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RESTRAINTS ON WAR: STUDIES IN THE LIMITATION OF ARMED CONFLICT. Edited by *Michael Howard*. Oxford: Oxford University Press. 1979. Pp. 173. $16.95.

HUMANITARIAN POLITICS: THE INTERNATIONAL COMMITTEE OF THE RED CROSS. By *David P. Forsythe*. Baltimore: The Johns Hopkins University Press. 1977. Pp. 298. $17.95.

Restraints on war arise from two basic sources. First, political and military policies, by defining the ends and means of war, determine whether war becomes "total" as in World Wars I and II or "limited." Second, normative principles and prescriptions may limit both ends and means of war. These normative limitations may derive from morality or from positive law. Ideally, policy and normative restraints on war complement and support each other. When the restraints converge, there is great opportunity to ameliorate the destruction and suffering of war. However, political and military policies and normative guidelines do not always converge. The true task of the law of war is to maximize such convergences.

The interrelation of the possible sources of restraint on war is therefore a matter of perennial importance. The relationships both within and between the two broad categories of normative and policy restraints are important. Political policy restraints are essential to the control of military policy, while military policy must find its justification in the service of political policy. Morality stands above policy as an external source of restraint. Yet, moral prescriptions divorced from the realities of policy may become irrelevant. Law is the meeting place for morality and policy. Ideally, the law of war reflects both sound moral principles and the realities of political and military policies.

The two books here reviewed recognize and deal with this complex of relationships. In *Restraints on War*, Michael Howard and a

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distinguished group of contributors address four categories of restraints on war and sometimes show their interrelations. Unfortunately, the contributors do not always realize the promise of Howard's introductory chapter in developing the connections between politics, military policy, morality and law. Still, the ingredients for such analyses are there. David Forsythe's *Humanitarian Politics* analyzes the policy implications of a body of law which is conspicuously grounded in moral values. In a thorough study of the International Committee of the Red Cross (I.C.R.C.), Forsythe emphasizes the political dimension of efforts to support and enforce humanitarian law and to advance moral principles and initiatives not yet clearly provided for in that law.

This review will consider *Restraints on War* first. After describing Howard's introductory essay, it divides the book into two sets of essays: those dealing primarily with normative restraints on war, and those dealing primarily with policy restraints. Forsythe's monograph will be discussed last, partly in the light of the issues raised in the evaluation of Howard's volume.

I

Howard, Chichele Professor of the History of War at Oxford, is one of the foremost military historians and analysts of our time. In the opening essay of *Restraints on War*, *Temperamenta Belli: Can War be Controlled?*, Howard builds on the central concept of control over the military instrument of policy. Howard first distinguishes force from violence: "War consists of such deliberate, controlled, and purposeful acts of force combined and harmonized to attain what are ultimately political objectives" (p. 3). He then observes that, "Military activity thus carries an intrinsic imperative towards control; an imperative derived from the need to maintain order and discipline, to conserve both moral and material forces and ensure that these are always responsive to direction" (pp. 3-4). Nevertheless, "[t]hese military criteria . . . will not necessarily coincide with the dictates of humanity" (p. 4). Recalling the countervalue strategies of General Sherman in the American Civil War, Howard concludes that "the military principle of 'economy of force' may sometimes conveniently coincide with the dictates of transcendent moral values, but there is little historical justification for assuming that this will always be the case" (p. 4).

Howard's point that control is the essence of good military policy, but that political/military control does not always produce the results enjoined by normative or humanitarian restraints, is an im-

portant one. Supporters of the law of war naturally tend to emphasize its coincidence with enlightened political/military policies and, conversely, the self-defeating effects that often result from manifestly illegal behavior. This is a prominent theme, for example, in the 1976 Air Force pamphlet, AFP 110-31, International Law — The Conduct of Armed Conflict and Air Operations.[1]

Howard next sketches the development of the law of war as a source of external restraint on war. He reviews the traditional distinction between the *jus ad bellum*, the law governing recourse to armed force, and the *jus in bello*, the law governing the conduct of war. The moral doctrine of Just War produced the *jus ad bellum*, while Grotius and subsequent framers of positive international law developed the *jus in bello*. In this survey Howard identifies the underlying characteristics of the political system and of limited wars that made development of these normative restraints possible.

In this century, when political and military realities changed to produce modern total war, the material bases on which both the moral just war doctrine and the international law of war had been grounded were destroyed. Total war between societies in conflict produced strategies that capitalized on modern military technology, strategies such as the countervalue strategic bombing policies of the RAF in World War II. These tactics represent an almost total divergence between political/military policy and the moral/legal principles of proportion and particularly of discrimination or the immunity of noncombatants and nonmilitary targets from direct intentional attacks. Neither morality nor law could make much of a stand against the necessities of total war. In the post-World War II era, the logic of political/military policy alone could revive limited war theories and policies. Thus, prudential rather than normative considerations gave hope of restoring restraints on war. At the same time that total war between nations has destroyed traditional normative restraints on war, wars of national liberation within nations have been waged with an "ends justifies the means" spirit that tends to make them particularly bitter and unrestrained, further endangering the prospects for normative regulation of war. The remaining essays in the book review these developments and assess the future prospects for restraints on war.

