler's Germany has been vehemently discountenanced outside and inside the Reich.²⁰

3. ILLEGAL WAR AS CRIME

Jackson's response to this was, I believe, of enormous, if much-neglected, significance. His response was to analyse war in terms of *crime*. An illegal war was just mass murder and all the other crimes included. Hence the post-First World War treaties that made war illegal except in certain circumstances also made it criminal: they removed all lawful justification from what was otherwise simply crime on a vast scale. Hence, the Crime against Peace was at bottom really a mass Crime against Humanity. Here is what Jackson said in his opening statement to the Nuremberg Tribunal on 21 November 1945:

There was a time, in fact I think the time of the first World War, when it could not have been said that war inciting or war making was a crime in law, however reprehensible in morals.

Of course, it was under the law of all civilized peoples a crime for one man with his bare knuckles to assault another. How did it come that multiplying this crime by a million, and adding firearms to bare knuckles, made a legally innocent act? The doctrine was that one could not be regarded as criminal for committing the usual violent acts in the conduct of legitimate warfare. The age of imperialistic expansion during the eighteenth and nineteenth centuries added the foul doctrine, contrary to the teachings of early Christian and International Law scholars such as Grotius, that all wars are to be regarded as legitimate wars. The sum of these two doctrines was to give war making a complete immunity from accountability to law.

This was intolerable for an age that called itself civilized. . . .

The common sense of men after the first World War demanded, however, that the law's condemnation of war reach deeper, and that the law condemn not merely uncivilized ways of waging war, but also the waging in any way of uncivilized wars – wars of aggression . . .

Any resort to war – to any kind of war – is a resort to means that are inherently criminal. War inevitably is a course of killings, assaults, deprivations of liberty, and

18 Ibid., at 299.

19 Ibid., at 363.

20 Motion Adopted by All Defense Counsel 19 November 1945, available online at www.yale.edu/lawweb/avalon/imt/proc/v1-30.htm#back1.

destruction of property. An honestly defensive war is, of course, legal and saves those lawfully conducting it from criminality. *But inherently criminal acts cannot be defended by showing that those who committed them were engaged in a war, when war itself is illegal.* The very minimum legal consequence of the treaties making aggressive war illegal is to strip those who incite or wage them of every defense the law ever gave, and to leave war-makers subject to judgment by the usually accepted principles of the law of crimes.²¹

Another American prosecutor at Nuremberg, Bernard Meltzer, defended the charge of aggressive war in similar terms:

War, whether or not it is waged chivalrously, inherently involves a series of acts which for millennia have been denounced as crimes under every civilized legal system: deliberate mass killings, assaults, burning – acts that have been criminal even without the abominable sadism which the Nazis added. . . . Thus, for example, the deliberate killing of Frenchmen even in the course of a war involved a violation of the French laws of murder where the French had been victims of aggression. Under this approach, the Kellogg–Briand Pact and similar agreements are important, not because they directly made aggressive war a crime, but because, by destroying it as a defense, they made the instigation of aggression subject to the universal laws against murder. It is these ancient laws which are the basis for the punishment of aggression prescribed by the Charter.²²

4. POST-INTERNATIONAL MILITARY TRIBUNAL CASES

The Crime of Aggression was applied sparingly by the tribunals of the immediate postwar era. The International Military Tribunal itself restricted the crime to Hitler's inner war-making circle and acquitted almost half of those accused of the charge. Standard criminal-law logic would undoubtedly have cast the net of aiders and abettors to the aggressive war effort rather more widely. Subsequent Military Tribunals derived from this the notion that 'only major war criminals – that is, those persons in the political, military, and industrial fields, for example, who were responsible for the formulation and execution of policies – may be held liable for waging wars of aggression'²³ or, even more narrowly, only those 'in a position to shape or influence the policy' of aggressive war.²⁴ On this basis, all of the industrialists charged in the *I.G. Farben Trial* and all of the top generals charged in the *German High Command Trial* were acquitted of crimes against peace and convicted only of lesser crimes, if at all. The Tokyo Tribunal was less forgiving, as all of the 25 accused politicians and military officers for whom verdicts were delivered were convicted of crimes against

21 R. H. Jackson, *The Nürnberg Case as Presented by Robert H. Jackson, Chief of Counsel for the United States, Together with Other Documents* (1971), 82–4 (emphasis added).

22 B. D. Meltzer, 'Comment: A Note on Some Aspects of the Nuremberg Debate', (1946–47) 14 *University of Chicago Law Review* 455, at 460–1.

23 'The I.G. Farben Trial', (1948) 10 LRTWC 1, at 38.

24 'The German High Command Trial', (1948) 12 LRTWC 1, at 68.

peace.²⁵ National tribunals also had no difficulty convicting leading occupation authorities of crimes against peace.²⁶

But the Jackson Principle's assault on the notion of equality between belligerents made itself felt even in charges of war crimes and crimes against humanity. It is true that, in most of the reported trials of these charges, the illegality of the war was not mentioned by the adjudicating tribunal, and the cases were decided solely on compliance with the laws and customs of war and humanity applicable even to legal occupations.²⁷ In some cases, there were acquittals for acts of violence whose only justification was that the perpetrators were engaged in war, with the fact that it was an illegal war of aggression not even raised.²⁸ There were even cases in which the illegality of the war had been explicitly raised by the prosecution, but was ignored by the tribunal. Such a case was the *German High Command* case itself, in which the charges of crimes against peace were dismissed on the basis of the accuseds' remoteness from the policy-making circle. But charges of war crimes and crimes against humanity remained, and most of the accused were convicted of these. In their defence, they had pleaded military necessity and, against this, the prosecution argued, inter alia, the aggressive nature of the war:

In the first place, it is our position that the defense of military necessity can never be utilized to justify destruction in occupied territory by the perpetrator of an aggressive war. To allow such a defence to be interposed in such circumstances would result in a farcical paradox. It is perfectly apparent that the phrase 'imperatively demanded by the necessities of war' was never intended to justify the commission of one criminal act in order to extricate the perpetrator from the consequences of another criminal act. The International Military Tribunal has already held that the German war against the USSR was an act of aggression. It also held that participation in the planning and preparation for such a war was a crime. *This is res adjudicata* . . . We submit that it is inconsistent on the one hand to hold a defendant guilty of planning and preparing for an aggressive war, and on the other hand to hold that the wanton destruction and

