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Cluster Bombs as Arms *mala in se*: An Ethical Framework for Assessing the Means and Methods of Warfare

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There is a growing movement aimed at curtailing the use of cluster munitions, viewed by many as indiscriminate weapons for their record of disproportionately harming non-combatants. Due to both serious design flaws and deliberate misuse by belligerents, these weapons pose a grave threat to civilians as they are capable of killing and maiming innocents long after hostilities have ceased. While both non-governmental organizations (NGOs) and state bodies have made a strong legal case in favor of a moratorium on the production and use of cluster bombs, a moral argument against their use has been noticeably absent from the debate. However, based upon the available evidence, it should be argued in terms of a just war (JW) tradition that these weapons are an example of arms *mala in se*, or inherently nefarious armaments.

Brian Orend states that in the modern era, “[t]he [just war] tradition has . . . been doubly influential, dominating both moral and legal discourse surrounding war. It sets the tone, and the parameters, for the great debate.”¹ Because of the Just War Theory’s (JWT) central role in the “great debate” vis-à-vis when and how wars ought to be fought, it is important to understand the historical context out of which contemporary JWT discourse has emerged. The ongoing discussion surrounding the morality of conflict has its roots in

a rich and textured JW tradition dating back to the laws and customs of classical Greece and Rome. As these principles have become more refined over the centuries, JWT has played an increasingly important role in how we view warfare.

Writing in the 5th century, Augustine of Hippo produced our earliest conception of the Christian JW doctrine striving to strike a balance between the Church's proscription against violence and the urgent need for the Roman Empire to defend its people and holdings from invasion.² In doing so, Augustine established the foundation underlying the two pillars of modern JWT: *jus ad bellum* and *jus in bello*. While the principles included in *jus ad bellum* seek to define under what circumstances a community might justly resort to armed violence, *jus in bello* attempts to limit the harm caused by war by placing restrictions on the means and methods used therein. Augustine believed that only self-defense motivated by genuine and universal Christian love could justify the use of force. Thus, in response to unjust and sinful aggression, the righteous defender must keep in mind that the whole of mankind, including miscreants, is worthy of love, and in so doing, must temper his response with a degree of caution. From this ideal emerged the two central principles of *jus in bello*: noncombatant immunity and proportionality.³

Although Augustine laid the groundwork for what would later emerge as a cohesive JW doctrine, it was not until the 12th century that the canonical jurist Gratian stimulated the "comprehensive and continuing inquiry...into just moral and legal limits to war that produced fruits that defined the just war doctrine of Western Christendom."⁴ From the Middle Ages onward, the JW doctrine continued to develop as an increasingly nuanced and relevant code of conduct, and today exists as a largely secularized set of moral principles assessing how wars are waged.

While differing exegeses of how JW principles ought to be applied to contemporary wars continue to emerge from the ongoing JW discourse, there nonetheless exists a generalized JW model currently used by many JW theorists by means of making moral judgments vis-à-vis war. This paradigm, as outlined by Orend, requires that six *jus ad bellum* principles must be satisfied to justify the initiation of war: just cause, right intention, proper authority, last resort, probability of success, and (macro-) proportionality.⁵ The principles of noncombatant immunity and (micro-) proportionality

remain the two key facets of *jus in bello*. And while some JW theorists have provided incomplete definitions for identifying methods *mala in se* (a distinction that logically falls under the ambit of *jus in bello*), there exist no clear criteria useful for making moral pronouncements against the use of certain means and arms.

In general, cluster bombs include rockets and artillery pieces that serve as “area weapons” by scattering - at a set time or altitude - from dozens to hundreds of sub-munitions, or “bomblets,” over a target area. These bomblets, mostly anti-personnel or anti-tank explosives, create a broad and lethal “footprint.”⁶ Under ideal circumstances, these sub-munitions explode on contact with either the ground or their intended military targets. Because of their wide dispersal pattern, these weapons are particularly effective in attacking airport runways, enemy convoys, and large troop formations.⁷

However, successful cluster attacks against legitimate military objectives almost always inflict a significant number of casualties among the non-combatants living within the large footprint.⁸ Due to design flaws and deliberate misuse, these weapons are often responsible for disproportionate levels of suffering when compared to the projected strategic benefits. They also indiscriminately target non-combatants both during and after periods of conflict. These characteristics provide a strong case for the ethical denouncement of cluster munitions as arms *mala in se*.

