‘Humanitarian Bombardments’ in *Jus in Bello*?

Robert Kolb

1 Introduction

Let us assume that there is an international armed conflict between State A and State B. In the context of that conflict, some military operations take place according to the traditional belligerent practices consisting in the weakening of the military assets of the adverse party. However, State B also commits various war crimes and crimes against humanity. Thus, for example, State’s B forces deport civilians in extermination camps, similar to the German forces during World War Two. Auschwitz-like camps are erected in the country. The deportation, we may assume, takes place by train. The railway lines lead directly to the camps. The question may now arise as to whether the aviation of State A may bombard these railway lines in order to disrupt or at least to slow down the deportation and extermination process.

Certain additional assumptions must be made. First, there is no definite ‘military advantage’ gained from bombarding the railway lines. In other terms, these lines do not serve any other purpose than that of the deportation. They do not make any contribution to the military action of State’s B armed forces. If it were otherwise, a bombardment would pose no particular problems under *jus in bello*, the rule of article 52(2), of Additional Protocol I of 1977 to the Geneva Conventions (‘AP I’) being plainly applicable. Second, we also assume that the bombardment of the railway lines has a distinctive effect on the deportation process. Clearly it is

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It may be noticed that this question is today retroactively debated in the context of events of World War Two. President F.D. Roosevelt is criticized, in certain circles, for not having bombarded the railway lines leading to Auschwitz, despite the information the US forces had on what was happening there.² Plainly, the law of armed conflicts was at that time more liberal in allowable bombings, if only by the fact that it did not contain detailed regulation on that matter,³ as it does today.

Having said all this, what is the legal position on the question at stake?

2 The Legal Sedes Materiae: Article 52(2) of AP I (1977)

The applicable law on the selection of targetable objects during warfare is formulated in article 52(2) of Additional Protocol I of 1977 to the four Geneva Conventions of 1949. This key provision reads as follows:

In so far as objects are concerned [i.e. not persons], military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

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The point is not, in the present note, to offer a fully-fledged analysis of that fundamental provision, which is replete with interesting legal issues. We may note a certain number of points, directly related to our subject matter.

First, article 52(2) of AP I purports to exhaustively regulate the selection of allowable targets during the armed conflict. In other words, in order to be compatible with the law of armed conflicts, the attack of an object must fulfil the conditions set out in this provision. If the provision were not exhaustive, that would mean that a belligerent would be allowed to attack other objects according to discretionary criteria. The protective value of the restrictive criteria contained in article 52(2) would be lost. Indeed, the provision would become largely pointless, since it would indicate only optional and not mandatory conditions for the attack of objects during warfare. This exhaustive nature is borne out by the text of the provision. It reads: ‘Military objectives are limited to those...’ (italics added). This part of the sentence has to be read in conjunction with the first sentence of article 52(2), stating explicitly: ‘Attacks shall be limited strictly to military objectives’. Hence, attacks may take place only against military objectives; and military objectives are only those, which fulfil the criteria indicated in the second sentence of article 52(2). This double limitation shows that no attack which fails to fulfil the conditions of § 2 could be considered as lawful under jus in bello as it stands today. The question of lawfulness under jus ad bellum, for example through mandates of the UN Security Council, is a distinct one (see below). It does not alter the position under the law of armed conflict outside the context of the Security Council mandate, due to the separation of jus in bello and jus ad bellum requirements.

Second, it stands to reason that according to the assumptions we made, the bombardment of the mentioned railway lines is not compatible with the conditions under article 52(2) of AP I. The point need not be argued at length. It is apparent that an object becomes a military objective (and may thus be targeted) only if it makes a military contribution and if there is a military advantage in destroying or neutralizing it by an attack. As is rightly stressed by the ICRC, the interpretation of the military contribution and advantage should be strict: if political, economic,
social or psychological advantages become relevant, the assessment becomes speculative and the objects attacked are virtually unlimited; what military forces would attack an objective without some advantage? A military contribution and a military advantage suppose an impact on the war-fighting capacity of the enemy. But that impact cannot be designed in general terms or obtained by indirect chains of causality: what must be hit is the war-fighting capacity by a weakening of military forces and assets. In other words, the attack directly bears on the capacity of the enemy to conduct offensive or defensive military action. If an object participated in that context and if its destruction or neutralization weakens the capacity of the enemy armed forces, it is a military objective. Were one to take a larger position, any consequential military advantage would be sufficient: e.g., civilian goods are hit, but by that the State loses tax income, therefore it can invest less in the war effort, hence there is a military advantage. If that were enough, virtually everything could be attacked.