1. DEPARTMENT OF THE AIR FORCE, INTERNATIONAL LAW — THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS, Air Force Pamphlet 110-31, at 5-8-5-10 (Nov. 1976).

A. *Normative Restraints on War*

Geoffrey Best takes the lead in developing the first of Howard's themes, the restraint on war by normative principles and prescriptions. Best, Professor of History at the University of Sussex, is a distinguished scholar whose recently published *Humanity in Warfare*[2] is an important contribution to the growing contemporary literature on the law of war. Best's essay, *Restraints on War by Land before 1945*, traces the evolution of the war from its customary form in the great era of limited war, 1648-1914, to its codification in the Hague Conventions of 1899 and 1907. Best displays a profound understanding of the doctrinal developments in international law from the seventeenth to the twentieth centuries. Beyond that, however, he displays a commendable interest in military sociology, a subject that must be studied in connection with efforts to translate law into terms meaningful to those to whom it is directed. Best writes:

> What soldiers actually think about conduct in war, and how their thoughts affect their conduct, is an area of this subject which has so far been very little explored. The legal and official literature, understandably enough, takes no notice of the possibility that within armed forces a kind of sub-culture or 'private' culture may exist, the norms and tendencies of which may conflict with those prescribed in the manuals of military conduct, etc. . . .
>
> The question then for the historian who wishes to embrace all relevant possibilities is: what are the relations between this private military culture which will lay its persuasive claims upon the thinking and behaviour of at least the regular soldier who has been acclimatized to it, and the public political culture from which his army as a whole ostensibly derives its standards and instructions? [P. 24.]

Best pursues this issue with respect to the law and practice governing treatment of prisoners of war, pillage, and the protection of women. He finds that, even in the nineteenth century, the law of war was more effective in protecting soldiers than civilians. And as the twentieth century unfolded, the possibility of protecting civilians by the law of war was drastically reduced by the advent of total war. Thus the political/military policies that produced limited wars also made possible the developments of the principles of discrimination (or non-combatant immunity) in positive international law. But, as early as the American Civil War, the phenomenon of societies totally mobilized for war rendered plausible Sherman's proposition that the way to win such a war is through direct intentional attacks on the mobilized society itself. Best traces this development through the Franco-Prussian War to the two World Wars.

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2. G. BEST, HUMANITY IN WARFARE (1980).

Best concludes with a brief examination of the phenomenon of popular resistance to military occupation and the resultant emergence of guerilla war as a major form of modern conflict. This phenomenon perpetuates civilian identification with war efforts and assures the continuance of political/military policies aimed at civilians and their property, policies that remain at odds with the aspirations of those who would revive the principle of discrimination. On the whole, then, Best finds discouraging prospects for the coincidence of policy with morality and law in war. Indeed, he ends by asking, "has the civilian, as liberal Europe used to know him, become extinct" (p. 36)?

The same theme of divergence of policy from law is pursued by Bryan Ranft, formerly Professor of History at the Royal Naval College, in his essay, *Restraints on War at Sea before 1945*. Ranft points out that much of the eighteenth and nineteenth century law of war at sea sought to negate the most decisive capability of naval warfare, namely, the ability to interdict and destroy vital merchant shipping. Ranft first recalls the long history of efforts to protect neutral shipping and neutral goods and to require that naval blockades be effective and not "paper." Once again the material environment affected the state of law, for the greatest progress in regulating naval warfare preceded the development of modern industrialized states. Once it became clear that modern states were critically dependent on overseas imports and hence vulnerable to blockades, the pressures on the law of naval warfare became increasingly great. The last great attempt to salvage the traditional law of naval warfare at the 1909 London Naval Conference failed utterly in the face of belligerent naval policies in the First World War. By the end of that war, virtually all of the law of naval warfare, established with great effort over the preceding centuries, fell before the demands of total war policies. Ranft recalls that both the Allies and the Germans justified this process by the concept of reprisals. Indeed, the decline and fall of this once central part of international law is traceable directly to a reprisal spiral that traded illegal act for illegal act until there was no law left.

Ranft concludes with a brief but critical point that might be called "technical necessity." World War I had shown the impossibility of treating submarines as though they were capable of observing the same law as surface warships. All pretense of uniform treatment was abandoned in World War II, when anti-submarine weapons systems, particularly maritime aircraft, made submarines extremely vulnerable. Accordingly, the interwar efforts (such as the 1922

Washington Conference, the 1930 London Conference, and the London Submarine Protocol of 1936) to codify a law regulating submarine warfare failed completely. Ranft points out once again that the law is likely to collapse where there is an unreasonable gap between the demands of law and the material characteristics of the regulated subject matter.