The tragic civilian costs of cluster bombs have been highlighted in recent conflicts, and as public awareness of these risks has increased, so has the pressure for reform. Israel’s massive, 11th-hour use of these weapons during its war against Lebanon in the summer of 2006, when 3 million bomblets flooded a huge swath of southern Lebanon, convinced even the most ardent supporters of Israel that, “whereas it is difficult to gainsay the use of force against terrorists, the sowing of southern Lebanon with cluster bombs in the final hours of last summer’s war was an act of genuine malignity.”⁹

Israel’s deployment of cluster munitions in largely populated areas exceeded the number that had been deployed during the major combat phases of the wars in Kosovo, Afghanistan and Iraq *combined*,¹⁰ adding a sense of urgency to demands for greater restrictions on cluster bomb usage. In February 2007, 46 nations committed themselves to push for a treaty that would ban most cluster bombs due to their humanitarian threat,¹¹

while United States Senators Patrick Leahy and Diane Feinstein sponsored a bill in Congress to restrict the manufacture, sale, and use of such weapons.¹² As with landmines, the growing chorus against cluster munitions is signaling the emergence of a moral consensus that views these weapons and the concomitant suffering as evils in and of themselves.

This paper's central aim is to present a more complete, ethical definition of *mala in se*. Doing so will help to inform the legal and moral debate regarding modern weapons and the tactics of war by providing a model with which we may assess certain acts and methods. The resulting framework can then assist moral thinkers and others in the JWT discourse as they ascertain the moral value - or immoral nature - of specific *jus in bello* practices.

While there are no doubt legal and moral concerns arising from the use of cluster munitions against combatants during wartime, the arguments laid out herein focus specifically on the ill effects that these weapons inflict on non-combatants. This is not to dismiss the suffering of belligerents; but rather to emphasize the disproportionate toll that cluster bombs and other means *mala in se* levy against innocents. In doing so, I hope to lend support to the belief that we are morally obligated to protect non-combatants, as they are - according to Michael Walzer - "men and women with rights and they cannot be used for some military purpose, even if it is a legitimate purpose."¹³ The exact nature of these "rights" is discussed below.

The term *mala in se* first appeared in English common law in the late 15th Century to refer to crimes that were evil in and of themselves (e.g. murder and theft). This contrasted with the term *mala prohibita*, or crimes that were deemed wrong because they violated legal standards without necessarily invoking moral outrage (e.g. parking violations).¹⁴ In recent years, some JWT theorists either incorporated *mala in se* into the body of *jus in bello* principles, or placed ethical restrictions on the specific tactics, tools, and strategies of warfare.¹⁵

In this context, *mala in se* is invoked when describing those means deemed "rights-violative,"¹⁶ which includes rape as a weapon of war, genocidal campaigns, specific weapons, and anything else that - by and large - opposes the JWT principles of

proportionality and non-combatant immunity. This latter group could also arguably include nuclear weapons, chemical and biological agents, and cluster bombs due to their innately indiscriminate nature.

While there is no consensual, enumerated body of means declared *mala in se*, we can look to the moral and legal discourse surrounding certain weapons and methods for guidance. This nexus between moral arguments and positive international law is vital to our understanding of how wars ought to be waged, as JWT principles and legal norms often support each other. According to James Turner Johnson:

By its very nature, law cannot render the fine details of moral argument. Its purpose is also...more narrowly focused: it is a hedge against undesirable behavior. Nonetheless, law bears an important relation to moral concerns, and over time these concerns may emerge in greater fullness through interpretations of positive law....¹⁷

Thus, while JWT provides a nuanced moral account of warfare, the body of international law serves as the “real-world” bulwark against unjust and immoral acts. From this link, we can devise an ethical conception of the principle of *mala in se* informed by legal arguments vis-à-vis the conduct of war.