However, in our case, the bombardment has a humanitarian purpose. It does not weaken the armed forces of the enemy; the railway lines do not contribute to any extent to the adverse military action. Under article 52(2) of AP I, they do therefore not constitute a military objective. Hence, under modern IHL, they may not be attacked.

This result may seem shocking to some observers. It may not be morally obvious to conclude that a bombing of such railway lines would be an unlawful attack under IHL. This is true despite the fact that law and morality do not coincide. There are two aspects, which must be keenly considered at this juncture. First, the regulation in article 52(2) must be understood as a limitation of destructive attacks. In the past, there was no clear or constraining rule for belligerents with respect to targeting. The result was a series of arbitrary attacks and an amount of destruction that modern IHL wishes to avoid. To this end, only a restrictive rule can be useful. It provides clear and limiting criteria for targeting, and thereby assures some legal certainly and the overall containment of destructive forces. In most contexts, this restriction works with satisfactory results. That a general and abstract rule cannot fit all highly particular circumstances is evident. The acid test must however be how the overall performance is. If we weaken the degree of prohibition in the provision to take account of highly exceptional contexts, such as the one of ‘humanitarian bombardments’, how much do we gain by the new flexibility, but how much do we lose on other destructive attacks which might become arguable and possibly lawful? Could the net result not be that we lose more than we gain? Is that not particularly probable in a context such as the one we are dealing with here? Two States are pitted against each other in a situation of highest psychological strain, due to a struggle for ‘survival’? Is not the tendency to self-serving, arbitrary and escalating interpretations particularly prone to arrive in such contexts? Second, a reflection is still warranted about how a reconciliation of moral necessity with the law could be obtained. Are there ways to interpret international law as a whole in a way the tension in these Auschwitz-like situations, highly exceptional as they are, could be at least to some extent released? The danger remains to open the Pandora’s Box and collaterally to weaken article 52(2). Each ‘exceptional’ argument is a loaded gun; it
invites others to mount other exceptional arguments. Moreover, all situations are not morally evident as the one presented here, with its clear-cut reductio ad Hitlerum as the evil per se. Thus, if the most varying human rights violations could lead to a bypassing of article 52(2) the result obtained would hardly be commendable. But once again, a reflection on ways out of the potential quagmire may be conducted. Before venturing into various arguments of this type, a preliminary question relates to State practice. Are there useful precedents for the problem presented? We will limit ourselves to some recent precedents, under the realm of article 52(2) of AP I, without projecting back to the older régimes of the law of armed conflicts.

3 Elements of State Practice

There are not many instances where the problem of a ‘humanitarian bombardment’ has come to be an issue, but there are some and these deserve to be shortly studied. The common point of the precedents is the question as to what extent military force can be used during an armed conflict (international or non-international) in order to stop or prevent the commission of (international) crimes of a certain gravity or magnitude.