The same point is made with equal emphasis by Donald Cameron Watt, Professor of International History, London School of Economics, in his essay, *Restraints on War in the Air before 1945*. Indeed, Watt sees a pattern in the process by which efforts to regulate aerial bombardment failed:

> The first [step] is the attempt of an advanced but still belligerent society to devise restraints and inhibitions on the use of a weapon the technological development of which was so constantly to be out of phase with men's concepts of its use. The second is the manner in which those concerned with the problem moved from optimism to extreme pessimism in their attitudes to the weapon and the technology that produced it. The third is the decline of overall moral standards and the dwindling of the ethical horizons of those responsible from a general to a purely national scale. [Pp. 58-59.]

Watt also traces the origins of the Royal Air Force doctrines of strategic bombing and force development that predetermined, in great measure, the policies of the Second World War. The early prophets of air power in Britain, of whom Lord Hugh Trenchard was the foremost, held out a strategic deterrent policy as the best defense posture. Indeed, this RAF doctrine greatly resembles the "more bang for the buck" policies of the Eisenhower Administration as it initiated nuclear strategic deterrence. Trenchard and others proposed that the RAF both adopt what we would now term countervalue policies, and develop capabilities to threaten a potential aggressor with a devastating assault on his cities. Although the RAF never achieved such a deterrent capability, it did proceed to the policy of "area" attacks on German cities in World War II, attacks that completely violated the traditional moral/legal principles of proportion and discrimination.

Watt's brief review of air law and strategy before 1945 (actually, before 1939) leads him to generalize that, as this Reviewer has also observed,[3] customary law grows and conventional law is viable where they have an adequate societal and material basis. In the first phase of the three-step process Watt describes in the quotation above, such a basis for law seems to exist. But, as the second two

3. *See* O'Brien, *Legitimate Military Necessity in Nuclear War*, 2 WORLD POLITY 35, 82-100 (1960).

phases unfold, law tends to take the form of conventions that are increasingly out of harmony with the realities of modern warfare until finally, in the third phase, the "ethical horizons" of those responsible for war shift from an international to a national scale.

It should be added that Watt's essay and, to a lesser extent, those of Best and Ranft, suffer from the Editor's apparent mandate to stop at the Second World War. Best and Ranft do make important points about the practice in that war and its implications for the law of war, but Watt does not project his analysis beyond the tentative days of aerial combat during the "Phoney War" before the fall of France. His comments on the realization during the rest of the war of the trends he has traced in RAF and U.S. Air Force strategic bombing practice are sorely missed.

The last essay in Restraints on War, *Wars of National Liberation and War Criminality* by G.I.A.D. Draper, Professor of Law at the University of Sussex, is the most detailed in its legal analyses. Draper begins by picking up one of Howard's themes, the relation between the *jus ad bellum* and the *jus in bello*. He reminds us that the emphasis on just cause for resort to war under the *jus ad bellum* has historically conflicted with the insistence of the *jus in bello* that both sides in a war must observe its rules. This conflict abated in the eighteenth and nineteenth centuries as the moral concept of just war declined and no substitute *jus ad bellum* developed to distinguish legal from illegal belligerents. It was in this age of secular humanitarianism that much of the *jus in bello* was codified. However, starting with the League of Nations Covenant and the Kellog-Briand Pact, a new positive law *jus ad bellum* was established. This new law distinguished aggressors who violated the prescriptions "outlawing" war as an instrument of policy from lawful belligerents engaged in wars of collective security and/or defense. Draper emphasizes, however, that the temptation to discriminate against aggressors with respect to rights and duties under the *jus in bello* was resisted. The 1949 Geneva Conventions, like the 1907 Hague Convention IV,[4] "are imbued with humanitarian principles, and reject any idea of their

4. Hague Convention of 1907 Respecting the Laws and Customs of War on Land (Hague IV), Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Geneva Convention of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

unequal application based on the legality or illegality of the 'cause' for which the belligerents have resorted to armed conflict" (p. 139).

Recently, however, a new "just war" concept has arisen which threatens the principle of equal application of the *jus in bello*. This new just war approach is a product of the importance given to the principle of self-determination by Third World nations and, ironically, of long-overdue efforts to apply the rights and duties of the *jus in bello* to participants in intranational conflicts.