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- 25 R. J. Pritchard and S. Magbanua Zaide (eds.), *International Military Tribunal for the Far East, The Tokyo War Crimes Trial, (1981–1988)*, Vol. 20, at 49773–858; a list of the verdicts is available online at www.cnd.org/mirror/nanjing/NMTT.html.
- 26 'Trial of Amon Leopold Goeth', (1946) 7 LRTWC 1 (Supreme National Tribunal of Poland); 'Trial of Rudolf Franz Ferdinand Hoess', (1947) 7 LRTWC 11 (Supreme National Tribunal of Poland); 'Trial of Gauleiter Artur Greiser', (1946) 13 LRTWC 70 (Supreme National Tribunal of Poland); 'Trial of Dr. Joseph Buhler', (1948) 14 LRTWC 23 (Supreme National Tribunal of Poland); 'Trial of Takashi Sakai', (1946) 14 LRTWC 1 (Chinese War Crimes Military Tribunal of the Ministry of Defence).
- 27 'The Dreierwalde Case', (1946) 1 LRTWC 81 (British Military Court, Wuppertal) (the right to kill a prisoner of war to prevent escape); 'The Belsen Trial', (1945) 2 LRTWC 1, at 119 (British Military Court, Luneburg) (the right to use reasonable force to maintain discipline in a concentration camp); 'Trial of Sergeant-Major Shigeru Ohashi', (1946) 5 LRTWC 25 (Australian Military Court, Rabaul) (the right of the occupier to execute rebels after a fair trial); 'Trial of Gerhard Friedrich Ernst Flesch', (1948) 6 LRTWC 111 (Supreme Court of Norway) (the right of the occupier to order execution of resistance fighters after a fair trial).
- 28 'Trial of Hauptsturmführer Oscar Hans', (1947) 5 LRTWC 82 (Supreme Court of Norway) (the right to carry out orders of execution on those condemned by occupying authorities where there was no reason to believe they had not had a fair trial); 'Trial of Erich Weiss and Wilhelm Mundo', (1945) 13 LRTWC 149 (United States Military Government Court, Dachau) (the right of police officer of the aggressor nation to shoot invading paratrooper in self defence); 'Trial of Richard Wilhelm Hermann Bruns', (1946) 3 LRTWC 15 (Supreme Court of Norway) (the right of occupying soldiers to shoot escaping resistance fighter they were trying to arrest), although, in this case, the trial court deployed the German aggression in deciding on the sentences (of death) for many cases of torture of other resistance fighters: 'If a nation, which without warning has attacked another, finds it necessary to use such methods to fight opposition, then those guilty must be punished, whether they gave the orders or carried them out', 3 LRTWC 15, at 18.

pillage carried out by his troops upon orders in the course of such a war is excusable on the ground of military necessity.²⁹

As it turned out, the accused were not convicted of crimes against peace, so the precise paradox argued by the prosecution did not occur. The prosecution argued as well that, aggressive war apart, proof of military necessity was lacking. It was this second point that the tribunal took up in acquitting the accused of the charges relating to spoliation: ‘The evidence on the matter of plunder and spoliation shows great ruthlessness, but we are not satisfied that it shows beyond a reasonable doubt, acts that were not justified by military necessity.’ And, from this, the law report commentator concluded that ‘the tribunal would appear to have rejected the argument that the accused could never plead military necessity in the course of a criminal war’.³⁰ But, in fact, the tribunal never commented on the prosecution’s point, perhaps because it was linked to the specific paradox about convicting the accused of crimes against peace, which did not happen. The tribunal did not even raise the issue in the judgment.

In those cases in which it was explicitly confronted by the tribunal, the picture was very different. One judgment explicitly embracing a version of the Jackson Principle was that of the American Military Tribunal that decided the *Einsatzgruppen* case.³¹ This was the trial for war crimes and crimes against humanity of the leaders of the SS units who accompanied the German armies as they invaded the Soviet Union – units whose sole task was to round up and shoot all the Jews, as well as such other undesirables as ‘gypsies’ and Communists. For ordering the murder of more than one million innocents without even the aid of gas chambers, 14 out of the 21 defendants were sentenced to death. The tribunal essentially took the war-as-crime approach of Jackson. Intentional killing without lawful excuse was murder:

Whether any individual defendant is guilty of unlawful killing is a question which will be determined later, but it cannot be said that prior to Control Council Law No. 10, there existed no law against murder. The killing of a human being has always been a potential crime which called for explanation. The person standing with drawn dagger over a fresh corpse must, by the very nature of justice, exonerate himself. This he may well do, advancing self-defense or legal authorization for the deed, or he may establish that the perpetrator of the homicide was one other than himself.³²

The Nazi defendants claimed these killings were in self-defence and thus within their rights as occupiers according to the laws and customs of war. The tribunal’s rejection of the defence was based first of all on the lack of any factual basis for it:

The annihilation of the Jews had nothing to do with the defense of Germany, the genocide program was in no way connected with the protection of the Vaterland, it was entirely foreign to the military issue. Thus, taking into consideration all that has been said in this particular phase of the defense, the Tribunal concludes that the

29 ‘The German High Command Trial’, (1948) 12 LRTWC 1, at 124–5 (United States Military Tribunal) (emphasis in original).

30 *Ibid.*, at 125 (Mr George Brand, Assistant Legal Officer to the United Nations War Crimes Commission).

31 *Trial of Otto Ohlendorf and Others*, Military Tribunal II-A, 8 April 1948, available online at www.mazal.org/archive/nmt/04/NMT04-Coor.htm.

32 *Ibid.*, at 459.

argument that the Jews in themselves constituted an aggressive menace to Germany, a menace which called for their liquidation in self-defense, is untenable as being opposed to all facts, all logic and all law.³³

But the tribunal did not leave it at that. The judges concluded with a categorical rejection of the plea of self-defence as completely ruled out by Nazi aggression:

One of the most amazing phenomena of this case which does not lack in startling features is the manner in which the aggressive war conducted by Germany against Russia has been treated by the defense as if it were the other way around. Thus, one of the Counsel in his summation speech said:

'However, as was the case in the campaign against Russia, when a large number of the inhabitants of this land, whether young, old, men, women or child, contrary to all acts of humanity and against every provision of international law, cowardly carries on a war from ambush against the occupying army, then certainly one cannot expect that the provisions of international law would be observed to the letter by this army.'

No comment is here needed on the statement which characterizes the defense of one's country as 'cowardly,' and the other equally astounding remark that the invader has the right to ignore international law.³⁴

It is true that there is a slight equivocation in the tribunal's characterization of what the defendants were trying to justify as 'the right to ignore international law', suggesting that this was a defence not of a right to rely on *jus in bello*, but of a right to violate it. And it was an obvious assumption of the case that the killing of non-combatants was the gravamen of the charge. However, while perhaps gratuitous, the rejection of any notion of 'equality between belligerents' was nevertheless unmistakable. Not only that, but it had a real legal consequence in the way the tribunal treated the question of reprisals, which it held were forbidden to the aggressor while permitted to the resistance fighter:

If it is assumed that some of the resistance units in Russia or members of the population did commit acts which were in themselves unlawful under the rules of war, it would still have to be shown that these acts were not in legitimate defense against wrongs perpetrated upon them by the invader. Under International Law, as in Domestic Law, there can be no reprisal against reprisal. The assassin who is being repulsed by his intended victim may not slay him and then, in turn, plead self defense.³⁵

An even stronger decision relating to reprisals and one that fully embraced the Jackson Principle (aggressive war as crime) was the Dutch prosecution of Hans Albin Rauter, the SS officer in charge of deportations and reprisals in Holland.³⁶ He was tried and convicted of war crimes and crimes against humanity and executed in 1949. One set of charges against him involved the killing of hostages in reprisal for

33 Ibid., at 469–70.

34 Ibid., at 466.

35 Ibid., at 493–4. Benjamin Ferencz, a prosecutor at the *Einsatzgruppen* trial, recalls that Chief Prosecutor Telford Taylor, in his argument to the Tribunal, 'compared the defendant's contention, that they were only acting to protect Germany, to the argument of a burglar who breaks into a house, shoots the owner, and then claims it was necessary "self-defense"', B. B. Ferencz, *Benny Stories*, Chapter 4: Nuremberg Trials and Tribulations (1946–1949) Story 35: Judgment Day for Mass Murderers, available online at www.benferencz.org/index.php?id=8&story=34.