The question arose first in the context of the situation in Rwanda, during the genocide of 1994 (there was at that time a non-international armed conflict). There were some media (notably Radio Mille Collines) heavily inciting hatred and calling for the commission of genocidal acts and war crimes. A similar situation arose some years later with the RTS (Serbian Radio-Television) during the Kosovo conflict of 1999 (which was an international armed conflict). Can a media become a lawful target if it is used to instigate such crimes? The Final Report to the Prosecutor by the Committee established to review the NATO bombing campaign against the Federal Republic of Yugoslavia (13 June 2000)\(^7\) suggests that if media is used to instigate international crimes, ‘then it is a legitimate target’. This may be true under jus ad bellum, i.e., mandates by the UN Security Council, calling for neutralization ‘by all necessary means’ such a broadcasting station. Conversely, it manifestly cannot hold true under IHL, since it ignores the conditions of article 52(2). Moreover, the terminology of the Report is vague and quite revealing: it speaks of ‘legitimate’ target, which places the accent on the plane of moral and political considerations, and not of a ‘lawful’ target under jus in bello requirements. The impression is that the Report is not based on expertise or on a thorough analysis of IHL.

\(^7\) www.un.org/icty/pressreal/natoo61300.htm (accessed on 2 October 2014).
If some authors concurred with the view of the Committee, many legal writings rejected this approach as incompatible with the rules of IHL. A different response would suppose that article 52(2), is either not exhaustive (we have shown that this is untrue), or that it can be derogated from by contrary agreements (but that would not account for a unilateral violation), or that it can be set aside by a mandate of the UN Security Council, necessity, belligerent reprisals or other norms (see below). The net result of these two precedents is that there are voices for such an enlargement of the lawful (or legitimate?) targets, but that in the literature the doubts and the negative attitude prevail. It also stands to reason that the NATO-led experts take liberal positions when the targets are situated in Rwanda and in Yugoslavia—the ‘other’ is always the bad one, and exceptional rules against that ‘other’ are thus acceptable. However, if the rule as proposed by these experts were accepted, it would become generally applicable. However, if Yugoslav or Rwandan forces bombarded US media, during a supposed armed conflict, for making the apology of Guantanamo or inciting to some aggressive war (as was Iraq in 2003), it is hardly imaginable that those experts would find the rule very commendable or indeed even applicable. These latter examples may seem to one or the other reader far-fetched or even ludicrous, but that would reveal only his staunch Western bias. States are equally sovereign under international law (article 2(1) of the UN Charter); and consequently each one may have its own views and appreciation of reality. There are thus many reasons to remain circumspect with regard to ‘exceptional’ reasoning, when it is hardly to be squared with the general rules of IHL.

Overall, there are currently too few elements in State practice in order to accept a customary evolution of the criteria of article 52(2) towards a more relaxed standard of targeting, notably in order to prevent or punish the commission of international crimes. Even assuming that NATO-close States would accept such a position (which is all but proven), a rule of universal customary international law would

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need to be based on the assent of a significant number of States of the different regional groupings of the world. There is no evidence for such a development. It is even highly improbable that most States (especially in the Group of 77) would accept such a construction of the military objective.

4 Possible Legal Arguments

The time has come to turn to possible legal arguments whose aim is to soften the tension between the strict requirements of IHL and the spontaneous sense of equity, which may consider it to be unacceptable not to try to slow down deportations and exterminations by aerial targeting. There are different avenues that can be explored. Some are based on lex lata, and are more or less credible or promising. Others straddle between lex lata and lex ferenda. Some are neatly situated within the lex ferenda. We will concentrate on the first two ones, since the others suppose a new legislation upon which discussion could be endless. In other words, it is not as a potential legislator, having the applicable law at its disposal, that I wish to formulate reflections, but within the cradle of the applicable law of today. This task is more exacting: it stands to test to what extent article 52(2) or indeed the interplay of different areas of international law, can leave or introduce some crack or opening into the clear-cut rule of IHL already exposed. It is obvious that many of the arguments presented cannot be strong and decisive ones, lest the conclusion we reached under article 52(2) would a posteriori be cast into foundational doubt. However, it is possible at least to colour the wings of the article 52(2)-driven interpretation in order to see if there is some allowance imaginable.

We may test seven arguments. There are certainly more avenues, which could be explored, but the narrow compass of this article does not allow venturing into each and every possible solution. A perusal of the following passages may stimulate the legal imagination of the reader so as to reflect on further constructions. If that happened, this article would already have performed a useful contribution.