To begin with the second factor, many commentators have observed a gap in the *jus in bello* insofar as participants in civil wars or internal conflicts are concerned. The only conventional law applicable to such conflicts has been the common Article 3 of the four 1949 Geneva Conventions. This Reviewer and others have long argued that there is a need for the law of war wherever there is a war in the material sense (*i.e.*, widespread and prolonged combat carried on for political rather than criminal purposes). The goal of international law should be to increase the applicability of the law of war to noninternational conflicts.[5] The Diplomatic Conference on Humanitarian Law,[6] 1974-1977, pursued this goal by drafting a Protocol to the 1949 Geneva Conventions explicitly addressed to noninternational armed conflicts.

Draper's account soon reveals a disturbing development in the work of the Diplomatic Conference. The Third World states, cheered on by eleven nonvoting National Liberation Movement (N.L.M.) delegations, sought to proclaim and implement the principle of self-determination. This principle, which had been a common theme of Third World struggles for independence, already had been proclaimed repeatedly in international human rights conventions and General Assembly resolutions.[7] Nevertheless, the Third World

5. *See, e.g.*, Baxter, *Forces for Compliance with the Laws of War*, American Society of International Law, Proceedings of the 58th Annual Meeting 82-92, 97 (article, panel discussion, and comments by William V. O'Brien) (1964).

6. The full designation for the Conference is the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. It should be noted that this designation, in addition to being somewhat pretentious and overlong, is confusing. Traditionally, the law of war was divided into the "Hague Law," which dealt with means and methods of warfare as well as with humanitarian protection of prisoners of war and civilians, and the "Geneva Law," which dealt exclusively with humanitarian protection. The 1977 Geneva Protocols deal with both Hague and Geneva subjects and it is misleading to label them "humanitarian" only.

7. U.N. CHARTER art. 1, para. 2, includes among purposes and principles of the organization the development of "friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples". The principle of self-determination is reaffirmed, *inter alia*, in the U.N. Declaration on the Granting of Independence to Colonial Countries and Peoples adopted by the General Assembly December 14, 1960, in G.A. Res. 1514, 15 U.N. GAOR, Supp. (No. 16) 66, U.N. Doc. A/4684 (1961), and in Articles 1 of both the U.N.

states wanted to concretize the right of self-determination through formal recognition of the belligerent rights of N.L.M.s that are still fighting for self-determination. Draper explains:

> The Third World States were not slow to see that a major political and a possible juridical advantage might be obtained, at one move, by securing the insertion of a provision in the scope, Article, I, of Protocol I, whereby the struggles of peoples against colonial, alien, and racist regimes should be included as situations to which the Conventions of 1949 and Protocol 1 would be applicable. By orthodox legal thinking such struggles were internal armed conflicts to which the Article 3, common to the Conventions of 1949 and Protocol 2 might be applicable. Once such 'peoples' struggles' for the selective purposes mentioned were ingested within the scope of Protocol I, they assuredly had no place in Protocol 2. The two Protocols had been drafted on the basis of mutual exclusion. For the National Liberation Movements and the Governments which supported them and who commanded the majority of votes, this was a political objective as manifest as it was desirable. [P. 146.]

As a result of Third World pressures, Article 1(4) of Protocol I, although designated as applying to international conflicts, became the source of belligerent rights for revolutionary forces hitherto not covered by any international law of war except the common Article 3 of the 1949 Geneva Conventions. Under Article 1(4), Protocol I was said to apply, *inter alia*, to:

> armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist *régimes* in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[8]

The discussions preceding the adoption of this language indicate that very specific situations were meant to be covered by Article 1(4) of Protocol I. These include wars of national liberation against Israel, South Africa, and Portugal. Since the drafting of the Protocol, internal changes in government led Portugal to dissolve its African colonial holdings and remove itself from what might be termed the wars-of-national-liberation "Hit List" (my term, not Draper's). That leaves only Israel and South Africa. Needless to add, the Third World states voting for Article 1(4) understood that *they* would not now or in the future be found guilty of "colonial domination" or

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International Covenants on Human Rights annexed to G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1967), *reprinted in* 61 AM. J. INTL. L. 861 (1967).

8. Protocol Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* December 12, 1977, UN Doc. A/32/144, Annex 1 (1977) [hereinafter cited as 1977 Geneva Protocol I], *reprinted in* 16 INTL. LEGAL MATERIALS 1391 (1977).

"alien occupation" or of maintaining a "racist régime." However, there is no reason to doubt that new villains may be added to the "Hit List," possibly including the United States.

If the 1977 Geneva Protocol I becomes accepted in international legal practice, Article 1(4) will resolve the issue of recognition of belligerency in intranational wars in an awkward and discriminatory fashion. Most noninternational conflicts will be governed by Protocol II, which is vastly inferior to Protocol I as a convention regulating belligerent conduct (most notably, Protocol II fails to institute the protections for prisoners of war that are guaranteed to POWs in international conflicts). But hostilities termed "wars of national liberation" against Israel and South Africa will be treated as international conflicts, and belligerent revolutionary forces in these nations can claim the full benefits of Protocol I and, indeed, of the 1907 and 1949 Hague and Geneva Conventions. Under this approach, PLO terrorism in Israel is an international conflict covered by Protocol I, while a Kurdish revolt against Iraq or Iran is a noninternational conflict that entitles the rebels only to the lesser protections of Protocol II.

