

***ANTI-PERSONNEL MINES AND PEREMPTORY NORMS OF  
INTERNATIONAL LAW  
ARGUMENT AND CATALYST***

Robert John Araujo, S.J.

A.B., J.D. Georgetown University; M. Div., S.T.L. Weston Jesuit School of Theology; LL.M., J.S.D. Columbia University; B.C.L. Oxford University. From 1974-1979, Attorney and Trial Attorney, Office of the Solicitor, United States Department of the Interior. From 1979-1984, Attorney and Associate Director of Federal Government Affairs, The Standard Oil Company [Ohio]. From 1984-1986, private practice including Licht & Semonoff, Providence, R.I. Entered the Society of Jesus in 1986; ordained into the priesthood 1993. Teaching Experience: Boston College Law School; Georgetown University Law Center; Associate Professor of Law, Gonzaga University, Spokane, WA. Chamberlain Fellow, Columbia University, 1989-1990.

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

***Introduction: Death in the Playing Fields***

Within the last three decades, an evolving item of military hardware has become the deterrent of choice in many regional conflicts: anti-personnel mines. This device has been described as "a weapon of mass destruction, in slow motion, because they indiscriminately kill or maim massive numbers of human beings over a long period of time." They are inexpensive to manufacture and relatively easy to deploy. Their individual cost is less than a few dollars; moreover, they can be broadcast across areas of military engagement by aerial seeding from planes and helicopters, artillery shells, or conventional missiles. These devices have been widely used in many regional conflicts which have taken place over the last three decades; in addition, they have become a convenient but irresponsible armament found in increasing numbers across the world. Unlike other conventional armament which follows combatants to their next theatre of operation or to storage when hostilities cease, anti-personal mines are left *in situ* unattended and ready to be detonated by any unsuspecting passer-by. The reasons for this, as implied in the quoted text taken from a letter of fifteen American admirals and generals submitted to President Clinton, are several.

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

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

I shall attempt to answer the fundamental question of whether the use of anti-personnel land mines can be justified under international law. The answer I reach formalizes, in terms of international law, the view of the American admirals and generals that further use of anti-personnel mines must be both arrested and discontinued. This response is, in large part, founded on the principle that the practice of introducing this type of weapon in military theatres which subsequently cease being places of armed conflict unlawfully threatens the welfare of non-combatant civilian populations. Notwithstanding any initial use which may be considered lawful under *jus in bello*, a further point I shall make is that the continued employment of anti-personnel mines violates peremptory norms of international law-- *jus cogens*. To succeed in these arguments, this essay will first examine the primary justification for the deployment of this military hardware. The second part will advance the argument that this justification fails to demonstrate the legality of the deployment and use of anti-personnel mines. In the third part of my presentation, I shall argue that the use of this particular type of military hardware violates *jus cogens*. In conclusion, I contend that the recommendation of the American military officers who wrote to President Clinton is not only correct but should be implemented and enforced by the civilized nations of the world as a peremptory norm of international law.

### ***1. International Law's General Justification of the Use of Force***

The issues surrounding the nature and type of force which may be used by combatants in military conflict have been examined and debated for centuries. The evolution of legal principles addressing the permissible use of force by combatants has led to the development of rules of combat generally referred to as *jus in bello*. Some of the earliest commentaries addressing the type of force which may be used by combatants were offered by Plato, Aristotle, St. Augustine, and Thomas Aquinas. More recently, nation states have come together to define in treaties, international conventions, and other agreements those military activities in which combatants may or may not engage. A major development in the consideration of general rules of combat was the founding of the United Nations at the conclusion of World War II. While the U.N. Charter declared that the U.N. is "determined to save succeeding generations from the scourge of war," the Charter nonetheless acknowledges the right of sovereign states to "individual or collective self-defence if an armed attack occurs against a member of the United Nations..." Although the right of self-defence is qualified and limited, the membership of the United Nations established grounds for endorsing the principle of *jus ad bellum*--the customary law which justifies a sovereign state's going to war. By acknowledging the existence of *jus ad bellum*, the U.N. membership tacitly implied that a just war--or at least a justified self-defence necessitating military action--can be furthered only by just means, i.e., *jus in bello*.

