



NEAR EAST UNIVERSITY  
INSTITUTE OF GRADUATE STUDIES  
INTERNATIONAL LAW PROGRAM

**A CRITICAL ANALYSIS OF THE PROPORTIONALITY PRINCIPLE  
IN THE LAW OF ARMED CONFLICT**

MİSTRAL ÇAYDAMLI

MASTER'S THESIS

NICOSIA  
2021

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NICOSIA  
2021

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## ABSTRACT

### A CRITICAL ANALYSIS OF THE PROPORTIONALITY PRINCIPLE IN THE LAW OF ARMED CONFLICT

The principle of proportionality is a cardinal principle of international humanitarian law, which requires belligerents not to cause incidental loss of civilian life, injury to civilians or damage to civilian objects if it would be excessive in relation to the concrete and direct military advantage anticipated with the launch of any action. Within the context of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977, the use of the term 'proportionality' is a misnomer, since the actual test prescribed by AP I is one of excessiveness. Whether proportionality should be determined on a case-by-case or a cumulative basis remains unclear. The military advantage of the larger campaign must be considered if attacks are to be aggregated. The safety of attacking forces may be factored into proportionality calculations and the popularity of a war may indirectly influence military actions. The real life application of the principle depends on subjective judgment calls made by the reasonable military commander. Different types of incidental harm, including illness and mental health, harm to civilian use of dual-use objects and economic loss and displacement, may be relevant for proportionality assessments under certain conditions.

A workable approach to applying proportionality may be suggested by first utilising the test of necessity as a precondition to the implementation of the principle and then by systematically drawing on the procedural requirements set forth under Article 57 of Protocol I as well as by requiring *ex ante* and *ex post* reviews of the application of the principle in armed conflicts.

**Keywords:** proportionality, international humanitarian law, law of armed conflict, Additional Protocol I

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## ABBREVIATIONS

AP I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977
C3	Command, control and communications
CDE	Collateral damage estimation
Draft AP I	Draft Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)
Goldstone Report	UN Human Rights Council, Report of the United Nations Fact-Finding Mission on the Gaza Conflict, 25 September 2009, A/HRC/12/48
ICRC	The International Committee of the Red Cross
ICTY	The Trial Chamber of the International Criminal Tribunal for Former Yugoslavia
IDF	Israel Defence Forces
NATO	The North Atlantic Treaty Organisation
NATO Bombing Report	The Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia
Quebec Meeting	The International Expert Meeting on 22-23 June 2016 in Quebec on the “Principle of Proportionality in the Rules Governing the Conduct of Hostilities Under International Humanitarian Law”
Rome Statute	The Rome Statute of the International Criminal Court 1998



Tallinn Manual	The Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations
UN	The United Nations
USA	The United States of America

**OSCOLA 4th Edition citation style is used.**

# A CRITICAL ANALYSIS OF THE PROPORTIONALITY PRINCIPLE IN THE LAW OF ARMED CONFLICT

## INTRODUCTION

From a *jus in Bello* perspective, the principle of proportionality is a cardinal principle of international humanitarian law. International humanitarian law is the body of rules that regulates the conduct of parties engaged in an armed conflict by prescribing their rights and duties during military operations. The parties engaged in an armed conflict are referred to as belligerents.<sup>1</sup> *Jus in Bello* (justice in war) is synonymous with international humanitarian law – it is the body of legal rules that governs the way in which warfare is conducted between belligerents, serving as a guideline for them to fight well once war has begun.<sup>2</sup>

The principle of proportionality forms the “holy triad of the modern law of armed conflict” together with the principles of distinction and necessity.<sup>3</sup> Proportionality specifically regulates the way warfare is conducted to limit collateral damage to civilians during an armed conflict.<sup>4</sup> The way in which it serves this purpose is by requiring belligerents not to cause incidental loss of civilian life, injury to civilians or damage to civilian objects if it would be excessive in relation to the concrete and direct military advantage anticipated with the launch of any action.<sup>5</sup>