36 'Trial of Hans Albin Rauter', (1949) 14 LRTWC 89 (Netherlands Special Court of Cassation).

attacks on the German occupiers. The trial court accepted the legitimacy of reprisals on behalf of the occupiers if done within the limits of international law, but held that killing innocents in revenge and in the excessive numbers employed by the Germans was not protected. However, on appeal, the Special Court of Cassation, while upholding the sentence, held that the right of legitimate reprisal was denied to the aggressor:

The appeal to this, in principle recognized, right of a belligerent State to take reprisals, provided they are of a permissible nature – eventually also against the population of occupied territory – cannot be of any avail to the defendant, as there was no previous international offence committed by the Netherlands against the then German Reich, so that the Reich mentioned had absolutely no right to take genuine reprisals.

It is indeed generally known all over the world and also convincingly established by the International Military Tribunal in Nuremberg . . . that the former German Reich unleashed against the Kingdom of the Netherlands, as it did against various other States in Europe, an unlawful war of aggression, and by so doing began on its part to violate International Law, an international offence which in itself the Kingdom of the Netherlands was already justified in answering by taking reprisals against the aggressor.

The then German Reich made its guilt even greater by making use, in the course of its military operations during the few days in May 1940, of treacherous means prohibited by the rules of war, such as in seizing by surprise important strategic objects – bridges, – . . . by means of misuse of Netherlands uniforms, contrary to Art. 23 (f) of the Rules of Land Warfare; by means of Netherlands traitors in its service who were instructed how to achieve this result; and by the bombing of a city – Rotterdam – before the expiration of a regular ultimatum.

After the military operations proper the then German Reich continued consistently with the commission of new violations of International Law, by, among other acts, withdrawing recognition to the lawful head of the Netherlands State; setting up in this country a civil administration which was made independent of a military commander, carrying out systematic Nazification of the Netherlands; increasingly persecuting Jewish Netherlands; compelling Dutch workers [to take part] in the German war effort and industries; and many other measures prohibited by International Law.

Thus the Kingdom of the Netherlands far from being by law liable to endure reprisals from the German side, would have, on the contrary been justified on all these grounds to take measures of reprisal against the then German Reich of its own right, against which reprisals, permitted by International Law, no counter-reprisals from the German side would have been allowed.³⁷

The law report commentator summarized this holding in terms of relevance to any occupation that is aggressive in character or criminal in the means it employs:

It will be recalled that the Court referred also to violations incidental to the aggression and affecting rules of a proper conduct of military operation. It also made a strong point of the conduct of the occupant towards the inhabitants during the occupation, and thus strengthened the attitude taken on the subject of the initial wrong done by the enemy by launching a war of aggression. . . . These breaches of international law were referred to with a view to showing that, even regardless of the criminal nature of a war of aggression, the invader and occupant behaved so as to originate violations of the laws and customs of war, and thus, for this reason, lost legal title to claim legitimate

37 *Ibid.*, at 134–5.

reprisals. The fact that such violations were committed by German official organs implicated the German State and created, in this instance as well, a wrong committed by the State at war with the Netherlands.³⁸

Other decisions of the era sidestepped the Jackson Principle. For example, the Tokyo Tribunal, faced with murder charges against the Japanese defendants for every killing that occurred during the war with the United States, including that of soldiers, said this:

Counts 39 to 52 inclusive (omitting Count 44 already discussed) contain charges of murder. In all these counts the charge in effect is that killing resulted from the unlawful waging of war at the places and upon the dates set out In all cases the killing is alleged as arising from the unlawful waging of war, unlawful in respect that there had been no declaration of war prior to the killings (Counts 39 to 43, 51 and 52) or unlawful because the wars in the course of which the killings occurred were commenced in violation of certain specified Treaty Articles (Counts 45 to 50). If, in any case, the finding be that the war was not unlawful then the charge of murder will fall with the charge of waging unlawful war. If, on the other hand, the war, in any particular case, is held to have been unlawful then this involves unlawful killings not only upon the dates and at the places stated in these counts but at all places in the theater of war and at all times throughout the period of the war. No good purpose is to be served, in our view, in dealing with these parts of the offences by way of counts for murder when the whole offence of waging those wars unlawfully is put in issue upon the counts charging the waging of such wars For these reasons only and without finding it necessary to express any opinion upon the validity of the charges of murder in such circumstances we have decided that it is unnecessary to determine Counts 39 to 43 inclusive and Counts 45 to 52 inclusive.³⁹

Similar to this was the 'Justice Trial' of Josef Altstötter and others, involving high officials in the German Ministry of Justice, and some prosecutors and judges, charged with crimes against humanity and war crimes for the way they administered the law.⁴⁰ While holding the accused guilty of crimes against humanity in the wartime application of racist laws and in the racist application of racially neutral laws, the tribunal refused to hold them guilty of meting out punishment for 'Crimes amounting to an undermining of the defensive strength of the nation; defeatist remarks, criticisms of Hitler, and the like'. The tribunal dealt with the Jackson Principle in these terms:

Questions of far greater difficulty are involved when we consider the cases involving punishment for undermining military morale Can we then say that in the throes of total war and in the presence of impending disaster those officials who enforced these savage laws in a last desperate effort to stave off defeat were guilty of crimes against humanity?

It is persuasively urged that the fact that Germany was waging a criminal war of aggression colours all of these acts with the dye of criminality. To those who planned the war of aggression and who were charged with and were guilty of the crime against the peace as defined in the Charter, this argument is conclusive, but these defendants are not charged with crimes against the peace nor has it been proven here that they

38 *Ibid.*, at 136–7.

39 Pritchard and Magbanua Zaide, *supra* note 25, at 48452–3.

40 'Trial of Josef Altstötter', (1947) 6 LRTWC 1 (United States Military Tribunal, Nuremberg).

knew that the war which they were supporting on the home front was based upon a criminal conspiracy or was *per se* a violation of international law. The lying propaganda of Hitler and Goebbels concealed even from many public officials the criminal plans of the inner circle of aggressors. If we should adopt the view that by reason of the fact that the war was a criminal war of aggression every act which would have been legal in a defensive war was illegal in this one, we would be forced to the conclusion that every soldier who marched under orders into occupied territory or who fought in the homeland was a criminal and a murderer. The rules of land warfare upon which the prosecution has relied would not be the measure of conduct and the pronouncement of guilt in any case would become a mere formality. . . . In view of our clear duty to move with caution in the recently charted field of international affairs, we conclude that the domestic laws and judgments in Germany which limited free speech in the emergency of war cannot be condemned as crimes against humanity merely by invoking the doctrine of aggressive war. All of the laws to which we have referred could be applied in a discriminatory manner and in the case of many, the Ministry of Justice and the courts enforced them by arbitrary and brutal means, shocking to the conscience of mankind and punishable here. We merely hold that under the particular facts of this case we cannot convict any defendant merely because of the fact, without more, that laws of the first four types were passed or enforced.⁴¹

This is a qualm-filled passage, but the more one reads it, the more it is clear that the holding was based squarely on a lack of proof of knowledge of the accused of the facts making the war aggressive, not on the idea that conscious participation in aggression would be irrelevant. In other words, it was an explicit non-decision of the question.