In order to make ethical pronouncements about certain means and methods of warfare, we must define what rights have been violated by their employment. But before we can do that, we must first identify a rights-influenced moral theory suitable for considering the kinds of violations emerging from armed conflicts. Jack Donnelly has noted, however, that such human rights-based “moral arguments” are susceptible to critique because “they operate within rather than across communities or traditions.”¹⁸ This is, indeed, sometimes the case.

Some of the standout contemporary liberal rights theories, such as those of Michael Walzer and John Rawls, largely predicate individual rights upon one’s membership in a defined political system. In the former, we have rights in so far as we are members of “political communities,” while in the latter, our rights are derived from being part of a community of “peoples,” or states.¹⁹ One problem that arises from such conceptions of rights is that they fail to consider the rights and needs of so-called “stateless” peoples. In the context of protracted conflict, this is an especially important

consideration when looking to protect the rights of refugees who are in a state of political and legal limbo, such as the Sudanese Darfurians living in Chadian refugee camps or the hundreds of thousands of Iraqis fleeing their war-torn nation.

To ensure that *all* innocent persons affected by armed conflict receive equal moral consideration, regardless of their association with given communities, it is imperative that our concept of rights be universal and cut across cultural and political boundaries. For this reason, I suggest that a rights approach predicated upon a two-pronged version of utilitarianism that takes into account both suffering and the stifling of preferences can serve as a suitable foundation for our discussion of the rights held by non-combatants in wartime. Such a conceptualization of rights promotes equal moral consideration of *all* innocents *qua* persons, regardless of whether or not they are tied to a particular political or cultural community.

This dual-level utilitarian rights approach has its provenance in two related schools of consequentialist thought. The first level seeks to address the physiological and psychological suffering caused by war. Clearly, this idea has its roots in the classical utilitarianism of Jeremy Bentham and John Stuart Mill, who sought to predicate moral values on the amount of pleasure or pain a particular action produces. The second level of utilitarian rights seeks to protect the various “preferences” of innocents, with the desire to continue living as the most supreme.²⁰

It often argued that utilitarianism acts as a poor foundation for human rights because it allows societies to “trade benefits to one person against benefits to another”²¹ in an attempt to produce some greater good (or decrease the overall amount of suffering). In the milieu of armed conflict, however, this basic principle has long been the rule, as seen in the doctrine of “double effect” (DDE). According to DDE, a key component of both JWT and humanitarian legal norms, military planners may carry out attacks with the knowledge that civilian “collateral” damage will occur. This is permissible if the attack is pursuant to some clear military advantage, and the harming of civilians is not the *intent* of the attack.²² Thus, JWT and the laws of war do “not really believe in civilian immunity...,” but rely upon the “threadbare fabric of ‘due care.’”²³

To promote a utilitarian-based rights approach does not necessarily threaten to *further* undermine the rights of innocents in combat zones by suggesting that their preferences or happiness be traded for greater military good. On the contrary, using a clearly defined utilitarian framework as a basis for making ethical denunciations of particular means and methods of warfare allows us to broaden the scope of protections by providing a more textured moral argument against the use of particular tactics and weapons. As we shall see, this two-pronged consequentialist view of rights can serve as the basis for greater legal protections of non-combatant rights, as the language used to support these rights promises to add moral substance to arguments in favor of bans and other restrictions of particular arms.

For the purpose of defining rights within the specific context of conflict,²⁴ it is instructive to look to Michael Tooley's argument vis-à-vis the rights of persons for guidance. Here, the author makes a distinction between the right to be free from wonton suffering accorded to all sentient beings and the "moral right to life" owed to persons "possessing [both] the concept of a self as a continuing subject of experiences and other mental states,"²⁵ and the "desire to continue existing as a subject" of such a life.²⁶ This distinction is important to our understanding of rights, as it confers vital rights upon two related - and sometimes overlapping - groups of beings: sentient beings capable of suffering and self-aware persons desirous of a continuing existence.