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<sup>1</sup> ‘belligerent’ (*Cambridge Dictionary Online*, Cambridge University Press 2021) <https://dictionary.cambridge.org/dictionary/english/belligerent> accessed 10 April 2021

<sup>2</sup> International Committee of the Red Cross, ‘What are jus ad bellum and jus in bello?’ (2015) <https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0> accessed 10 April 2021

<sup>3</sup> James Kilcup, ‘Proportionality in Customary International Law: An Argument Against Aspirational Laws of War’ (2016) Vol. 17(1) *Chicago Journal of International Law* 247 <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1707&context=cjil> accessed 10 December 2020

<sup>4</sup> Samuel Estreicher, ‘Privileging Asymmetric Warfare (Part II)?: The “Proportionality” Principle Under International Humanitarian Law’ (2011) Vol. 12(1) *Chicago Journal of International Law* 143 <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1618&context=cjil> accessed 10 December 2020

<sup>5</sup> International Committee of the Red Cross, *Additional Protocol I*, art. 51(5)(b) <https://ihl-databases.icrc.org/ihl/WebART/470-750065> accessed 10 December 2020; International Committee of the Red Cross, *Customary International Humanitarian Law Rules*, rule 14 [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter4\\_rule14](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14) accessed 10 December 2020;

The principle of distinction complements the proportionality principle, requiring belligerents to perpetually distinguish between civilians and combatants on the one hand, and civilian objects and military objectives on the other hand. Attacks must only be directed against military objectives.<sup>6</sup> By extension, they may not be directed against the civilian population (including individual civilians) and civilian objects,<sup>7</sup> the latter of which are objects that are not defined as military objects. Military objects are limited to “objects which by their nature, location, purpose or use make an effective contribution to military action and whose [...] destruction, capture or neutralisation, [...] offers a definite military advantage”.<sup>8</sup>

International humanitarian law also recognises the principle of military necessity. The principal military objective of armed conflicts is weakening the opponent’s military capacity and winning the war.<sup>9</sup> Hence, necessity permits decision-makers to take all reasonable, necessary actions in combat to achieve a legitimate

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and Janina Dill, ‘Applying the Principle of Proportionality in Combat Operations’ (2010) Policy Briefing, Oxford Institute for Ethics, Law, and Armed Conflict 1

<sup>6</sup> International Committee of the Red Cross, *Additional Protocol I*, art. 48 <https://ihl-databases.icrc.org/ihl/WebART/470-750061?OpenDocument> accessed 10 December 2020; International Committee of the Red Cross, *Customary International Humanitarian Law Rules*, rule 14 [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule14](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule14) accessed 10 December 2020

<sup>7</sup> International Committee of the Red Cross, *Additional Protocol I*, articles 51(2) and 52(1) <https://ihl-databases.icrc.org/ihl/WebART/470-750065>, <https://ihl-databases.icrc.org/ihl/WebART/470-750067> accessed 10 December 2020; International Committee of the Red Cross, *Customary International Humanitarian Law Rules*, rules 1 and 7 [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter1\\_rule1#:~:text=international%20armed%20conflicts-.Rule%201..only%20be%20directed%20against%20combatants.&text=State%20practice%20establishes%20this%20rule,and%20non%20international%20armed%20conflicts](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule1#:~:text=international%20armed%20conflicts-.Rule%201..only%20be%20directed%20against%20combatants.&text=State%20practice%20establishes%20this%20rule,and%20non%20international%20armed%20conflicts), [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule7#:~:text=Interpretation-.Rule%207..be%20directed%20against%20civilian%20objects](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule7#:~:text=Interpretation-.Rule%207..be%20directed%20against%20civilian%20objects) accessed 10 December 2020

<sup>8</sup> International Committee of the Red Cross, *Additional Protocol I*, art. 52(2) <https://ihl-databases.icrc.org/ihl/WebART/470-750067> accessed 10 December 2020; International Committee of the Red Cross, *Customary Rules of International Humanitarian Law*, rule 8 [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule8#:~:text=In%20so%20far%20as%20objects,time%2C%20offers%20a%20definite%20military](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule8#:~:text=In%20so%20far%20as%20objects,time%2C%20offers%20a%20definite%20military) accessed 10 December 2020