The one decision that flatly rejected the Jackson Principle was the so-called ‘Hostages Trial’ of Wilhelm List and Others by another United States Military Tribunal.⁴² This case involved the Nazi occupation of Yugoslavia, Albania, and Greece and the 12 defendants included the commander-in-chief of the invading forces and other German commanders. The charges were war crimes and crimes against humanity in the killing of many thousands of Yugoslav and Greek civilians. The case took its name from an order directing the execution of 100 civilian hostages for every German soldier killed by the partisans. On other occasions, all the inhabitants of particular villages near which partisan action had occurred were slaughtered and the villages burned. The defendants were also charged with the unwarranted killing of partisans or guerrillas. Though most of the accused were convicted, the judgment was extremely permissive, not only on the taking and killing of hostages, but also on the killing of so-called ‘unlawful combatants’.⁴³ The convicted accused also got off very lightly. None was sentenced to death. List himself was released in 1951 for health reasons, but survived to 1971.⁴⁴

The prosecutors had argued, as in other cases, that because of the unlawful nature of the occupation, the accused could not rely on the rights of occupiers under the laws

41 Ibid., at 51–2.

42 ‘Trial of Wilhelm List and Others’, (1948) 8 LRTWC 34.

43 Ibid., at 57: ‘captured members of these unlawful groups were not entitled to be treated as prisoners of war. No crime can properly be charged against the defendants for the killing of such captured members of the resistance forces, they being franc-tireurs.’

44 Yad Vashem, *Nuremberg Proceedings*, at 10, available online at www1.yadvashem.org/exhibitions/nuremberg/img/NUREMBERG_PROCEEDINGS.pdf.

and customs of war. This time, however, the court neither accepted nor side-stepped the argument, but firmly rejected it:

At the outset, we desire to point out that International Law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory. There is no reciprocal connection between the manner of the military occupation of territory and the rights and duties of the occupant and population to each other after the relationship has in fact been established. Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject.

It must not be overlooked that international law is prohibitive law. Where the nations have affirmatively acted, as in the case of the Hague Regulations, 1907, it prohibits conduct contradictory thereto. Its specific provisions control over general theories, however reasonable they may seem. We concur in the views expressed in the following text on the subject: 'Whatever may be the cause of a war that has broken out, and whether or no the cause be a so-called just cause, the same rules of International Law are valid as to what must not be done, and must be done by the belligerents themselves in making war against each other, and as between the belligerents and neutral States. This is so, even if the declaration of war is *ipso facto* a violation of International Law, as when a belligerent declares war upon a neutral State for refusing passage to its troops, or when a State goes to war in patent violation of its obligations under the Covenant of the League or of the General Treaty for the Renunciation of War. To say that, because such a declaration of war is *ipso facto* a violation of International Law, it is 'inoperative in law and without any judicial significance,' is erroneous. The rules of International Law apply to war *from whatever cause it originates*. Oppenheim's *International Law*, II Lauterpacht, p. 174.⁴⁵

The Hostages Trial aroused a brief controversy in its time because of the public clash between, on the one hand, the prosecutor, Brigadier General Telford Taylor, America's chief counsel for war crimes, and, on the other, the president of the court, Iowa Supreme Court Justice Charles Wennerstrum, over critical statements made by Wennerstrum about the trials immediately after the verdict was rendered. To this day, Wennerstrum is cited by Holocaust deniers as an authority for 'the crime' of Nuremberg. Two days after the judgment, Wennerstrum gave an interview, published in the *Chicago Tribune* on 23 February 1948, still copiously quoted by neo-Nazis, such as on the website of the supporters of Ernst Zundel (convicted in 2007 in Germany for Holocaust denial and sentenced to five years' imprisonment, after deportation from the United States and Canada).⁴⁶ Here is what Wennerstrum said in the original article, most of which is quoted on the website:

'If I had known seven months ago what I know today,' [Wennerstrum] told friends as he packed to leave for America, 'I would never have come here.'

'Obviously,' he said, 'the victor in any war is not the best judge of the war crime guilt. Try as you will, it is impossible to convey to the defense, their counsel, and their people that the court is trying to represent all mankind rather than the country which appointed its members.'

45 'Trial of Wilhelm List and Others', *supra* note 42, at 59–60⁴² (emphasis in original).

46 'Nuremberg: The Crime That Will Not Die', available online at www.zundel.org/english/advanced_articles/incorrect.o11a.html.

The initial war crimes trial here was judged and prosecuted by Americans, Russians, British and French with much of the time, effort and expenses devoted to whitewashing the allies and placing the sole blame for World War II upon Germany.^[47]

‘What I have said of the nationalist character of the tribunals,’ the judge continued, ‘applies to the prosecution. The high ideals announced as the motives for creating these tribunals has not been evident.

‘The prosecution has failed to maintain objectivity aloof from vindictiveness, aloof from personal ambitions for convictions. It has failed to strive to lay down precedents which might help the world to avoid future wars.

‘The entire atmosphere here is unwholesome. Linguists were needed. The Americans are notably poor linguists. Lawyers, clerks, interpreters and researchers were employed who became Americans only in recent years, whose backgrounds were embedded in Europe’s hatreds and prejudices.

...

‘Also abhorrent to the American sense of justice is the prosecution’s reliance upon self-incriminating statements made by the defendants while prisoners for more than 2 ½ years, and repeated interrogations without presence of counsel. Two and one-half years of confinement is a form of duress in itself.’

...

‘The lack of appeal,’ replied the judge, ‘leaves me with a feeling that justice has been denied.’⁴⁸

Prosecutor Taylor attacked Wennerstrum in an open letter, calling the remarks ‘a deliberate, malicious, and totally unfounded attack on the trial’ and claiming that ‘in giving vent to these slanders, you have fouled your own nest and sought to discredit the very judgment which you and your colleagues have just rendered’. Taylor added that the remarks showed Wennerstrum’s ‘unreasoning bias . . . so clearly on behalf of the defendants . . . If you in fact held the opinions you are quoted as expressing, you were guilty of grave misconduct in continuing to act in the case at all’.⁴⁹ But Wennerstrum stood by his statements:

Reporters who met the party at the [air]field quickly handed Judge Wennerstrum clippings of the interview and General Taylor’s reply. After reading these carefully, the judge remarked: ‘I have no reason to deny my statements. I made them because I thought they would be helpful; otherwise I would not have done so. I do not intend, however, to engage in any recriminations as to General Taylor’s criticism.’⁵⁰

Apart altogether from the chief judge’s ‘unreasoning bias’, the Hostages Trial judgment also has a big jurisprudential hole in it. The crucial quotation from *Oppenheim’s International Law* came from Lauterpacht’s sixth edition of 1940, meaning that it *pre-dated* the International Military Tribunal’s decision. The passage had remained substantially the same since Oppenheim had written it in 1912, although the parts

47 This last sentence appears in the article without quotation marks, but, in its context, appears, or is made to appear, as if it were a direct quote. There are other slight inconsistencies in the use of quotation marks, and I have left them exactly as they appear in the original article.

48 ‘Nazi Trial Judge Rips “Injustice”’, *Chicago Tribune*, 23 February 1948, 3.