Peter Singer, the controversial utilitarian ethicist, further developed this line of reasoning in his version of preference utilitarianism. According to Singer, killing a person against their will is wrong as it "violates not just one preference but a wide range of the most central and significant preferences a being can have."²⁷ Therefore, the "right to life" protects our ability - as persons - to continue pursuing our many preferences, with the "desire to continue existing as a distinct entity"²⁸ being the most paramount. If we conflate Tooley and Singer's views to simplify the key ideas, the argument goes as follows: as individuals who are capable of suffering, we have both the right to be free from any undue suffering done to us by others *and* the right to life.²⁹

Such a utilitarian ethical foundation serves as a reasonable basis for determining whether certain means of war ought to be considered *mala in se*, as it factors in war's

“inhumane consequences” with respect to the suffering and death brought upon its victims.³⁰ Because this preference utilitarianism-inspired ethic cuts across communitarian lines, it provides a moral impetus for the protection of *all* innocent persons in conflict zones. I would further argue that such a conception of rights could be viewed as the basis for much of the existing body of positive human rights and humanitarian law. Indeed, the Universal Declaration of Human Rights³¹ (UDHR) and its particular covenants suggest that many of our most “significant preferences” are represented therein.

When assessing the moral value of particular means and methods of war, we ought to ask whether they violate the preference utilitarian rights discussed above. To borrow a phrase from Protocol One of the Geneva Convention, *mala in se* are weapons and tactics that either cause non-combatants “superfluous injury or unnecessary suffering,”³² *or* violate their “right to life” by killing them against their will. More specifically, we can condemn weapons or tactics that (a) cause - by design - permanent physiological or psychological suffering that exceeds the parameters of the JWT principle of proportionality, *or* (b) indiscriminately fail to distinguish between military personnel and innocents, thus killing and/or causing widespread suffering to non-combatants.³³ For our purposes, the “proportionality” test is whether a weapon “may be expected to cause incidental loss of civilian life [or] injury to civilians...which would be excessive in relation to the concrete and direct military advantage anticipated.”³⁴

While the term “excessive” is vague and the process of determining whether a weapon fails to deliver an expected military advantage while harming non-combatants might, in some cases, require the execution of unsettled and dubious calculations, it is reasonable to suggest that “excessive” harm can be defined as that which cannot be adequately justified by the belligerents causing the harm. In other words, the burden of justifying the damage to civilians resulting from the use of particular weapons must fall upon those making military decisions, and the failure to provide an acceptable rationale for the harm caused would violate the proportionality principle. The emergence of a moral consensus against the use of particular weapons and means (e.g., nuclear weapons, campaigns involving mass rape, and siege warfare) would clearly indicate that certain practices do not withstand moral scrutiny.

In discussing specific arms *mala in se* with respect to the moral and legal discourse surrounding the movement to restrict the use of landmines, I hope to lay the groundwork for a similar ethical prohibition of cluster munitions. As we shall see, the similarities in the nature and effect of landmines and cluster munitions allow us to reasonably conclude that they constitute arms *mala in se*.

Landmines

While efforts to restrict anti-personnel landmines began in the late 1970s under the aegis of the International Committee of the Red Cross (ICRC), a moral consensus favoring the prohibition of these weapons did not fully emerge until the mid-1990s, when global civil society organizations and national governments joined forces to call for action.³⁵ In employing a language that reflects -in large part - the consequentialist moral concerns outlined above in the criteria for *mala in se* pronouncements, this movement engendered ethical and legal prohibitions against the continued use of landmines.

Those advocating for a landmine ban generally argued that the indiscriminate nature of mines caused excessive wounds and gratuitous pain. This approach focused on the actual nature of the injury, concomitant suffering, and the mines' inability to target specific combatants, thus disproportionately killing or maiming innocents.