In addition to its discriminatory resolution of the issue of belligerent status for purposes of application of the *jus in bello*, Article 1(4) of Protocol I promises to produce a revolutionary effect on the *jus ad bellum*. Under existing international law and the Charter of the United Nations, there are only two situations in which nations can legally resort to military force. One is during an enforcement action under Chapter VII of the Charter, a situation that has never arisen because of the lack of consensus among the permanent members of the Security Council. The other is during exercise of the Article 51 right of individual and collective self-defense. If the 1977 Geneva Protocol I is accepted, resort to force in a third situation — wars of national liberation as defined in Article 1(4) — will be authorized by the *jus ad bellum*. Thus the trend of the contemporary *jus ad bellum* to limit severely the circumstances in which belligerents can legally resort to armed force has been reversed. In effect, a new "just war" category has been added to the *jus ad bellum*.

Having made these points, Draper observes that this victory for Third World values is obtained at the cost of imposing duties on revolutionary belligerents, duties that they may well be unable to honor in practice. A typical guerrilla force prosecuting a war of national liberation will find it quite difficult to meet many of the requirements of Protocol I and of previous conventions of the *jus in bello*. As Draper observes, "[o]ccupation of enemy territories, the

conduct of hostilities, the appointment and functioning of Protecting Powers, the penal repression of 'grave breaches' and other topics governed by the Conventions and Protocol 1 present major difficulties when applicable to N.L.M.s" (pp. 147-48).

The Diplomatic Conference defined belligerency very differently under Protocol II than under Protocol I. Here the Third World states faced the possibility that *they* might be the target of revolutionary insurrection, and they were at pains to limit the rights of those who might oppose their *régimes* by force. Article 1 of Protocol II imposes a high threshold of belligerency: it requires a continuous, high intensity conflict before revolutionary forces may profit from even the modest provisions of Protocol II.[9] Thus, to continue the earlier example, the PLO qualifies *per se* for belligerent status because of its *cause*. Sporadic terrorist attacks that in no way satisfy the belligerency threshold of Protocol II nevertheless suffice to qualify the PLO as a belligerent under Protocol I. On the other hand, a Kurdish revolutionary force in Iraq or Iran would have to maintain a broad, prolonged, uninterrupted, and highly successful guerrilla war in order to qualify for the lesser belligerent rights afforded by Protocol II.

Draper concludes with a consideration of the problems of enforcing the now expanded law of war. He notes that, because communist and Third World countries have often refused to accept or cooperate with the International Committee of the Red Cross, there may be no certified impartial third party to monitor compliance with the law. And because reprisals are so widely limited by explicit limitations in the older Conventions and the new Protocols, there remains very little in the way of legally permissible retaliation to deter and punish violations of the law.[10] Finally, Draper discusses the problems

9. 1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

Protocol Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* December 12, 1977, UN Doc. A/32/144, Annex II (1977), *reprinted in* 16 INTL. LEGAL MATERIALS 1442 (1977).

10. The issue of dwindling reprisal rights in the *jus in bello* is examined in O'Brien, *The Jus in Bello in Revolutionary War and Counter insurgency*, 18 VA. J. INTL. L. 193, 237-40 (1978).

caused by emphasis in the Protocols on the punishment and prevention of "grave breaches." Draper calls attention to the difficulties English municipal law has experienced in translating the concept of punishment of grave breaches into domestic law and legal procedures. Similar problems face the United States, and they will doubtless be discussed when the Protocols are submitted to the Senate. Draper reiterates that national liberation movements will have little or no capability to punish grave breaches. Draper thus raises the specter of a double standard under which the developed states are expected to comply with an expanded body of international law and to enforce it through appropriate domestic law proceedings, while their potential adversaries in revolutionary or counterinsurgency wars are measured against reduced expectations of compliance. All of this leads Draper to question the ability of the *jus in bello*, at the moment of its apparent reaffirmation and expansion, to curb the excesses of belligerents fighting under the banners of new "just wars."