<sup>9</sup> International Committee of the Red Cross, ‘Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November / 11 December 1868.’ <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=568842C2B90F4A29C12563CD0051547C> accessed 13 April 2021

military purpose, provided the relevant actions are not prohibited by international humanitarian law and they comply with the other core principles of it.<sup>10</sup>

In an armed conflict, the ability of belligerents to select warfare methods, weapons and military tactics is not limitless either. Any means that cause more suffering or damage than is necessary to obstruct or destroy the enemy are prohibited.<sup>11</sup>

Within this framework, the incidental loss of civilian life, injury to civilians or damage to civilian objects during armed conflict is not prohibited per se, nor does it constitute a war crime under either international humanitarian or criminal law, provided that the attacks in question are performed against military objectives and any resulting damage is considered proportionate to the military advantage expected by them. If so, the relevant attacks will be considered lawful, even when they lead to collateral damage.<sup>12</sup>

On that note, the proportionality principle represents two sides to the same coin, as it can be used both as a sword to justify a war and as a shield to establish the illegality of war. Put differently, it leaves room for belligerents to either justify an attack by claiming that the principle was not violated or argue that an attack was illegal since the principle was, in fact, violated. As a result, the principle may act as a facilitator of death and destruction in armed conflict instead of serving as a humanitarian protection tool. This is because as long as civilian casualties fit into the formal constraints of the proportionality formula, there will be no violation of

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<sup>10</sup> International Committee of the Red Cross, 'Introduction to the Law of Armed Conflict: Basic Knowledge' (2002) 16 [https://www.icrc.org/en/doc/assets/files/other/law1\\_final.pdf](https://www.icrc.org/en/doc/assets/files/other/law1_final.pdf) accessed 10 April 2021

<sup>11</sup> International Committee of the Red Cross, 'Treaties, States Parties and Commentaries, Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land.' The Hague, 18 October 1907' articles 22 and 23(e) <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/0/1d1726425f6955aec125641e0038bfd6> accessed 16 April 2021; International Committee of the Red Cross, *Additional Protocol I*, art. 35(2) <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=0DF4B935977689E8C12563CD0051DAE4> accessed 16 April 2021

<sup>12</sup> International Criminal Court, *Open Letter of Luis Moreno-Ocampo, then Chief Prosecutor at the International Criminal Court, regarding invested allegations of war crimes committed during the 2003 invasion of Iraq* (2006) 5 [https://www.icc-cpi.int/nr/rdonlyres/04d143c8-19fb-466c-ab77-4cdb2fdebef7/143682/otp\\_letter\\_to\\_senders\\_re\\_iraq\\_9\\_february\\_2006.pdf](https://www.icc-cpi.int/nr/rdonlyres/04d143c8-19fb-466c-ab77-4cdb2fdebef7/143682/otp_letter_to_senders_re_iraq_9_february_2006.pdf) accessed 16 April 2021

law, with the lack of precision in the principle's design operating in the interests of the military rather than that of civilians. Accordingly, it is suggested that more often than not, proportionality acts as "the ultimate exemplar of law used instrumentally as a tool to further a particular politics and paradigm of power".<sup>13</sup>

This thesis has the purpose of critically examining the principle of proportionality by assessing whether its theoretical definition and practical implementation is clear and effective enough to sufficiently guide well-intentioned combatants and protect civilians during armed conflict. In doing so, it will analyse a variety of important and relevant international case law, international treaty provisions, UN and other national or international reports and military manuals and notable authors' works and articles in the study area to glean out the theoretical explanation of the principle and demonstrate its precarious and problematic application in real life.