The SiRus Project (whose name is a derivation of the phrase "superfluous injury or unnecessary suffering") highlighted the "design-dependent" consequences of anti-personnel landmines that produced catastrophic and permanent disability.³⁶ According to Dr. Robin M. Coupland, mines are especially nefarious because "[t]he treatment of the injury requires, on average, twice as many operations and four times as many blood transfusions as an injury from other weapons."³⁷ Thus, because such trauma to the victim is - by design - unusually intense and permanent in its effects, mines should be outlawed. Morally, the same reasoning could be used to declare mines *mala in se* as they result in disproportionate suffering to any real military gain, thereby violating the innocent victim's right to freedom from unnecessary suffering. Here, this right over the right of innocents in wartime to not be killed against their will is emphasized because in the case

of landmines, nearly half of all victims survive and must endure any life-long disabilities.³⁸

As previously mentioned, the second argument of landmine opponents is congruent with the preference utilitarian-inspired *mala in se* criterion condemning those arms and means which fail to distinguish between military personnel and innocents, thus killing and/or causing widespread suffering to non-combatants. According to Jody Williams, the firebrand of the landmine ban movement:

Landmines distinguish themselves because once they have been sown, once the soldier walks away from the weapon, the landmine cannot tell the difference between a soldier or a civilian--a woman, a child, a grandmother going out to collect firewood to make the family meal. The crux of the problem is that while the use of the weapon might be militarily justifiable during the . . . battle, once peace is declared the landmine does not recognize that peace . . . [it] goes on killing.³⁹

Because landmines are designed to be triggered by the movements of unsuspecting passersby, they can potentially lie in wait for years, only to be detonated long after the war is over. These post-conflict victims are almost always non-combatants, and it is estimated that mines are responsible for 18,000 deaths and injuries every year.⁴⁰

Such arguments for prohibiting landmines were effective, as evidenced by the widespread and rapid acceptance of the Ottawa Mine Ban Treaty. Initially enacted in 1999, this binding international treaty claims 155 signatories and is remarkable in that parties to the treaty accept its provisions without the legal “reservations” often used to eviscerate other multilateral agreements.⁴¹ Furthermore, the treaty’s near universal acceptance reflects not only an established moral consensus against land mines, but also the emergence of a broader consensus against the widespread suffering brought about by means *mala in se*.

The movement’s real strength lay in its sweeping appeal. The language employed in the arguments against landmine use resonated with a wide audience, gaining the movement high profile support from the likes of the United Kingdom’s Princess Diana and Jordan’s Queen Noor. Notable U.S. politicians such as Senator Patrick Leahy also lent their influential voices to the call for landmine prohibition.

Just as the prohibition movement began to gain momentum in the early 1990s, Leahy asked Congress, “What do chemical and biological weapons have in common with landmines[?] They do not discriminate. A landmine will blow the leg or the leg off of whoever steps on it. It does not make a difference whether it is a combatant [or] a civilian...”⁴² Cluster munitions should be added to this list of unjustifiably harmful arms as they tend to cause indiscriminate and disproportionate suffering to non-combatants living in war zones.

Cluster Bombs

Groups such as Human Rights Watch have suggested that military planners, when applying the proportionality test to given weapons, should weigh both the short- and long-term effects that they will have on non-combatants. With cluster munitions, “strike and post-strike casualties greatly increase the likelihood that the loss would be excessive in relation to the military advantage.”⁴³ In fact, a recent report by Handicap International that investigated over 11,000 cluster bomb incidents found that in excess of 82% of casualties occur post-conflict,⁴⁴ sometimes decades after hostilities have ceased. This high incidence of post-strike casualties suggests a violation of the proportionality principle, as the killing and maiming of non-combatants outside the ambit of open hostilities cannot contribute to legitimate military gains.