B. *Policy Restraints in War*

The other three essays in Howard's book deal with the limited war aspect of restrictions of international conflict. John C. Garnett, Dean of the Faculty of Economic and Social Studies at the University College of Wales, Aberystwyth, presents a useful analysis of the meaning and implications of *Limited 'Conventional' War in the Nuclear Age*. Along with such authorities as Robert Osgood and Bernard Brodie,[11] he prefers to restrict the term "limited war" to wars in which the superpowers are involved and in which they deliberately restrict the use of available military capabilities. For Garnett, the heart of the matter is not so much the limitation of ends as of means. When nuclear powers are directly or indirectly involved in a conflict, limiting means may prevent escalation to nuclear war. Accordingly, he excludes "small" and "local" wars that do not involve belligerents with nuclear capabilities or nuclear-capable allies from his discussion. While this is a reasonable approach, others may prefer to hold out guidelines for limited war that can be applied in substantial measure to all belligerents.[12]

Having specified his elite concept of limited conventional war,

11. *See* B. BRODIE, STRATEGY IN THE MISSILE AGE 309 (1959); Osgood, *The Reappraisal of Limited War*, in PROBLEMS OF MODERN STRATEGY 92, 94 (1970).

12. The Reviewer attempts a more comprehensive approach to the definition of limited war and the development of guidelines applicable to most belligerents in O'Brien, *Guidelines for Limited War*, MIL. REV., Feb. 1979, at 64. This approach will be elaborated in THE CONDUCT OF JUST AND LIMITED WAR (forthcoming).

Garnett analyzes the differences between such wars and ordinary conventional wars. The problem for belligerents faced with a possibility of nuclear escalation is to "win" enough to achieve the desired ends but not so much as to risk nuclear escalation. A second distinctive objective in such wars is to deploy forces in such a way as to permit effective conventional fighting without rendering them excessively vulnerable to nuclear attack should escalation occur. The solution to the first and more important problem is to develop implicit "ground rules" of conflict, a concept suggested in Kissinger's early writing and elaborated by other strategic thinkers such as Thomas Schelling.[13] One such implicit ground rule is the restriction on bombing targets that the U.S. Air Force observed during its attacks on North Korea and North Vietnam.

The concept of tacit rules of conflict is attractive to the proponents of both limited war and the international law of war. When they are successfully established by the patterns of behavior and expectation in a conflict, ground rules reconcile policy with the normative goals of limiting war. As Garnett points out, however, enthusiasm for such rules of conflict is often limited to elite proponents of limitation. Particularly in a liberal democracy, the apparent or real sacrifices of possible military advantage resulting from such ground rules are often viewed with concern and can generate outright opposition. The problem of limited war, then, is in retaining enough military effectiveness to assure a reasonable probability of success while also significantly limiting the more destructive and dangerous methods of warfare, and in achieving both these objectives while retaining the support of a society that wants a rapid and successful conclusion to the conflict.

In a searching application of these concepts to NATO strategies, Garnett explores the problems of reconciling the provision of an adequate limited defense of Europe with the maintenance of a strategic deterrent. The paradox is that too convincing a conventional defense capability may undercut the credibility of the strategic nuclear deterrent. There seems to be little danger that this will become a critical dilemma in the near future, given the inadequacies of NATO's present conventional forces *vis-à-vis* those of the Warsaw Pact. Nevertheless, Garnett is quite right in raising this dilemma, for it is one that will always confront NATO and, indeed, other similar

13. H. KISSINGER, NUCLEAR WEAPONS AND FOREIGN POLICY 140-41 (1957); T. SCHELLING, ARMS AND INFLUENCE (1966). The principal authorities on limited war are cited and their suggested ground rules incorporated into limited war guidelines in O'Brien, *supra* note 12.

defense alliances. Moreover, Garnett has put his finger on one of the profound issues of modern deterrence and defense: Is it better to maximize a nation's ability to fight limited wars in the event that strategic nuclear deterrence fails, and in the process perhaps impair that deterrence or to put everything into strategic deterrence in the hope that it will be effective in preventing "limited" and unlimited major wars?

Laurence Martin continues many of Garnett's themes in his essays on *Limited Nuclear War*. Martin is Vice-Chancellor of the University of Newcastle upon Tyne and one of the foremost strategic thinkers writing today. His essay distinguishes two approaches to limited nuclear war: (1) tactical nuclear war, and (2) strategic limited nuclear war. The first, an integral part of NATO's defenses, plays a complicated role because of the "creative ambiguity" (p. 106) inherent in the ability of NATO forces to opt either for conventional nonnuclear defense policies or for conventional plus limited nuclear defense policies. Although this creative ambiguity contributes to deterrence, it is a constant source of apprehension within NATO. The United States fears the escalatory implications of any decision to use nuclear weapons, even at a battlefield tactical level. The Europeans prefer to rest primarily on the protection of U.S. strategic nuclear deterrence and, understandably, dread the prospect of an inordinately destructive tactical nuclear defense of Western Europe. These fears of the NATO allies are compounded by concern for the adequacy of common-control arrangements and the problems of coordinating political and military decisions and policies.

One solution to these problems, Martin suggests, might be a "mini-nuke" strategy: tactical nuclear weapons would be employed from the outset of an invasion (with no conventional "pause") under policies designed to control collateral damage in the areas defended (pp. 109-10). Still, Martin admits, the destruction would be very extensive and, most importantly, there would be no assurance that the Soviets would cooperate in maintaining nuclear thresholds and ground rules. This, of course, is a nagging issue in any limited war discussion. When the enemy has equal or superior capabilities and options, there is no assurance that he will see an interest in tacit ground rules advantageous to the other side.