First, an overview will be provided of the legal sources of international humanitarian law related to the principle of proportionality – namely, customary international law, Protocol Additional to the Geneva Conventions of 12 August 1949 (the "Geneva Conventions")<sup>14</sup>, and relating to the Protection of Victims of

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<sup>13</sup> Robert P. Barnidge, Jr., 'The Principle of Proportionality Under International Humanitarian Law and Operation Cast Lead' in William C. Banks (ed.), *New Battlefields/Old Laws: From the Hague Convention to Asymmetric Warfare* (Columbia University Press, 2011) 276 [https://mfa.gov.il/MFA\\_Graphics/MFA%20Gallery/Legal%20Advocacy/Gaza.pdf](https://mfa.gov.il/MFA_Graphics/MFA%20Gallery/Legal%20Advocacy/Gaza.pdf) accessed 10 December 2020; and W.A.D.J. Sumanadasa, 'Principle of Proportionality: The Criticized Compromising Formula of International Law' (2010) *ISIL Yearbook of International Humanitarian and Refugee Law* Vol. 10 33-34 [http://heinonline.org.ezproxy.neu.edu.tr:2048/HOL/Page?handle=hein.journals/isilyrbk10&div=5&start\\_page=21&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults](http://heinonline.org.ezproxy.neu.edu.tr:2048/HOL/Page?handle=hein.journals/isilyrbk10&div=5&start_page=21&collection=journals&set_as_cursor=0&men_tab=srchresults) accessed 10 December 2020

<sup>14</sup> The Geneva Conventions of 1949 and their Additional Protocols are international treaties that limit the atrocities of armed conflict by aiming to protect persons who do not partake the fighting, such as civilians and medics, as well as those who can no longer fight, such as wounded and sick troops and prisoners of war. The Diplomatic Conference of Geneva adopted the Geneva Conventions in 1949. Collectively, the Geneva Conventions of 1949 refer to four conventions. International Committee of the Red Cross, *the 1949 Geneva Conventions* <https://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm>

International Armed Conflicts (Protocol I), of 8 June 1977<sup>15</sup> (“AP I”), and the Rome Statute of the International Criminal Court 1998 (the “Rome Statute”)<sup>16</sup>.

Second, the different approaches to the interpretation of proportionality will be examined; namely, the human rights model, which prioritises the protection of civilians, and the contractual model, which prioritises state interests. This will be followed by a demonstration of state practice of these approaches.

Third, a critical analysis of the various tenets of the principle will be undertaken. In doing so, the following will be explained:

- i. Within the context of AP I, the use of the term ‘proportionality’ is a misnomer, since the actual test prescribed by AP I is not one of strict proportionality but one of excessiveness.
- ii. The matter of whether the proportionality of an attack should be determined on a case-by-case basis by looking at the military advantage of a specific operation or on a cumulative basis by looking at the contribution of a specific operation to the belligerent’s overall campaign is surrounded with disaccord. In the case of an aggregation of attacks, the military advantage of the larger campaign must be considered.
- iii. The safety of attacking forces may be factored into proportionality assessments. The popularity of a war may indirectly influence a military commander’s determination of sustainable losses.
- iv. The application of the principle in real life depends on subjective judgment calls made by the so-called reasonable military commander, which is likely to lead to different interpretations of proportionality made by different

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<sup>15</sup> International Committee of the Red Cross, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 [https://www.icrc.org/eng/assets/files/other/icrc\\_002\\_0321.pdf](https://www.icrc.org/eng/assets/files/other/icrc_002_0321.pdf) accessed 10 December 2020

<sup>16</sup> United Nations, *Rome Statute of the International Court* (last amended 2010), 17 July 1998, A/CONF.183/9 [https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf) accessed 10 December 2020

decision-makers in the same situation, based on various factors including their specific background, professional experience and moral calculus.

- v. Whether different types of incidental harm, including illness and mental health, harm to civilian use of dual-use objects and economic loss and displacement, are relevant for proportionality assessments are open to debate.

In this context, it will be held that the principle remains too ambiguous and puts great trust in the operation of abstract concepts such as common sense and good faith, with its lack of precision operating in the interests of the military rather than that of civilians and leading to reduced effectiveness to sufficiently guide well-intentioned combatants and adequately protect civilians during armed conflict.