As opposed to anti-personnel landmines, which are designed to inflict grave but largely survivable wounds, cluster bombs “contain more explosive power and metal fragmentation, making them more likely to kill and to cause multiple casualties.”⁴⁵ Nonetheless, in the cluster bomb’s existence of half a century, thousands of victims have suffered the effects of permanent disability and trauma. Common cluster-inflicted wounds include the loss of limbs, paralysis, blindness, and deafness.⁴⁶ These findings illustrate that due to the gratuitous and oft-permanent harm associated with cluster bombs, they could be deemed arms *mala in se* in so far as they violate non-combatants’ basic right to be free from “permanent physiological or psychological suffering” disproportionate to any presumed military benefit.

Like landmines, cluster bombs are largely indiscriminate weapons that are incapable of honing in on a specific military target. Because of their innate imprecision and high failure (or “dud”) rate ranging from 5%-80%, a volley of cluster bombs is needed to achieve the desired level of destruction, and the resulting footprint can include an area as large as a kilometer in diameter. Anyone or anything within that radius runs the risk of becoming collateral damage.⁴⁷ Moreover, those bomblets that fail to detonate upon initial contact become the most lethal form of unexploded ordnance, posing a threat exponentially greater - in terms of deaths - than that of anti-personnel mines and other explosive remnants of war.⁴⁸

Indeed, Handicap International’s aforementioned comprehensive report presents a stark illustration of the global fallout resulting from these armaments. A striking 98% of all reported cluster-related casualties were non-combatants, and a majority of them were either killed or wounded after the conflict had ended.⁴⁹ Children account for almost half of these casualties, and young boys engaged in occupational activities are more likely to fall prey to errant cluster bomb explosions.⁵⁰ These figures turn the principle of discrimination on its head, ironically suggesting that these weapons are *discriminatory* in that they almost exclusively victimize civilians. Due to this intrinsic propensity to target non-combatants living in conflict zones and areas recovering from war, cluster bombs can be said to violate the *mala in se* principle of discrimination.

Aside from the preceding preference-influenced arguments for an ethical denouncement of cluster munitions, there is also a compelling reason that seemingly impairs - in most cases - the need to use these weapons. In those instances wherein cluster bombs are most effective (e.g., attacks on armored vehicle columns and mortar sites), there exist alternative weapons that pose significantly diminished risks to non-combatants and provide comparable military utility. Weapons carrying unitary payloads, as opposed to multiple sub-munitions, can destroy enemy targets within a more precise footprint without leaving behind failed unexploded ordnance.⁵¹ Guided weapons such as the Sense and Destroy Armor Munition (SADARM) seek out only armored vehicles and self-destruct immediately if they fail to identify a target.⁵² The high dud rate of cluster munitions and the existence of viable alternatives have some in the military establishment

questioning the need for these arms and wonder whether they are merely anachronistic “Cold War relic[s].”⁵³

Thus, when the shortcomings of cluster bombs are considered (i.e., indiscriminate and disproportionate suffering, obsolescence, and military disadvantage), it appears that a strong case supporting a ban can be made legally and morally. Indeed, if militaries insist on continuing to use these and other arms *mala in se*, the onus of demonstrating that these weapons serve some benefit that trumps non-combatants’ rights lies with our political and military leaders. However, the evidence suggests that such a case would be impossible to make with cluster bombs.

Conclusion

This paper set out to provide a framework with which to make moral pronouncements vis-à-vis certain means and weapons of warfare. When we view the basic rights of persons in preference utilitarian terms, it is possible to define which violations are affected by certain acts and arms. Such a conception of rights provides a foundation for an ethical definition of *mala in se*, one that views the rights of non-combatants in combat and post-war zones as paramount.

In applying this ethical restatement of *mala in se*, which considers the right to freedom from undue suffering inflicted by others and the right to life, to landmines and cluster bombs, a strong moral argument against their use can - and ought - to be made. Furthermore, we might use this test to make similar judgments vis-à-vis those arms and means that share the propensity to violate the basic rights of innocents. For example, using the criteria outlined above, it could be argued that nuclear weapons and blinding lasers constitute arms *mala in se*, as the former are indiscriminate in nature and the latter result in permanent, irreversible injuries.