Argument 1: can a ‘state of necessity’ under article 25 of the Articles on State responsibility be raised? As is known, article 25 of the Final Articles on State Responsibility for Internationally Wrongful Acts (2001) allows the ‘state of necessity’ as a circumstance precluding wrongfulness under general international law. The actual conduct of the State must be the ‘only way for the State to safeguard an essential interest against a grave and imminent peril’. However, the successful invocation of a state of necessity supposes the fulfillment of a series of conditions, specified in the various paragraphs of the quoted provision. It is not necessary to dwell into the matter further here, since the argument of necessity under general international law cannot be invoked in order not to apply obligations under IHL. Indeed, the exception clause of 25(2), letter a, applies: ‘In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: a) the international obligation in question excludes the possibility of invoking necessity’. As the Commentary of the ILC rightly states, this is the case namely for IHL
provisions.\textsuperscript{10} The law of armed conflicts is already designed for a highly exceptional situation of ‘necessity’, namely warfare; it therefore has its own concept of ‘military necessity’; and it is accepted in the primary law of IHL that military necessity to suspend the application of a rule of IHL can be invoked only if the concrete IHL rule makes explicit allowance for it.\textsuperscript{11} A plea of necessity under general international law could therefore not legally serve to displace the injunction of article 52(2) of AP I (or related customary law), since that provision contains itself no military necessity-exception. It may perhaps be added that the circumstances precluding wrongfulness are designed to guide the law of State responsibility, i.e., to determine when a State owes reparation to another or when certain consequences (such as countermeasures) may ensue. The aim of these secondary rules is not to alter the primary bodies of law by introducing new lawful conducts by the backdoor. On all of those accounts, the argument of necessity fails in our context.

\textbf{Argument 2: the Security Council could provide a mandate, under Chapter VII of the UN Charter, to bombard such railway lines.} The argument is that the UNSC could issue a binding resolution under Chapter VII of the Charter and allow such a bombardment. This resolution would be binding (article 25 of the Charter) and take precedence over contrary conventional law (article 103 of the Charter) and over non-peremptory customary international law (\textit{lex specialis} principle). The UNSC could in this context found itself also on the notion of the ‘responsibility to protect’.\textsuperscript{12} This legal analysis is basically sound. The targeting of the lines would here be based on a \textit{jus ad bellum}-mandate. The UNSC may consider that in order to maintain or restore international peace, some egregious IHL violations must be stopped, even by using force. The attacks flown against the lines must then comply with the other IHL requirements, namely proportionality (article 51(5)(b) of AP I) and precautions (article 57 of AP I). It stands to be stressed that this legal argument does not wrongfully confuse \textit{jus ad bellum} and \textit{jus in bello}-issues, contrary to the principle of separation of both.\textsuperscript{13} Objects may have to be neutralized by military force under \textit{jus ad bellum}-considerations, for which the UNSC is the sole master. IHL is not intended to limit the powers of the UNSC to indicate which objects must


\textsuperscript{12} On this concept, see I. Winkelmann, Responsibility to Protect, in: Max Planck Encyclopedia of Public International Law, Vol. VIII, Oxford 2012, pp. 965 ff.; see also the contribution of a former UN under-secretary of legal affairs, N. Michel, La Responsabilité de Protéger – Une vue d’ensemble Assortie d’une Perspective Suisse, in: Revue de droit suisse 131 (2012), p. 5 ff.