49 Ibid.

50 ‘Judge Stands Firm in War Trial Case’, *New York Times*, 25 February 1948, 10. It should be pointed out, in fairness perhaps, that the author of the *Einsatzgruppen* decision that so warmly embraced the Jackson Principle was the famous jurist Michael Musmanno, a pro-labour activist before the war who had been, among other things, a volunteer appellate counsel for Sacco and Vanzetti.

about the Covenant of the League and of the General Treaty for the Renunciation of War had been added by Lauterpacht. Oppenheim died in 1919 before he could write an edition that took into account any of the great developments after the First World War. In fact, in the 1926 edition (written after the coming into force of the Covenant of the League of Nations), the editor added this footnote: 'The editor thinks it probable that the author would have considerably revised some of the §§ in this Section, had he lived to edit a postwar edition.'⁵¹ The subsequent editions by Lauterpacht eliminated this footnote, although he did add some important new material further on in the chapter, reflecting these changes:

[S]o long as war was a recognised instrument of national policy both for giving effect to existing rights and for changing the law, the justice or otherwise of the causes of war was not of legal relevance . . . The legal position has now changed with the limitation of the right of war in the covenant of the League and with its abolition as an instrument of national policy in the General Treaty for the Renunciation of War. As before, International Law is not concerned with the merits of the controversies giving rise to war. But for many legal purposes it seems now again possible to distinguish between just and unjust (or lawful and unlawful) wars – the latter being those waged in breach of the obligations of the Covenant and of the Treaty for the Renunciation of War.⁵²

Neither this passage nor, naturally, the footnote to the 1926 edition made it into the Hostages Trial judgment. Far more importantly, when Lauterpacht wrote his next edition, published in 1952, he felt obliged to rewrite the whole section to take account of the decision of the International Military Tribunal, thus:

§61 Prior to the Covenant of the League of Nations, the General Treaty for the Renunciation of War, and the Charter of the United Nations, it was generally believed that whatever may be the cause of war, and whether or not the cause be a so-called just cause, the same rules of law applied between the belligerents *inter se* and the belligerents and neutrals. Having regard to the development of International Law as expressed in the above-mentioned instruments that view can no longer be accepted without qualification. In so far as war has ceased to be a right – or an exercise of power – fully permitted by International Law, an illegal war, i.e. a war resorted to contrary to the fundamental obligations accepted by a State and prescribing the institution of war as such, can no longer confer upon the guilty belligerent all the rights which traditional International Law, characterised as it was by the unlimited right of States to wage war . . . conferred upon the belligerent. *Ex injuria jus non oritur* is an inescapable principle of law. At the same time, in view of the humanitarian character of a substantial part of the rules of war it is imperative that *during the war* these rules should be mutually observed regardless of the legality of the war . . . Accordingly it must be held that during the war all belligerents are bound to respect and are entitled to insist as among themselves on the observance of rules of warfare generally recognized. Thus, for instance, the belligerent occupant even if he is the aggressor is entitled to exact from the civilian population the obedience due by it to the occupant under the rules of International Law . . . This is but one example of the necessity of maintaining the operation of the rules of war regardless of the illegality of the war.

...

⁵¹ L. Oppenheim, *International Law: A Treatise*, Vol. 2 (1926), at 127.

⁵² L. Oppenheim, *International Law: A Treatise*, Vol. 2 (1940), at 176–7.

In strict logic it may be held that the killing of combatants by the aggressor is no more than murder and that the appropriate penalty is the natural consequence of the crimes thus perpetrated. *Pendente bello* logic must stop short of viewing in that light the activities of the armed forces of the aggressor. However, on the part of those primarily responsible for the planning and instigation of the unlawful war that responsibility is identical with the supreme crime against the peace as enumerated in the indictment preceding the judgment pronounced by the International Military Court at Nuremberg and as fully accepted by the Tribunal.⁵³

There are clearly some questionable logical steps here. It is hard, for example, to understand the progression that takes one from the desirability of compliance with the humanitarian elements of the law of war, regardless of the illegality of the war itself, to the distant conclusion that the civilian population has a legal duty to obey the illegal occupier. In a kind of infinite regress, Lauterpacht tempers the logic of the International Military Tribunal with reliance on such aberrant rulings as that of the *Hostages* case, itself based on an out-of-date and by then erroneous version of Lauterpacht's own text!⁵⁴ The Court in *Rauter* disagreed with the precise proposition about the civilian population's duty, although it recognized that there may be a prudential reason for obedience to the occupier:

leaving aside the question as to how far the inhabitants of the occupied territory, having regard for the risk of their own compatriots, should refrain from acting contrary to the regulations of the enemy in order to prevent retaliatory measures against the remaining population, there can be no question of a duty in law on the part of individual civilians to obedience towards the enemy.⁵⁵

Such a duty is also absent from the Geneva Conventions concluded after the Second World War. In fact, the duties imposed by the conventions are all duties on *occupiers*—duties such as those in Article 55:

To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.⁵⁶

Or there are prohibitions such as those against population transfers in Article 49. The population of the occupied territory, not the occupiers, are the convention's 'protected persons',⁵⁷ and they are the bearers of rights correlative to all the duties and prohibitions on the occupiers. The rights conferred on the occupiers are very few and usually intended as exceptions to the prohibitions. For example, Article 68 imposes a general *limit* on punishment to proportionate imprisonment, and allows the death penalty only for a few serious offences and only if punishable by death

53 L. Oppenheim, *International law: A Treatise*, Vol. 2 (1952), at 217–18, 220 (emphasis in original).

54 *Ibid.*, at 218, footnote 2.

55 'Trial of Hans Albin Rauter', (1949) 14 LRTWC 89, at 135.

56 Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949.

57 *Ibid.*: 'Art. 4. Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.'

under local law before the occupation, only if the offender was over 18, etc.⁵⁸ Apropos of targeted killing, Article 78 limits pure security measures to assigned residence or internment.⁵⁹ In any event, nothing in the Fourth Geneva Convention deals either way with the question of the relevance of the illegality of an occupation, nor could anything in it be construed as seeking to absolve anyone of the consequences of doing anything not explicitly authorized by the convention in defence of an aggressive or illegal war.

On the other hand, the Preamble to Protocol 1 of 1977, not ratified by nearly as many states as the 1949 Conventions themselves (not ratified, for example and apropos of the examples given at the beginning of this article, by Israel or the United States), attests that its signatories sought to ensure that compliance with its *jus in bello* protections would not absolve anyone of their *jus ad bellum* crimes:

Expressing their conviction that nothing in this Protocol or in the Geneva Conventions of 12 August 1949 can be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations.⁶⁰

And, while the Preamble also tries to separate the two *juries*, it does so only in respect of *protected persons*:

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

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

58 Ibid.: 'Art. 68. Protected persons who commit an offence which is solely intended to harm the Occupying Power, but which does not constitute an attempt on the life or limb of members of the occupying forces or administration, nor a grave collective danger, nor seriously damage the property of the occupying forces or administration or the installations used by them, shall be liable to internment or simple imprisonment, provided the duration of such internment or imprisonment is proportionate to the offence committed. Furthermore, internment or imprisonment shall, for such offences, be the only measure adopted for depriving protected persons of liberty. The courts provided for under Article 66 of the present Convention may at their discretion convert a sentence of imprisonment to one of internment for the same period. The penal provisions promulgated by the Occupying Power in accordance with Articles 64 and 65 may impose the death penalty against a protected person only in cases where the person is guilty of espionage, of serious acts of sabotage against the military installations of the Occupying Power or of intentional offences which have caused the death of one or more persons, provided that such offences were punishable by death under the law of the occupied territory in force before the occupation began. The death penalty may not be pronounced against a protected person unless the attention of the court has been particularly called to the fact that since the accused is not a national of the Occupying Power, he is not bound to it by any duty of allegiance. In any case, the death penalty may not be pronounced on a protected person who was under eighteen years of age at the time of the offence.'