In conclusion, a workable approach to applying the principle will be suggested; namely, that of applying proportionality by:

- i. utilising the test of necessity as a precondition to the implementation of the principle, which would require asking whether alternative weapons and warfare methods available at the time of combat could achieve the same military advantage as successfully but without causing as much harm,
- ii. then systematically drawing on the procedural requirements set forth under Article 57 of AP I and requiring *ex ante* as well as possible *ex post* reviews of the application of the principle in armed conflicts.

## **CHAPTER 1**

### **THE LEGAL SOURCES OF INTERNATIONAL HUMANITARIAN LAW RELATED TO THE PROPORTIONALITY PRINCIPLE**

#### **1.1 The Proportionality Principle under Customary International Law**

International law regulates the relationship between sovereign states.<sup>17</sup> The two principal sources of international law are treaties and customary international law.<sup>18</sup> Treaties, which are international agreements concluded between states, are an expression of positive international law and the most commonly used means of creating binding norms between states. However, they only create legal rights for and binding obligations upon signatory state parties.<sup>19</sup>

Nonetheless, an obligation created by treaties may still be binding upon states if it is also found under customary international law. Customary international law exists independent of treaty law and is made up of rules that stem from a general practice accepted as law.<sup>20</sup> According to the Statute of the International Court of Justice, there are two requirements for a practice to reach the degree of customary international law: (i) it must be followed as a general practice, and (ii) it must be accepted as law, constituting *opinio juris*.<sup>21</sup>

The International Committee of the Red Cross (the “ICRC”) maintains that the principle of proportionality is a rule of customary international law.<sup>22</sup> Indeed, as reiterated under the Advisory Opinion of the International Court of Justice titled ‘*Legality of the Threat or Use of Nuclear Weapons*’ and dated 8 July 1996, the fundamental rules of international humanitarian law – which inarguably include the proportionality principle – must be observed by all states even if they have not ratified the Geneva Conventions and its Additional Protocols, as they

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<sup>17</sup> United Nations, ‘2011 Treaty Event – Towards Universal Participation and Implementation’ (2011) [https://treaties.un.org/doc/source/events/2011/press\\_kit/fact\\_sheet\\_1\\_english.pdf](https://treaties.un.org/doc/source/events/2011/press_kit/fact_sheet_1_english.pdf) accessed 13 April 2021

<sup>18</sup> John J. Chung, ‘Customary International Law as Explained by Status Instead of Contract’ (2012) Vol. 37(3) North Carolina Journal of International Law and Commercial Regulation 616-7 <https://core.ac.uk/download/pdf/151516518.pdf> accessed 13 April 2021

<sup>19</sup> United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, Treaty Series, vol. 1155, 331 articles 2 and 26 [https://legal.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf) accessed 13 April 2021

<sup>20</sup> International Committee of the Red Cross, ‘Customary Law’ <https://www.icrc.org/en/war-and-law/treaties-customary-law/customary-law> accessed 10 December 2020

<sup>21</sup> United Nations, *Statute of the International Court of Justice*, 18 April 1946, art. 38(1)(b) <https://www.icj-cij.org/en/statute>; Chung (n 18) 617

<sup>22</sup> International Committee of the Red Cross, *Customary International Humanitarian Law Rules*, rule 14 [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule14](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule14) accessed 13 April 2021



“constitute intransgressible principles of international customary law”.<sup>23</sup> Likewise, in both *the Prosecutor v Kupreskic* heard by the Trial Chamber of the International Criminal Tribunal for Former Yugoslavia (the “ICTY”) and the *Military Junta* case heard by the Argentinean National Appeal Court, the principle of proportionality was considered as part of customary international law.<sup>24</sup>

Rule 14 of the customary international humanitarian law rules published by the ICRC specifically concerns “proportionality in attack”, prohibiting the launch of “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”.<sup>25</sup>

Furthermore, Rule 18 and Rule 19 of the same respectively require belligerents to “assess whether the attack may be expected to cause [disproportionate harm]” and “cancel or suspend an attack if it becomes apparent that the target is not a military objective or that the attack may be expected to cause [disproportionate harm]”. Thus, belligerents are expected to take all feasible precautions in the authorisation stage of the attack as well as at the stage during which an attack that was previously authorised as being proportionate is already under way.