\textsuperscript{13} On this principle, see the clear words of M. Sassoli/A. Bouvier/A. Quintin, supra note 4, pp. 117 ff.
be neutralized under such ‘maintenance or restoration of peace’-considerations. In other words, article 52(2) is certainly exhaustive concerning IHL targeting; but it is not exhaustive in the sense that the UNSC, under its Chapter VII powers, could indicate for destruction or neutralization only military objectives according to that provision. The two sets of norms run parallel and do not limit each other. The question could be raised to what extent this position would amount to an unlawful derogation from IHL. This body of the law is often qualified as peremptory law from which no derogation is permitted. But even assuming that article 52(2) of AP I were a peremptory norm in dealings between States, it would not necessarily be one with regard to the competence of the UNSC. This is not as surprising as it may seem at first sight: article 2(4) of the UN Charter is often styled as a norm of peremptory law for States; and yet it is uncontroversial that the UNSC may use force in a quite discretionary way (article 42 UN Charter and customary international law). The better view is in any case that there is no derogation at all. The two sets of provisions work each one in ordine suo. The UNSC does not interfere in an armed conflict between States by allowing one or the other of them to take liberties with the targeting provision applicable in bello. It rather has its own agenda and asks for the destruction of an object under the ‘maintenance and restoration of peace’-logic. Jus ad bellum and jus in bello therefore remain perfectly separated, each one pursuing its own aims.

Argument 3: Human Rights Law and Responsibility to Protect without the Security Council; article 1 of the Geneva Conventions of 1949? An attempt could be made to read some other norms of international law as allowing action which article 52(2) AP I would otherwise prohibit. A first potential argument is that human rights law may carry an obligation to act. The argument would rest e.g., on the positive duties a State incurs under the ‘right to life’-guarantee, enshrined in all the relevant human rights instruments as one if not the most basic right. A second potential argument would be to use the already mentioned concept of the ‘responsibility to protect’ in order to postulate some duty of action, even aloof from the Security Council. A third potential avenue would be to rely on common article 1 of the Geneva Conventions of 1949. This provision stipulates that the ‘High Contracting Parties undertake to respect and ensure respect for the present Convention in all circumstances’. However, none of these arguments is really solid from a legal point of view. The first two rights mentioned may imply positive

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14 E. David has argued in this sense already in the first editions of his monograph on IHL, cf. E. David, supra note 8, p. 86 ff.
17 For a thorough analysis of this provision, see A. Frutig, Die Pflicht von Drittsaaten zur Durchsetzung des humanitären Völkerrechts nach Art. 1 der Genfer Konventionen von 1949, Basle 2009.
obligations, but not obligations which would violate the non-use of force rule under article 2(4) of the UN Charter or IHL provisions. It would be hard indeed to claim that the right to life under human rights law is lex specialis with regard to the relevant IHL provisions for the protection of life during warfare, when the ICJ has emphasized exactly the opposite.\textsuperscript{18} As to article 1 of the GC of 1949, it stands to reason that the aim of this article is not to allow a belligerent to selectively put to rest any other applicable provision of the body of IHL. The aim of the provision is to strengthen the application of IHL, not to be taken as a basis to literally assassinate other provisions of IHL. It is thus legally impossible to justify the bombardment of the railway lines on such bases. There being a clear prohibition to attack—under IHL—other objects than military objectives, there is also no room for a balancing-up process, e.g., as to the relative importance of the prevention of international crimes and the sacrifice of the targeting provision under article 52(2).

\textit{Argument 4: Subsequent practice modifying article 52(2) of AP I?} It has already been suggested in section III that a belligerent might try to argue for some elements of State practice showing a customary law modification of article 52(2) of AP I. A treaty can indeed be modified by concordant subsequent practice of the treaty parties.\textsuperscript{19} However, the threshold for admitting such a modification binding all parties to a convention (or all States under customary international law) is quite high. There must be a significant practice and a shared \textit{opinio juris} (in principle of all the parties to the convention, or at least almost all), expressed either by doing or by not opposing the new practice. In view of the Rwandan and Kosovo precedents discussed above, it would be completely adventurous to claim that such a modification of article 52(2) has taken place. Thus, subsequent practice may modify that provision in future, but for the time being, a modification on the lines of an allowance for ‘humanitarian bombardments’ has not taken place.