This ability to morally assess the specific arms used in conflicts promises to enhance the key principles outlined within *jus in bello*, providing a catalyst for promoting greater security for non-combatants. Furthermore, this clearly defined conception of arms *mala in se* gives participants in the JW debate extra criterion with which to judge

the overall justice of a given war, or *jus universitus*. Thus, in adding an extra layer to *jus in bello*, this utilitarian, rights-based conception of *mala in se* allows for the development of a more complex and relevant JWT capable of providing more nuanced and complete moral assessments that are capable of addressing contemporary asymmetrical wars.

Condemning the use of cluster munitions as arms *mala in se* would create more stringent levels of protection for those who are most vulnerable in war-torn societies: defenseless innocents caught up amidst the conflicts raging around them. The legal and moral calls for prohibiting weapons (e.g., landmines and cluster bombs) that pose significant post-conflict risks to civilians is important, and as Johnson cogently stated, “After a war is over, all are non-combatants, and ongoing harm to them violates the immunity from harm they should then enjoy.”⁵⁴ Hence, we must take extra care that in terms of human suffering, the effects of war are limited to the timeframe of a particular conflict. This is the least that we can do for non-combatants, although they undoubtedly deserve more.

As we continue to face asymmetrical conflicts wherein the line between combatants and innocents is clouded by the chaos of warfare, we must not lower our standards of conduct with the concomitant effect of waging war on non-combatants. Indeed, it is morally incumbent upon belligerents to take great caution when deciding whether and how to execute wars that threaten to overwhelmingly harm innocents. Prohibiting arms and methods deemed *mala in se* promises to raise the bar for how wars are fought, and doing so helps to preserve the fundamental JWT principles of non-combatant immunity and proportionality that frequently come under fire during wartime.

Furthermore, embracing a clear ethical definition of *mala in se* will bridge the gap that exists between: (a) human rights theory and practice, which maintain that certain rights exist *absolutely* regardless of a particular context; and (b) the theory and practice of warfare which create - via the principle of double effect and the idea of “collateral damage” - a slippery slope that often results in the unnecessary suffering of innocents. The conflict between these two schools of law and theory can only be ameliorated by raising the standards by which we fight, and the introduction of a clearly-defined conception of *mala in se* is a first step toward this end. By strengthening the theory and

practice of just wars, we can better protect the basic rights of those who are caught in the tumult of war—rights that should not be traded easily away for some presumed military advantage.

Endnotes

¹ Brian Orend, “War,” in *Stanford Encyclopedia of Philosophy*, (Stanford, CA: Metaphysics Research Lab, 2005), <http://plato.stanford.edu/entries/war/#2>

² James Turner Johnson, *Can Modern War Be Just?* (New Haven, CT: Yale University Press, 1984), 1.

³ *Ibid.*, 2-3.

⁴ James Turner Johnson, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry* (Princeton, NJ: Princeton University Press, 1981), 121.

⁵ Brian Orend, *Michael Walzer on War and Justice*, (Kingston, Ontario: McGill-Queen’s University Press, 2000), 86-109.

⁶ Human Rights Watch, “Off Target: The Conduct of the War and Civilian Casualties in Iraq,” (New York: Human Rights Watch, 2003), <http://www.hrw.org/reports/2003/usa1203/>

⁷ For a sympathetic view of cluster munitions, see Thomas Herthel, “On the Chopping Block: Cluster Munitions and the Law of War.” *The Air Force Law Review* 51 (Spring 2001): 229.

⁸ Human Rights Watch, “Off Target,” 55.

⁹ Leon Wieseltier, “Sympathy for the Other,” in *New York Times Review of Books*, (New York: New York Times, 2007), <http://www.nytimes.com/2007/04/01/books/review/Wieseltier.t.html>

¹⁰ Human Rights Watch, “Firing Blind: Israel’s Use of Cluster Munitions in Lebanon in July and August 2006,” (New York, Human Rights Watch, 2007), 26. This report is expected to be released in June, 2007.