After examining the second type of limited nuclear policy — the "limited strategic options" strategy advocated by Secretary of Defense James Schlesinger (and revived once again the summer of 1980 in President Carter's Presidential Directive 59) — Martin concludes that the possibility of nuclear war is a permanent reality. He states:

> It would be absurd to believe that such powerful means of destruction can be wholly and permanently divorced from political conflicts. The question thus becomes in what way can this linkage best be handled so as to minimize conflict and, above all, to avert all-out nuclear war. Limited nuclear war thus presents a familiar dilemma: how to steer a course between relatively manageable strategies for employment and the horrifying prospects of catastrophe, so as best to preserve the deterrent and stabilizing influence of the nuclear balance? [P. 119.]

It is appropriate to end this review of Howard's book with a critique of D.P. O'Connell's essay, *Limited War at Sea since 1945*. O'Connell, whose untimely death since the publication of this book was a major loss to international and relations scholarship, was the Chichele Professor of Public International Law at Oxford. One might have expected a formal legal emphasis in his chapter. But although O'Connell begins by noting the need for legal justification for use of force in self-defense, he emphasizes the kind of "ground rule" limitations on policy stressed by Garnett and Martin. He suggests that such limitations are to be found in three broad forms: (1) limitations on the theater of operations wherein naval force will be applied; (2) limitations on the scale of operations and the level of weaponry; and (3) graduation of force and scale of response.

Significantly, the author of the foremost contemporary comprehensive treatise on international law in English says of the first kind of limitation: "Whether the localization of the conflict at sea is a legal concept or merely a matter of prudence is a moot question" (p. 126). To illustrate how open the issue remains, O'Connell contrasts U.S. policy in the Vietnam War with India's conduct in its 1971 war with Pakistan. The United States limited interdictory naval operations to within twelve miles of the coasts of North and South Vietnam. By contrast, India pursued its war on the high seas, thus refusing to accept a common contemporary limited war guideline.

O'Connell offers the U.S. policies regarding mining Haiphong Harbor as examples of the second and third types of implicit limitations distinguished above. O'Connell, a classical international law publicist, demonstrates his cognizance of the critical importance of limited war rules of engagement by concluding: "The intellectual framework of limited war has thus become an essential component of the professional activity of naval staffs" (p. 134). Thus, O'Connell's essay again illustrates the theme of the Howard volume: the interaction of policy and normative restraints produces a spectrum of prescriptions and guidelines ranging from political/military rules of conflict to practices leading to customary international law to restatements in the form of international conventions.

II

David P. Forsythe's *Humanitarian Politics* is an extraordinarily comprehensive and scholarly monograph on the work of the International Committee of the Red Cross (I.C.R.C.) in developing and implementing the humanitarian law of war. Forsythe, who is now a professor of political science at the University of Nebraska, has served as a consultant to several Red Cross agencies and committees. His book is a significant case study of the interaction of the basic normative and policy restraints on war. Forsythe's dedicated appraisal of the I.C.R.C.'s goals and efforts leaves little doubt about their moral emphasis. Yet Forsythe looks beyond the organization's efforts to maximize the automatic operation of formal humanitarian law and of the I.C.R.C.'s role in that process: he steadfastly probes into politics to find ways in which the I.C.R.C. can do things that could not be agreed upon in the law-making processes of the contemporary decentralized international legal system. Forsythe's distinctive criticism is that the I.C.R.C. should recognize the limits imposed by the need for consensus in modern international law and should, accordingly, reach beyond the law to politics to accomplish tasks required by morality.

Forsythe traces the development of the Red Cross movement, places the I.C.R.C. in the context of the larger Red Cross organization in Switzerland and worldwide, and explains its functions and basic philosophy. He also explores in detail its *ad hoc* diplomacy on behalf of political prisoners, its role in the development of humanitarian international law, and its better known activities in providing protection for prisoners of war and civilian victims of war. All of this analysis is based on extensive study of the archives of the organization, on interviews with key personnel, and on the broader scholarly literature on humanitarian law.

Forsythe concludes his study with an analysis of three "challenges" to the I.C.R.C. in the future: the challenge of self-identification, the challenge of evaluating law and the challenge of moral choice (pp. 231-35). Forsythe contends that the challenge of self-identification raises the issue of whether the I.C.R.C. should remain an "establishment" humanitarian agency representing Swiss and Western values and approaches, or whether it should instead become a spokesman for "mankind" that employs new and perhaps radical approaches in a quest for greater protection of human values (pp. 228-42).