\textit{Argument 5: Countermeasures (armed reprisals) in bello?} An argument might be attempted that the deportations and exterminations are a grave breach of IHL and that therefore an armed reprisal \textit{in bello} is allowable.\textsuperscript{20} True, there are a series of conditions before the belligerent reprisal can be taken,\textsuperscript{21} such as a prior warning, a decision on the highest command/government level, respect for necessity and proportionality, means of last resort, etc. But these conditions could be fulfilled; it is not impossible to satisfy them in the context of our railway lines bombardment. Article 52(2) of AP I does not belong to the provisions which cannot be set-aside under the law of reprisals: This is true at least as long as protected persons are not attacked.\textsuperscript{22} As has been said, in our case only the railway line is attacked. The

\textsuperscript{18}International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996-I, pp. 240, 25.
\textsuperscript{20}For a thorough analysis of the law of reprisals in times of armed conflict, see J. Hebenstreit, Repressalien im humanitären Völkerrecht, Baden-Baden 2004.
\textsuperscript{21}See J. M. Henckaerts/L. Boswald-Beck, supra note 1, pp. 513 ff.
\textsuperscript{22}See article 51, § 6 of AP I.
difficulty flowing from the fact that the initial violation of the law does not relate to the legal rights of the State bombarding the railway lines can possibly be overcome if the violation, because of its object and its gravity, is seen as a violation of *erga omnes* obligations or rights. It would then also be a violation of the rights of the attacking State, amongst all the other States. A forcible answer would here be possible because the non-use of force rule does not apply *in bello*, between the belligerents. Thus, the fact that the reprisals are 'armed' would not pose any particular problem. It is true that in peacetime, armed reprisals are prohibited under article 2(4) of the UN Charter. However, in times of armed conflict there is already a basic license to use force. The armed reprisals fit into this general legal scheme, which they do not subvert. There remains however the unpalatable fact that belligerent reprisals are meant to set aside rules of IHL and that they have a dark historical record. Taking liberties with IHL-rules under reprisals law is opening the gates to dangerous precedents and to a constant downward spiral. In World War One, the whole law of maritime warfare collapsed under the weight of reprisals and counter-reprisals. This is not to say that the argument could not be tried in the extreme circumstances we are envisaging here. But it is fraught with its own dangers of multiple 'loaded guns', and must be at least mistrusted from that point of view. One knows where one starts, one never knows where one ends.

**Argument 6: A teleological expansion of article 52(2) AP I?** Another potential argument runs as follows. The object and purpose of article 52(2) of AP I is to protect the target State, its civil society and the civilians from excessive belligerent destruction. However, in the present case, the normative injunction of article 52 (2) works to the opposite effect: it heavily harms civilians, who are deported and massacred. Hence, in order to realize the main aim of the provision, which is protective of the civilians, the limitation could be dropped in our context. This teleological argument has sometimes been applied for setting aside contextually inequitable IHL provisions. The most famous example is the transfer of prisoners of war aboard ships in the Falkland/Malvinas war of 1982. The ships were the safest and warmest place to hold these prisoners in the circumstances occurring at the time. But article 22 of GC III prohibits the transfer of prisoners of war on ships. This provision was set aside under a teleological argument (effective maximum protection), with the agreement of the ICRC. The dangers and difficulties of such an argument are quite clear: under the guise of interpretation, a provision is to some extent ‘refashioned’. It may not always be as obvious as in the Falkland/Malvinas case what is the more protective régime for the concerned persons and what is thus

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25 The reason is that ships are considered less safe places than land locations. Moreover, in the past, since the Napoleonic Wars, prisoners transferred on ships disappeared.  
compatible with the gist of articles 6/6/6/7 and 7/7/7/8 of the GC of 1949 (no diminution of the rights of protected persons by special agreements among the belligerents; no renunciation of protections by the protected persons themselves). However, *in extremis*, even such an argument—problematic as it is—could be tried. The danger is to damage the whole system of IHL by taking liberties in single situations. A very careful and cautious assessment has to take place in these contexts.