The most fundamental question which must be first addressed regarding their existence and deployment is whether any justification for the use of anti-personnel mines exists. To find an answer, we must place our understanding of permissible and impermissible warfare in the context of the development of *jus in bello*. Aquinas offered a foundation for answering the question generally when he maintained that war can be justified if three criteria are met: (1) the sovereign who wages war has the authority to do so; (2) once the authority is established, the war is waged for a "just cause"; and, (3) the belligerents who pursue this just cause have a "rightful intention" in which they propose to advance good and avoid evil. In the Thomistic context, the belligerents who employ anti-personnel mines would most likely be able to justify their use if all three criteria for the just war are convincingly met.

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

These principal points raise two other important considerations which are both relevant and important in ascertaining whether the means of contemporary warfare in a presumed just war can be justified on moral grounds. These considerations are: (1) is the force used discriminate, and (2) is it proportional? As one examines the body of international agreements concerning the use of force in armed conflict, these two considerations surface throughout this corpus of international law addressing *jus in bello*. Consequently, a major factor in ascertaining whether the military force used in the self-defence is whether it is discriminate and proportional.

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

In the context of the more recent Geneva Conventions of 1949, the subject of discrimination is addressed in the principle that indiscriminate attacks are prohibited. Within the contemporary domain of modern warfare, this means that certain factors must be considered in determining whether the force used in the military exercise is discriminate or indiscriminate. Guidelines for defining whether the military conduct is discriminate or not include a determination of whether attacks: (1) can or cannot be directed at a specific military target; (2) employ combat means and methods which can or cannot be restricted to military targets alone; or, (3) use means of combat which can or cannot otherwise be restricted as required by the terms of Protocol 1 of the 1949 Geneva Conventions.

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

self-defence with that force which is necessary to repel the unprovoked attack. The force called upon to repel the attack must be proportional to the threat which the defender faces and must continue for only such duration as is needed to complete the defence successfully.

At this stage in the discussion, the question of whether the use of anti-personnel mines meets the standards of *jus in bello* will be addressed.

## ***II. The Jus In Bello Justification for Anti-personnel Mines Fails***

Since my investigation concentrates on the effect of anti-personnel mines on non-combatants (most often children and farmers), its second phase will examine those norms of international law found in agreements, covenants, and other sources which define the contemporary understanding of *jus in bello* as this concept addresses the means of modern warfare and the considerations these legal norms give to civilian populations. The use of anti-personnel mines will then be evaluated in this context. My conclusion will be that the introduction of this kind of ordnance into military theatres fails to comply with *jus in bello*.

An important place to begin an excursion into the modern adaptation of *jus in bello*, especially with victim-triggered weapons, is with the 1907 Hague Convention VIII Relative to the Laying of Automatic Submarine Contact Mines. Noting that the freedom of peaceful navigation is vital even during the time of war, Article 1 of this agreement forbade the use of unanchored automatic contact mines unless they were designed to disarm themselves no more than an hour after being deployed. The same article also forbade the use of anchored automatic contact mines which would not self-disarm if the tether were to be broken. Articles 2 and 3 refined the general principles of this convention by explaining that the agreement's substantive content was designed to protect commercial, i.e., civilian, shipping. Once hostilities prompting the legitimate use of contact mines ceased, states which had laid these mines were obliged "to do their utmost to remove the mines which they have laid..." While the convention was largely ineffective to control the tactics employed by belligerents during the first and second world wars, it nonetheless provided instruction reflecting *opinio juris* which distinguished between discriminate and indiscriminate use of this type of weapon.

At the time the convention on the use of submarine contact mines was being deliberated, many representatives of the participating states also addressed in Convention VI the status of enemy merchant ships and the protection to be accorded them at the outbreak of hostilities. Article 1 of Convention VI declared the "desirability" of allowing civilian shipping to leave hostile waters unmolested at the outbreak of the hostilities. The underlying justification of this principle is advanced in Article 3 and concerns the safety of civilian personnel on board. Once again, the evolving law of *jus in bello* demonstrated that belligerents must not direct hostile or life-threatening force against non-combatants.