59 Ibid.: 'Art. 78. If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.'

60 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

The main thing is that the Geneva Conventions pose no obstacles to treating occupiers differently from the occupied and illegal occupiers differently from legal ones⁶¹ – all of which is to say that, *pace* Lauterpacht, there seems nothing inherently inconsistent with insisting on compliance with the humanitarian part of the law of war by the occupiers while denying them impunity for the consequences of their aggression, much less denying their victims the right to resist with all necessary means.

But, at least in Lauterpacht, as in almost all of the post-war decisions, the irrefutable moral logic of the Jackson Principle is recognized and, indeed, vindicated in the condemnation of the instigators of an illegal war for the supreme crime of aggression – in other words, there is ‘linkage’ between the suspension of the logic of illegal-war-as-crime against the ordinary soldier and its full implementation against those primarily responsible. This may well be thought to underlie the many post-Second World War prosecutions of those beneath the leadership level that ignored the supreme criminality of the war itself and stuck to the conventional laws of war and humanity. In fact, much of the recent debate over symmetry among the moral philosophers is exclusively concerned with the problem of the ‘ordinary soldier’, with the implicit or explicit assumption that greater responsibility for aggression justifies greater ‘asymmetry’.⁶²

However, modern legal scholarship and, more importantly, modern legal practice seem to have lost this thread. Take, for example, Yoram Dinstein’s text on the law of war.⁶³ Dinstein is scrupulous in his defence of the charge of aggressive war, but when he comes to discuss crimes against humanity and against the laws and customs of war, he does his utmost to discredit any linkage between them and crimes against peace, by a staunch defence of the doctrine of equality between belligerents, that is, between aggressor – supreme international criminal – and victim:

The proposition of equality between belligerents is, first and foremost, a precept of common sense. The *jus in bello* has in the past succeeded in curbing excesses, notwithstanding the pervasive animosity towards the enemy that is characteristic of every war, only because it has generated mutual advantages for both sides. No State (least of all a State which, through its aggression, has already perpetrated the supreme crime against international law) will abide by the strictures of the *jus in bello* if it knew that it was not going to derive reciprocal benefits from the application of the norms.⁶⁴

This, of course, is wildly speculative and contradicted by the actual experience of war. The Nazi aggressors of the Second World War were equally as contemptuous of the laws and customs of war and of humanity as of the law of peace, and

61 A different view of the Geneva Conventions and the equality of belligerents can be found in A. Roberts, ‘The Equal Application of the Laws of War: A Principle under Pressure’, (2008) 90(872) IRRC 931, at 936–7, available online at www.icrc.org/eng/assets/files/other/irrc-872-roberts.pdf.

62 D. Zupan, ‘A Presumption of the Moral Equality of Combatants: A Citizen-Soldier’s Perspective’, in Rodin and Shue, *supra* note 8, at 214: ‘a general officer on the Joint Staff might be guilty of wrongdoing, even if we judge that the combatant on the ground who is actually doing the killing is not (guilty). We must, that is, recognize the gross difference in power, knowledge, access to information, influence and freedom that obtains among people in a hierarchical chain of command. The lower one is in the chain, the lesser influence, etc., one has, and the lesser one can be held responsible for the wars one is fighting.’

63 Y. Dinstein, *War, Aggression, and Self-Defence* (2005).

64 *Ibid.*, at 157.

they were condemned for both in the aftermath.⁶⁵ Furthermore, the argument appears to confuse, on the one hand, the complicated calculus of immediate practical and propaganda advantages and disadvantages that aggressors and victims make in deciding to what degree they will comply with or disregard the laws of war with, on the other hand, the distinct question of what effect, if any, the threat of punishment at war's end for violating the laws of war and peace has on the same decisions. The decisions made by the United States to engage in torture during the Iraq war seem to have had nothing to do with either the fear of punishment by an international tribunal (how could they have, given America's juridical as well as practical immunity?) or compliance with the laws and customs of war by the other side, whom the Americans accused of routinely violating them and to whom, as designated 'unlawful combatants', the Americans flatly refused their protection.⁶⁶

Dinstein's jurisprudential arguments for his position are no more persuasive than his prudential ones. Prominent among the authorities he relies on is the *Hostages* case itself.⁶⁷ He does not mention *Rauter*, although he cites the case of Friedrich C. Christiansen, a senior commanding officer of the German Army in Holland convicted and sentenced to 12 years' imprisonment (of which he served only three) for crimes against humanity and the laws and customs of war, from which Dinstein quotes the following: 'The rules of international law, in so far as they regulate the methods of warfare and the occupation of enemy territory, make no distinction between wars which have been started legally and those which have been started illegally.'⁶⁸

Of course, in the *Rauter* case, a Dutch court superior to the one in *Christiansen* decided the exact opposite. Furthermore, in *Christiansen*, the accused Nazi occupier was not claiming the *protection* of the laws of war from the effects of his aggression, but an *exemption* from them on the basis of the supposed illegitimacy of the resistance. He was arguing that, because he was the occupier, any resistance was a violation of the laws of war, allowing him the reciprocal right to violate the laws of war. It was this that was emphatically rejected by the court and it is in this context that the passage quoted by Dinstein must be read. In fact, Dinstein is quoting from an edited version of the *Christiansen* case in Lauterpacht's *Digest* and it seems to be a summary rather than a direct quotation from the judgment. The passage quoted by Dinstein does not appear at all in the UN Reports, but the following ones do, and they make it clear that the Court's main point was to vindicate the rights of the *occupied*, not the rights of the occupier:

65 Judgment of the International Military Tribunal for the Trial of Major War Criminals, *supra* note 9.

66 The White House, Office of the Press Secretary, *Fact Sheet: Status of Detainees at Guantanamo*, 7 February 2002, available online at www.presidency.ucsb.edu/ws/index.php?pid=79402.

67 The assumption that the law of Nuremberg on the relationship between the two *jures* is represented by the *Hostages* case can be found on both sides of the philosophical debate. See, e.g., G. Reichberg, 'Just War and Regular War: Competing Paradigms', in Rodin and Shue, *supra* note 8, at 193, 210 (opposing the separation); and Roberts, *supra* note 61, at 941, available online at www.icrc.org/eng/assets/files/other/irrc-872-roberts.pdf (supporting the separation).

68 Dinstein, *supra* note 63, at 160.

The Court wishes . . . to let it be known as its considered judgment that it does not subscribe to the arguments on the grounds of which counsel considers the resistance committed in the present case to be illegal.

Counsel has certainly advanced that it is a rule of International Common Law that the civilian population must refrain from attacks on the army of occupation, but the Court denies that such a rule would exist in the sense that the civilian population would be violating a duty in law towards the occupant by acts of resistance such as occurred here.

As long as International Law, when regulating the way a war and an occupation should be conducted, does not discriminate between a legitimate and an illegitimate occupation, a rule of that sort would be unthinkable.⁶⁹

Even the Lauterpacht version from which Dinstein quotes contains the following passage (which Dinstein does not quote):

In the present condition of public international law there was only one exception to the general rule that the legality or illegality of civilian resistance was irrelevant to the question whether the Occupant could take shelter behind particular grounds of impunity; that was, when the Occupant takes action against acts of resistance on the part of the civilian population which were themselves a form of defence against violations of the law of nations by the Occupying Power. The reason was that their acts were acts of justifiable defence which the Occupying Power was forbidden either to punish or to counter with reprisals. In the case under consideration, however, there was no question of such lawful acts of defence.⁷⁰

This seems pretty close to the Jackson Principle and, in any event, can only be read as a statement contrary to any notion of ‘equality between belligerents’ between aggressor and victim. One is not surprised to find that there are no reported cases of the postwar prosecution of Dutch resistance fighters for killing Nazis.