The challenge of evaluating law involves critical review of both the utility of international law as an instrument for the protection of

human rights and the role of the I.C.R.C. in developing humanitarian law. Forsythe is troubled by the emphasis in contemporary international law on the rights and prerogatives of sovereign states. He finds an excessive deference to the rights of states. This, of course, is not surprising given the present decentralized international lawmaking process wherein states make, interpret, and apply the law for themselves. Forsythe thinks that the task of developing and supervising more of this kind of law, always with proper deference to the rights of sovereign states, is an insufficient challenge for the I.C.R.C. Forsythe believes the I.C.R.C. should transcend legal purposes and methods to emphasize *ad hoc* diplomacy on behalf of human rights, rather than organize more conferences to produce conventional humanitarian law and exert more efforts to implement that law (pp. 242-45). A prominent example of this *ad hoc* diplomacy is provided in the record of I.C.R.C. involvement on behalf of political prisoners during the "colonels' " *régime* in Greece from 1967-1974 (pp. 76-84). Forsythe's chapters on protection of political prisoners and intervention in cases of hijacking, kidnapping, and other situations not covered by international law offer further examples of this *ad hoc* diplomatic approach.

Finally, Forsythe explores the challenge of moral choice that faces the I.C.R.C. He distinguishes between three forms of humanitarianism: impartial, international, and revolutionary (p. 227). *Impartial humanitarianism*, the typical practice of the I.C.R.C. and the UN High Commission for Refugees, is based on a theory of "discreet incrementalism," the "one more blanket" theory of doing what one can to alleviate suffering. Two working premises underlie this approach: the humanitarian organization should operate with the consent of the government having jurisdiction over the persons requiring protection, and the organization should rarely if ever criticize that government in public. There is a tradeoff between practical relief and initiatives that might pressure those in control of the persons who are in need of assistance to drastically change their policies. *International humanitarianism*, typified by Amnesty International, operates with consent of the government with jurisdiction over the persons to be protected at some times and without that government's consent at others. Under this approach, the humanitarian organization does not hesitate to criticize or to seek fundamental changes in the state of affairs that has produced the need to provide protection. Revolutionary humanitarianism, typified by the Joint Church Aid (JCA) organization's activities in the Biafra War in Nigeria, disregards the wishes and claims of public

authorities and does whatever it can both to ameliorate and to eliminate the conditions requiring humanitarian intervention.

The moral challenge to the I.C.R.C. is whether to continue to pursue "discreet humanitarianism," impartial humanitarianism, or move in the direction of international or revolutionary humanitarianism. Forsythe's own recommendations are twofold. First, he thinks that "the ICRC should move to make Geneva law more effective and more oriented to human needs rather than state interests, when the two values are divergent" (p. 244). He gives as an example the I.C.R.C. position on the 1977 Geneva Protocols discussed above in the review of Draper's essay.[14] Like this Reviewer, Forsythe would have urged that one Protocol should govern all armed conflict. This was the original position of the I.C.R.C. However, it ultimately bowed to the wishes of the governments participating in the Diplomatic Conference, even though the second Protocol, which governed noninternational conflicts, offered quite inferior humanitarian protections to the first, which governed internal conflicts.

Finally, Forsythe contends that "the ICRC should move to make as much of its work as possible alegal" (p. 244). In terms that will surely shake the traditional image of both the role of humanitarian law and the I.C.R.C., Forsythe argues:

> This "delegalization" process would counteract certain claims by states — viz., that the law did not apply, that the law only required X but not Y, that use of the law led to implications about the overall nature of the situation that the state wished to avoid. In many situations an ICRC alegal, purely humanitarian approach might produce considerable humanitarian results. *Geneva law should be regarded as a necessary evil and a last resort, useful in some but not all situations* (emphasis added). [P. 244.]

Conclusion

In these two important contributions to the literature of the law of war and limited war, Howard and his associates and Forsythe demonstrate the interaction of normative and policy restraints on war. At a time of great interest in revival and improvement of the law of war — or, as it is increasingly called, the law of international and/or noninternational conflict — it is imperative for moralists, lawyers, scholars of political/military policy, and decision makers to ponder the choice of strategies in developing restraints on war. Howard's volume shows the critical relationship between political/military policies and capabilities and normative restraint. The

14. *See* text at notes 4-10 *supra*.

essays suggest that it may prove more helpful to develop tacit, informal ground rules of conflict rather than to attempt to codify international law restrictions on belligerent means of destruction.

Forsythe penetrates into the "holy of holies" of the law of war — Red Cross, Geneva, humanitarian law — and suggests that political approaches, based on moral objectives and transcending both law and legal techniques of restraint, may offer the best strategy to protect human rights. Together, the two books provide indispensable discussions, discussions on which those interested in restraint on war should reflect profoundly if this most difficult enterprise is to have a chance of influencing the dangerous trend of contemporary conflict.