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

The events involving military and other state action against civilian populations during World War II again raised the need for international regulation designed to increase and reinforce the protection of non-combatants. The International Military Tribunals convened in 1945 and 1946 at Nuremberg and Tokyo respectively were instituted to address the atrocities which government officials of Nazi Germany and Imperial Japan perpetrated against non-combatant civilian populations. For example, the Charter of the

Nuremberg Tribunal relied on the concept of *jus in bello* to define the term *crimes against humanity* as the "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population..." The efforts of the international military tribunals in defining principles of international law protecting non-combatants in times of war ultimately led the United Nations to draft the 1948 Convention of the Prevention of the Crime of Genocide.

A year after the drafting of the Genocide Convention, the 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War was signed. While earlier conventions and international agreements largely addressed how combatants were to be treated, this convention was the first major agreement to address the protection to be extended to non-combatants.

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

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

Part IV of Protocol I contains the substantive provisions applicable to civilian populations and begins with Article 48 (Basic Rule) mentioned earlier. The heart of this protocol's protection of civilian populations commences with the assertion that both civilian populations and individual civilians are to receive the general protections of Protocol I. Fundamentally, those individuals and groups protected by Protocol I "shall not be the object of attack, acts or threats of violence" designed to spread terror amongst civilians. Under the terms of this protocol, civilians are to receive protection from "indiscriminate attacks" which (1) are not directed at specific military targets; (2) use means of combat which cannot be restricted to specific military objectives; or, (3) employ a means of combat whose effects cannot be limited as mandated by Protocol I. Of course, civilians would lose the protections of the protocol if they were to "take a direct part in hostilities." As a practical matter, however, the application of this last exception becomes increasingly difficult when only some, but not all, individuals from the civilian population participate in hostilities. There is, moreover, ambiguity in what constitutes taking a "direct part in hostilities" because this concept is not defined by the protocol. However, as has been noted earlier, where there is doubt about whether or not a person is a combatant or a civilian, it will be presumed that such individual is a civilian.

While Protocol I is designed to address international military conflicts, Protocol II of 1977 as previously mentioned is directed at internal conflicts, civil wars, and military activities. A major purpose of the second protocol is to ensure that civilian populations are protected from armed conflict regardless of whether or not the conflict has an international flavour or whether it is an internal matter not generally subject to regulation by international law. The preamble of Protocol II notes that the fundamental intent of its

provisions is to apply to internal conflicts the general provisions of Article 3 of the 1949 Geneva Conventions dealing with international conflicts along with those of Article 1 of Protocol I as well. Article 4.2(a) presents the basic prohibition designed to protect civilians from "violence to the life, health, and physical or mental well-being of persons..." Additionally, Article 13 gives expansive protections to "civilian populations and individual civilians" from the "dangers arising from military operations." The intent of these protections reflects those found throughout Protocol I.

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

Protocol II of the CCW deals with landmines and booby-traps and is most pertinent to this study. This protocol defines a mine as "any munition under, on or near the ground... and designed to be detonated... by the presence, proximity, or contact of a person." Article 2.1 of this Protocol also defines a "remotely delivered mine" as "any mine so defined [previously] delivered by artillery, rocket, mortar, or similar means or dropped from an aircraft." A booby-trap for the purposes of this convention is "any device... which is designed, constructed or adapted to kill or injure and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act." Article 3's general restrictions prohibit the use of mines or booby-traps "in *all circumstances*... either in *offence, defence* or by way of *reprisals*, against the *civilian population*... or against *individual civilians*." This protocol, furthermore, reiterates traditional *jus in bello* principles and outlaws the indiscriminate use of conventional weapons (1) which are not directed against a military objective, (2) which use delivery methods that cannot be directed at specific military targets, or (3) which, when employed, "may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." In addition, use of such weapons in areas of civilian concentration is also prohibited once combat ceases in these areas or it "does not appear imminent."