This jurisprudence also has intriguing implications for situations in which armed resistance to aggressive or illegal occupation employs methods that violate the *jus in bello* by targeting non-combatants or by failing to discriminate between combatants and non-combatants. This may be the only means of ousting a militarily superior occupier immune to conventional warfare.⁷¹ This jurisprudence argues that some violations of *jus in bello* are legitimate if they meet the criteria of self-defence. Furthermore, the Fourth Geneva Convention specifically prohibits reprisals only against ‘protected persons’, defined as ‘those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals’.⁷² It is

69 Judgment of the Special Court at Arnhem, in the case against Friedrich Christiansen, delivered on 12 August 1948, quoted by the Law Report commentator in the notes to the ‘Trial of Hans Albin Rauter’, (1949) 14 LRTWC 89, at 128.

70 ‘Re Christiansen’, in H. Lauterpacht, *Annual Digest and Reports of Public International Law Cases, Year 1948* (1953), 413–14.

71 In G. Pontecorvo’s *La Battaglia di Algeri* (1966), the resistance leader is reproached by a journalist for being ‘plutôt lâche d’utiliser les sacs et les couffins de femmes pour transporter vos bombes, ces bombes que font tant victimes innocents’ [‘rather cowardly to use women’s bags and baskets to carry your bombs that result in so many innocent victims’] to which Ben M’Hidi replies ‘Evidemment, avec des avions, ce serait beaucoup plus commode pour nous. Donnez-nous vos bombardiers, monsieur, et on vous donnera nos couffins’ [‘Of course, if we had your airplanes it would be a lot easier for us. Give us your bombers, sir, and we’ll give you our baskets’].

72 Fourth Geneva Convention, *supra* note 56, Arts. 4, 33.

hard to see how this could be taken to include civilians of an occupying power. The 1977 Protocol to the Geneva Conventions, which aims to protect 'the civilian population' from attack, also seeks in its Preamble to ensure that it is 'fully applied in all circumstances *to all persons who are protected* . . . without any adverse distinction based on the nature or origin of the armed conflict'.⁷³

It is true that civilians of an occupying power would clearly be covered by Common Article 3, which prohibits violence against 'persons taking no active part in the hostilities'.⁷⁴ However, the point of the reprisal doctrine is to *allow* violations of *jus in bello* prohibitions like these. To this mix, there has to be added the far-reaching implications of the International Court of Justice's *Nuclear Weapons Advisory Opinion*, which severely undermined the supposed irrelevance of *jus ad bellum* to *jus in bello*.⁷⁵ In that case, the International Court held that even 'the inherent and total incompatibility [of recourse to nuclear weapons] with the law applicable in armed conflict' could not allow it to 'conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rule applicable in armed conflict in any circumstance'. Why? Because 'the Court cannot lose sight of the fundamental right of every state to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival was at stake'.⁷⁶ Only where the use of nuclear weapons failed to meet the requirement of Article 51 was the Court unanimously of the view that it would be unlawful.⁷⁷ In his separate opinion, Judge Guillaume drew out the implications of this:

None of the states which appeared before the Court raised the question of the relations between the right of self-defence recognized by Article 51 of the Charter and the principles and rules of law applicable in armed conflict. All of them argued as if these two types of prescription were independent, in other words as if the *jus ad bellum* and the *jus in bello* constituted two entities having no relation with each other . . . It may be wondered whether that is indeed the case or whether, on the contrary, the rules of *jus ad bellum* may not provide some clarification of the rules of the *jus in bello*. . .

. . . [N]o system of law, whatever it may be, could deprive one of its subjects of the right to defend its own existence and safeguard its vital interests. Accordingly, international law cannot deprive a State of the right to resort to nuclear weapons if such action constitutes the ultimate means by which it can guarantee its survival. In such a case the state enjoys a kind of 'absolute defence' ('*excuse absolutoire*') similar to the one which exists in all systems of criminal law.⁷⁸

73 Protocol I Additional to the Geneva Conventions, *supra* note 60, Art. 51 and Preamble (emphasis added).

74 *Ibid.*, Art. 3.

75 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep. 226.

76 *Ibid.*, at 262–3, paras. 95–96. The relevant operative paragraph of the court's judgment was adopted by the President's tie-breaking vote, which means the judges were actually split evenly on the point. However, the individual dissenting and majority opinions ranged over the whole spectrum of views, with some dissenting judges supporting the dominance of self-defence over *jus in bello* and some majority judges opposing it. The President's explanation of his tie-breaking vote was in terms of an irresolvable clash: 'In certain circumstances, therefore, a relentless opposition can arise, a head-on collision of fundamental principles, neither one of which can be reduced to the other', Declaration of President Bedjaoui, *ibid.*, at 273, para. 22.

77 *Ibid.*, at 266, para. C.

78 *Ibid.*, at 290, para. 8. The meaning of this decision has not been lost on one modern defender of the 'dualistic axiom' – Robert Sloane, who claims that the axiom 'can rightly be hailed as one of the paramount achievements of the postwar law of war'. His assessment of the International Court of Justice opinion, which he argues (without evidence) is a 'holding that most regard as, at best, confused', includes the following: 'On

When the International Court of Justice holds that self-defence could well trump *jus in bello*, even in the case of nuclear weapons, or even that the clash between the two *jures* is irresolvable in such a case, the weak legal status of any notion of ‘equality between belligerents’ between aggressor and victim is hard to miss.⁷⁹ Does this ‘lead inexorably to the destruction of independent constraints on the use of force by polities’?⁸⁰ But why should asymmetry mean no restraint whatsoever? A victim of aggression can have wider *jus in bello* rights than an aggressor, precisely as a victim of aggression has wider *jus ad bellum* rights, without declaring that there are no limits whatsoever on these rights. There are always the moral and legal limits of necessity and proportionality. And it is not as if there is no one to hold responsible for what would otherwise be violations of the *jus in bello* that respect these limits. Legal responsibility follows moral responsibility straight to the doorstep of the aggressor. That was precisely the point of Nuremberg’s declaration that aggression is the supreme international crime because it ‘contains within itself the accumulated evil of the whole’.