¹¹ Cluster Munition Coalition, “Oslo Report and Next Steps,” (London: n.p., 2007), <http://www.stopclustermunitions.org/news.asp?id=53>

¹² “Leahy, Feinstein Introduce Legislation (S. 594) Restricting Use, Sale Or Transfer Of Cluster Bombs,” in *Office of Senator Patrick Leahy*, (Washington: n.p., 2007), <http://leahy.senate.gov/press/200702/021507d.html>

¹³ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977), 137.

¹⁴ “The Distinction between ‘Mala Prohibita’ and ‘Mala in se’ in Criminal Law,” *Columbia Law Review* 30, no. 1 (1930): 74.

¹⁵ For example, Brian Orend has addressed means *mala in se*, but only in passing, calling it an “imprecise yet interesting idea.” See Orend, *Michael Walzer on War and Justice* (Kingston, Ontario: McGill-Queen’s University Press, 2000), 124.

¹⁶ *Ibid.*

¹⁷ James Turner Johnson, “Just Cause Revisited,” in *Close Calls: Intervention, Terrorism, Missile Defense, and ‘Just War’ Today* (Washington, DC: Ethics and Public Policy Center, 1998), 26.

¹⁸ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca, NY: Cornell University Press, 2003), 22.

¹⁹ For more on this, see Michael Walzer, *Just and Unjust Wars: A Moral Argument With Historical Illustrations* (New York: Basic Books, 1977), 53-4 and John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 2002).

²⁰ Peter Singer, *Writings on an Ethical Life* (New York: Ecco Press, 2000), 134.

²¹ Peter Singer, "A Response to Martha Nussbaum," in *Utilitarian.net*, (2002), <http://www.utilitarian.net/singer/by/20021113.htm>

²² Brian Orend, *The Morality of War* (Toronto: Broadview Press, 2006), 15.

²³ *Ibid*, 261.

²⁴ That is not to say that the right to be free from unnecessary suffering and the right to life do not apply outside of the context of war. To be sure, Peter Singer and other utilitarian thinkers cogently promote a similar foundation for a generalized moral theory. However, Singer and others would not confer a "right" to not suffer, but would instead describe this issue solely in terms of "interests" or "preferences."

²⁵ Michael Tooley, "Abortion and Infanticide," *Applied Ethics* ed. Peter Singer (Oxford: Oxford University Press, 1986), 64.

²⁶ *Ibid*, 69.

²⁷ Singer, *Writings on an Ethical Life*, 134.

²⁸ *Ibid*, 135.

²⁹ While this line of reasoning clearly suggests that sentient non-humans possess the right to be free from unnecessary suffering, this issue will not be addressed here as it falls outside of my argument vis-à-vis non-combatant *persons* in times of war.

³⁰ Joanne K. Lekea and George K. Lekeas, "Quantitative Military Ethics: Applying Game Theory to Strategic and Tactical Decision-Making," in *United States Air Force Academy*, (Colorado Springs, CO: United States Air Force Academy, 2006),

http://www.usafa.af.mil/jscope/JSCOPE06/Lekea-Lekeas06.html#_edn1

³¹ "Universal Declaration of Human Rights (UDHR)," in *The Office of the High Commissioner for Human Rights* (Geneva: Office of the High Commissioner for Human Rights, 1948), <http://www.unhchr.ch/udhr/index.htm>

³² International Committee of the Red Cross (ICRC), "Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), art. 25," in *The Office of the High Commissioner for Human Rights* (Geneva: Office of the High Commissioner for Human Rights, 1977), <http://www.unhchr.ch/html/menu3/b/93.htm>

³³ This is derived from Article 51 of the "Additional Protocol," which, inter alia, defines indiscriminate attacks and arms.

³⁴ ICRC, Protocol 1, art. 51(5)(b).

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