Unfortunately, it may still be possible not to be held liable for violation of the provisions if the combatants responsible for deployment of these weapons: (1) issue appropriate warnings, or (2) cordon the areas of deployment from civilian access. A further problem with Protocol II is that it provides for the opportunity to deploy remotely delivered ordnance if it is directed toward military objectives, the location of which can be accurately recorded; however, if this is not possible, the weapons may still be used if they will be effectively neutralised when they "no longer serve the military purpose for which [they were deployed]." Other safeguards mandate the recording and publication of locations of anti-personnel mine deployment as well as taking those steps necessary to protect civilians from the "effects of minefields, mines, and booby-traps." In addition, the Convention provides for international co-operation in the removal of minefields, mines, and booby-traps. Protocol II also incorporated a technical annex which provided specific guidelines for recording the location of the conventional weapons covered.

Notwithstanding all of these provisions, some of which constitute enforceable international law and others of which suggest the direction in which international law may be evolving, it is clear that the current deployment and abandonment of anti-personnel mines are inconsistent with the most fundamental principles of *jus in bello*. This position becomes all the more certain as one considers the long tradition of law of war as well as humanitarian laws which preclude employment of any weapon which indiscriminately harms tens of thousands of innocent non-combatants every year. Moreover, the use of anti-

personnel mines is disproportional to accomplish permissible military goals. Therefore, their continued deployment cannot be justified under *jus in bello* since their introduction and abandonment fail to abide by traditional norms regulating the waging of war which adversely affects civilian populations.

### ***III. The Jus Cogens Argument Against Antipersonnel Mines***

Up to the present day, members of the international community continue to labour for the banning of anti-personnel mines. This campaign is consistent with the conclusion of the previous section that the *jus in bello* justification for anti-personnel mines fails. The movement for the elimination of these mines is taking place on several fronts which include proposals for the (1) discontinuance of their use in all military theatres; (2) clearing existing mine fields; and, (3) eradicating the international trade of this military hardware. On 15 December 1994, the U.N. General Assembly in Resolution 49/75 urged member states which had not already taken steps to do so to declare a moratorium on the export of anti-personnel mines. Paragraph 4 of this general resolution tied its principal concerns with Protocol II of the 1980 CCW. By the U.N. reiterating in 1994 concerns which were raised earlier in the CCW, renewed hope emerged concerning the possibility of reducing or even eliminating the ever-growing threat posed by anti-personnel mines. Regrettably, the Secretary-General noted in his 23 June 1995 correspondence to the foreign ministers of states which were not party to the 1980 CCW that approximately four to ten million additional anti-personnel mines had been deployed since 1993. As a counterpoint to these new problems, a number of member states did take unilateral action by adopting their own moratoria on the use and proliferation of anti-personnel mines. But much work remains to be done in eliminating this monstrous ordnance from the farms and play areas where virtually all of the victims of anti-personnel mines are claimed today. As the International Committee of the Red Cross (ICRC) has recently noted, the toll of civilian casualties-such as the innocent civilians identified by the American flag officers-continues at the alarming rate of approximately 25,000 casualties per year. While this number is appalling, only one civilian casualty per year would still be too much. The question now becomes whether the world of international law has done everything it can to stop the slaughter and maiming of innocents caused by these diabolical weapons.