To return to Dinstein, he completes his analysis with a very modern scepticism about the viability of the crime of aggression itself:

Moreover, no aggressor is ever willing to concede that it is indeed in breach of the *jus ad bellum*. The Security Council, vested by the UN Charter with the authority to determine in a binding way who the aggressor is, rarely issues such a verdict. Each belligerent, consequently, feels free to charge that its opponent has committed aggression. If every belligerent were given a licence to deny the enemy the benefits of the *jus in bello* on the ground that it is the aggressor State, there is reason for skepticism whether any country would ever pay heed to international humanitarian law. Mankind might simply slide back to the barbaric cruelty of war in the style of Genghis Khan.⁸¹

either view, the ICJ’s opinion has disquieting implications beyond the unique horror of nuclear weapons. There is no principled reason to limit its logic to particular weapons or methods of warfare. Chemical or biological weapons, too, would be justified to ensure a state’s survival, as would torture, summary execution, terrorism, denial of quarter, and other *in bello* violations – provided only that the cost of military defeat in *ad bellum* terms reaches a sufficient level, that is, the destruction of a state or (perhaps) a cognate nonstate polity. A core purpose of the dualistic axiom is to avoid this kind of misguided logic. Taken to its extreme, it leads inexorably to the destruction of independent constraints on the use of force by polities. . . . Even apart from general philosophical objections, one obvious problem with this contention in the context of international law is that it cannot be limited in principle to the survival of “desirable” polities – say, to liberal democratic states. States like North Korea may equally invoke this sort of logic to justify IHL violations and disregard the dualistic axiom – as may nonstate collectives, such as al-Qaeda, that espouse some collective, sacred value higher than the individual’, R. D. Sloane, ‘The Cost of Conflation: Preserving the Dualism of *Jus ad Bellum* and *Jus in Bello* in the Contemporary Law of War’, (2008) 34 Yale JIL 47, at 92, 112.

79 Naturally, the Charter-protected inherent right of self-defence is restricted to states and hence would not avail resistance movements who do not act on behalf of states. However, as the International Court of Justice pointed out in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ([2004] ICJ Rep. 194–5), even where self-defence is not available, the doctrine of necessity is. There is no reason why this should not apply to an occupied people in the same way as it does to the occupying power. Furthermore, on the critical question of the limits on an *aggressor state’s* right to defend itself against the consequences of its aggression (to avail itself of Art. 51 or of necessity), one can think of no reason why the mere state-or-non-state character of the resistance movement should make any difference. A defence of ‘necessity’, such as that raised in the International Court decision on the *Construction of a Wall* itself, would seem to be equally unavailable to an aggressor as is self-defence, since the aggressor always has the legal (and legally obligatory) alternative of ceasing its aggression.

80 Sloane, *supra* note 78, at 92.

81 Dinstein, *supra* note 63, at 157–8.

This is a frequent refrain of defenders of the equality-of-belligerents doctrine, namely that uncertainty in the *jus ad bellum* would lead to a practical erosion of the *jus in bello*, because all sides always claim they are not the aggressor.⁸² But it is hard to see the basis for it. All sides usually claim they respect the *jus in bello*, too. It is not a question of what each side *claims*, but what they are *proven* to have done. The Nazis, too, claimed they were not the aggressors, but the International Military Tribunal did not find that an obstacle to making its own judgement. There seems no reason to suppose that *jus in bello* crimes are easier to prove than *jus ad bellum* ones. It may be that a sort of bootstrap argument is at work here: because there are no tribunals interested in prosecuting the crime of aggression, and because it is eschewed in *jus in bello* adjudication, one assumes that it is inherently impossible to prove. Nor is it a question of 'denying the enemy the benefits of the *jus in bello* on the ground that it is the aggressor State', but rather one of how to apply the law of war to distinguish between aggressor and victim. Once again, just because the moral and legal limits on the way in which aggression may be countered differ from those on the way in which it may be pursued does not mean that there are no limits whatsoever.

All this apart, the real failing of Dinstein's analysis, it seems to me, is the de-linking of the 'equality between belligerents' for the purposes of the laws and customs of war from the punishment of the aggressors for the supreme crime against peace, namely for their primary responsibility for all the predictable horrors of war, whether inflicted in compliance with the *jus in bello* or not. This is the very linkage that Lauterpacht deployed to resolve the contradiction between the moral logic of the Jackson Principle and what he saw as the practical necessities of *jus in bello*. But, for this, Dinstein can perhaps be forgiven, because of the de-linking in practice that has taken place since the Second World War. There have, in fact, been no charges before international tribunals since 1947 for crimes against peace, not only despite their frequency, but also despite the revival of a very active system of international criminal law since the early 1990s. In fact, as was pointed out earlier, neither of the busy international criminal tribunals set up by the Security Council for Yugoslavia and Rwanda even had provision in their statute books for prosecuting crimes against peace. The International Criminal Court, adhered to now by more than half the states of the United Nations and already involved in investigations of war crimes in Africa, has demoted the crime of aggression from the supreme crime of the Nuremberg Tribunal to a uniquely voluntary opt-in offence, if indeed it is even voted into force in 2017.⁸³ The only exception contemplated, for states parties and non-states parties alike, is where jurisdiction is conferred by the Security Council, which would be to give a permanent exemption via the veto to the five Permanent Members and whoever any of them choose to protect. The states parties and the

82 See J. McMahan, 'The Morality of War and the Law of War', in Rodin and Shue, *supra* note 8, at 27, who is critical of the doctrine from a moral point of view ('It seems to me, therefore that the moral equality of combatants can have no foundation in basic morality'), but nevertheless supports it from a pragmatic point of view on the basis of this supposed special uncertainty of the *jus ad bellum*. See also C. Kutz, 'Fearful Symmetry', in Rodin and Shue, *supra* note 8, at 69; and Roberts, *supra* note 61, at 956–7.

83 International Criminal Court Assembly of States Parties, RC/Res.6. The crime of aggression (2010), available online at www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf, proposed Art. 15 *bis*, para. 5.

supporters of the International Criminal Court appear in this way as determined as ever to win the approval of the United States, and that is why aggressive war was left out in the first place.⁸⁴ This would compare rather unfavourably with what Jackson told the Nuremberg Tribunal in his opening statement:

And let me make clear that while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn aggression by any other nations, including those which sit here now in judgment.⁸⁵

Or what he later wrote to President Truman: 'These standards by which the Germans have been condemned will become the condemnation of any nation that is faithless to them'.⁸⁶

The effect of this on the moral legitimacy of international criminal law should be equally devastating. As Meltzer wrote:

This progressive abandonment of restraint and chivalry is typical of all wars, and infects in varying degrees both sides . . . [T]he conventions regulating the waging of war are at best a fragile barrier between the violence of war and its victims . . . [A] modern war, no matter how chivalrous, involves so much misery that to punish deviations from the conventions without punishing the instigators of an aggressive war seems like a mocking exercise in gentlemanly futility.⁸⁷

In fact, I believe it is worse than merely an exercise in futility, because the obvious tendency of the doctrine of equality between belligerents, coupled with aggressor impunity, is to *legitimate* aggression by making it legally irrelevant and, indeed, to justify it as a perfectly acceptable response to real or invented *jus in bello* criminality by the various enemies of the big powers, thus to legitimate war itself and, incidentally, to pave the way for more of the very war crimes and crimes against humanity singled out for punishment by international criminal law.⁸⁸ The drafters of the preamble of Protocol I of 1977 to the Geneva Conventions implicitly recognized this when they expressed their conviction to the contrary:

Expressing their conviction that nothing in this Protocol or in the Geneva Conventions of 12 August 1949 can be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations.

But it seems to me that this is bound to remain a pipe dream so long as the evil that 'contains within itself the accumulated evil of the whole' is ignored when we go about dealing with the accumulated evils it contains.

84 G. Conso, 'Epilogue: Looking to the Future', in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (1999), 475.

85 Jackson, *supra* note 21, at 93.

86 *Report of Robert H. Jackson, supra* note 11, at 439.

87 Meltzer, *supra* note 22, at 460–1.

88 See Mandel, *supra* note 4, especially at 242–9, for an extended defence of this proposition.