**Argument 7: A violation of article 52(2) to be accepted?** Respect for the law is essential if a complex society is to function and to prosper. But respect of the law is not the only duty or indeed the absolute duty. There are circumstances when the putting aside of a legal injunction may be necessary. The legal philosophers discuss this issue in the loaded context of radically unjust laws.\(^{27}\) The question has however a more general reach. It stands to reason that if I find an injured person I would rush to hospital by car (if I had learned to drive, indeed) without respecting the traffic limitation signs. This is true notwithstanding that a plea of necessity was or was not available to me, since I would probably not even think of that issue in the situation. I would obviously try to be particularly attentive not to put into danger others persons, by my rule-free driving. Thus, there are highly exceptional situations where the respect for the letter of the law might be excessive: *summum jus, summa injuria*. In such cases, a subject has to make a careful assessment and take a position that might carry a moral risk.\(^{28}\) The other members of society may then accept the highly exceptional conduct breaching the law. They may condone it in the circumstances, e.g., by renouncing attributing to it the consequences of unlawful behaviour. The other members of society might however also do not share the arguments of the actor and condemn its conduct as being illegal. Such a choice of conduct under moral risk should be made only in the most highly exceptional circumstances of life, lest the legal order becomes a sort of pick and choose-option. At the end of the day, in our example of deportation and mass destruction, such a highly exceptional situation might occur. A general and abstract rule is workable in the greatest amount of factual situations. But it cannot perform equitably in every single and perhaps highly atypical set of circumstances. The general prohibition must continue to stand, since it is convenient for the bulk of real circumstances. An exceptional liberty under moral risk can be attempted in the most extreme fringes of circumstances—but to remain ‘just’, such a behavior has to test itself as against the strictest standards and to check in particular any self-serving or self-righteous deviations.

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\(^{28}\) The present writer has argued on similar lines in R. Kolb, *Note on Humanitarian Intervention*, in: *International Review of the Red Cross* 85 (2003), pp. 119 ff., emphasizing clearly that humanitarian intervention without the mandate of the United Nations Security Council resolution is today illegal under positive international law.
5 Conclusion

Each legal rule of some clarity has its own blind spot in which it does not operate satisfactorily. The question as to what to do in such situations is as old as the law itself and quite difficult to solve. The whole branch of equity in eternal contrast with formal legal rules is rooted in such situations. In our present context, it is certainly better to keep the restrictive rule under Article 52(2) and to exclude ‘humanitarian’ or ‘criminal-prevention’-bombardments. The gaps opened by an exception would be more harmful than the good concurrently gained. There are however two ways by which the problem can be pragmatically approached, without too heavily damaging the system.

First, there may be a mandate of the UN Security Council under *jus ad bellum*, i.e., Chapter VII of the UN Charter. The Security Council could ask willing member States, carrying out an operation under its mandate, to take all necessary measures to stop a broadcasting station or a deportation, including by using force. This stance could be buttressed by the ‘responsibility to protect’-doctrine. Such a mandate is not unlawful simply because it does not fit into *jus in bello*-criteria. Indeed, *jus ad bellum* remains a separate body of law. The mandates of the Security Council are self-contained with respect to *jus in bello*. In particular, they may indicate particular objects to be removed or destroyed. The attacks themselves must obviously be carried out in respect of *jus in bello*, which here means essentially the proportionality-rule and precautions in attack, i.e., Articles 51 and 57 of AP I.

Second, failing such a Security Council mandate, a State could weigh up the stakes and decide to give prevalence to its moral duty over the legal one (or argue reprisals). It will then violate Article 52(2) of AP I. At the same time, it might state the precise reasons and dilemmas it faced. Confronted with such a concrete situation and its related discourse, the rest of the community of States will have to take position. Either they condone the violation, finding that the circumstances of the individual case warranted such a course. At the same time, they will certainly be at pains to insist on the maintenance of the general rule. Or they condemn the violation, finding that the arguments put forward in its defense were not convincing in the circumstances. In short, there are situations in life when a violation of the law may be contemplated. It however stands to reason that such a course should be chosen only as an *ultima ratio* in the most exceptional circumstances, since each precedent in that sense weakens the essential fabric of international law-rules, so paramount in our violent, anarchic and restless world.
From Cold War to Cyber War

The Evolution of the International Law of Peace and Armed Conflict over the last 25 Years