My response, as suggested at the outset of this essay, is that an argument can be made that the continued use and trade of these devices as well as the failure to remove them constitute violations of peremptory norms of international law. A crucial purpose for making this argument is to facilitate the ability for international organizations as well as sovereign states to take whatever actions are available and consistent with the enforcement of *jus cogens* to curtail if not eliminate the ongoing, unjustifiable casualties claimed by anti-personnel mines. While many individuals recognize that there are difficulties in enforcing peremptory norms of international law, it remains essential to demonstrate why the use of anti-personnel mines which causes so many unnecessary and unreasonable casualties every year must be halted as quickly as possible. The *jus cogens* argument offers a strong, and perhaps the strongest, incentive for those combatants who continue to deploy anti-personnel mines to desist once and for all. There are, as Prof. Meron has argued, tools at the disposal of the international community as well as individual sovereign states to stop atrocities which are "matters of major international concern." And as Prof. Schachter has further noted, *jus cogens* are "rules of necessity" which cannot be derogated by multiple states' practices or by international agreement. While there is a high burden to meet in arguing that a particular principle is *jus cogens*, there also exists substantial evidence for meeting the burden of demonstrating that the use or failure to remove or otherwise neutralise anti-personnel mines violates *jus cogens*. One need only reflect for a moment on the uninterrupted daily maiming and slaughter of innocents. These statistics mount a persuasive body of evidence which illustrates, as Prof. Schachter implies, the necessity for rules banning further deployment and punishing persistent users of these obnoxious devices.

While it is difficult to identify comprehensively peremptory norms of international law, certain of them emerge with little difficulty, i.e., those rules prohibiting piracy and slavery, those for national self-determination and the equality amongst states, those prohibiting the use of force and genocide, those concerned with crimes against humanity, and those addressing racial non-discrimination. If it is the nature of fundamental necessity and the quality of anti-derogation that contribute to the making of a principle of international law into a peremptory norm, then the norm which I am advocating should also possess this nature and this quality. If there is a "considerable burden of proof" which has to be met to identify the

peremptory norm I am advancing, then the evidence in support of this proposition will amply demonstrate the necessity and its not being derogable. If *jus cogens* are non-derogable norms which emerge from international law, then the sources of the norm I am advocating most likely have their roots in custom and international agreement-or a synthesis of the two.

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

This argument is further warranted by the pertinent international agreements dealing with the universal concern to preserve and protect human rights and life which have entered into force during the past half century. The first of these covenants would be the CHARTER OF THE UNITED NATIONS. The Charter's preamble declares the affirmation of individual and collective "faith in fundamental human rights, in the dignity and worth of the human person" in order "to promote social progress and better standards of life in larger freedom." Arguably, these are very broad statements declaring noble goals. Yet, notwithstanding their generality, these broad, but important principles set the stage for norms which define that the precious human life of each person is to be protected from unreasonable, unnecessary, and arbitrary interference. With the conclusion of the hostilities of the Second World War, and with the evidence demonstrating the brutality of the Holocaust mounting, more and more members of the international legal community understood that the right to life is one of the greatest, most fundamental human rights. Refinement of this general principle continued in the UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948).

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

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

Once life is secured in accordance with the International Covenant, it must be able to do something. One activity identified by the Covenant is that every person who is lawfully within a territory of a state shall have the right to "liberty of movement." Yet, the arbitrary and indiscriminate effects which anti-personnel

mines have had and continue to have constitute unwarranted and unjustifiable denials of the inalienable right to life and to its related liberty of freedom of movement. These principles from the Covenant generally accord with the earlier customary principles of *jus in bello* regarding protections to be afforded to non-combatants.

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

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

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

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

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

But even if an argument could be made that the military action which adversely affects civilian populations may be considered legitimate with regard to general military actions, the coming into force of the 1980 CCW poses a revealing counterpoint. Even though the CCW has been considered a flawed agreement that has had difficulty in attracting support, it nonetheless identifies the dangers which anti-personnel mines pose to civilian populations. When the protective theory underlying the CCW is viewed in light of the actual statistics of the number of annual civilian casualties caused by the maiming or killing generated by this hardware, any and all justification for continued use of these devices evaporates. Customary law has demonstrated that anti-personnel mines cannot be legitimated on grounds of being proportional and discriminate. Covenant law has similarly illustrated that ongoing use of anti-personnel mines has escaped beyond any and all justifications which might exist under these agreements and unduly threatens non-derogable human rights. The conclusion is inescapable: in order to protect the potential victims from this unreasonable threat of harm, international law necessitates the immediate elimination of anti-personnel mines from military arsenals and from theatres of military activity.

### ***Conclusion***

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

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

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