The commentaries found under all three rules make it clear that they are to be applied in non-international as well as international conflicts. Rule 14 in particular is followed by a statement that although Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)<sup>26</sup> (“AP II) “does not contain an explicit

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<sup>23</sup> International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996* (1996) ICJ Reports 1996 257 <https://www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-00-EN.pdf> accessed 12 December 2020

<sup>24</sup> W.A.D.J. Sumanadasa, ‘Principle of Proportionality: The Criticized Compromising Formula of International Law’ (2010) ISIL Yearbook of International Humanitarian and Refugee Law Vol. 10 36 [http://heinonline.org.ezproxy.neu.edu.tr:2048/HOL/Page?handle=hein.journals/isilyrbk10&div=5&st\\_art\\_page=21&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults](http://heinonline.org.ezproxy.neu.edu.tr:2048/HOL/Page?handle=hein.journals/isilyrbk10&div=5&st_art_page=21&collection=journals&set_as_cursor=0&men_tab=srchresults) accessed 12 December 2020

<sup>25</sup> International Committee of the Red Cross (n 22)

<sup>26</sup> International Committee of the Red Cross, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609 [https://www.icrc.org/eng/assets/files/other/icrc\\_002\\_0321.pdf](https://www.icrc.org/eng/assets/files/other/icrc_002_0321.pdf) accessed 12 December 2020

reference to the principle of proportionality in attack, it has been argued that it is inherent in the principle of humanity which was explicitly made applicable to the Protocol in its preamble and that, as a result, the principle of proportionality cannot be ignored”.<sup>27</sup>

As a result, it is safe to conclude that the principle of proportionality is binding on all states in international as well as non-international conflicts as a customary international law rule, since customary international law rules bind all states independent of their accession to treaty law and regardless of whether they have consented to be bound by them.<sup>28</sup>

## 1.2 The Proportionality Principle under Additional Protocol I

The main tenet of the proportionality principle in the *jus in Bello* context is codified into positive international humanitarian law as a rule in Article 51(5)(b) AP I titled “*Protection of the civilian population*”. This provision frames the proportionality principle within the context of a prohibition on indiscriminate attacks. In other words, examples are given of indiscriminate attacks, one of which is then prohibited as being disproportionate so that the principle constitutes a form of indiscriminate attack. Accordingly, Article 51(5)(b) of AP I states that “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated” shall be considered as indiscriminate and is thus prohibited.<sup>29</sup>

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<sup>27</sup> International Committee of the Red Cross, Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (1<sup>st</sup> edn., 2005, reprinted with corrections in 2009, Cambridge University Press) 48 <https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf> accessed 12 December 2020

<sup>28</sup> Robert P. Barnidge, Jr., ‘The Principle of Proportionality Under International Humanitarian Law and Operation Cast Lead’ in William C. Banks (ed.), *New Battlefields/Old Laws: From the Hague Convention to Asymmetric Warfare* (Columbia University Press, 2011) 278-9 [https://mfa.gov.il/MFA\\_Graphics/MFA%20Gallery/Legal%20Advocacy/Gaza.pdf](https://mfa.gov.il/MFA_Graphics/MFA%20Gallery/Legal%20Advocacy/Gaza.pdf) accessed 12 December 2020

<sup>29</sup> International Committee of the Red Cross, *Additional Protocol I*, art. 51(5)(b) <https://ihl-databases.icrc.org/ihl/WebART/470-750065> accessed 12 December 2020

The use of the terms “expected” within the context of civilian losses and “anticipated” within the context of military advantage indicates that this proportionality analysis is a “pre-attack calculation rather than a post-attack justification”.<sup>30</sup> To this effect, Article 51 of AP I is supplemented by Article 57 of AP I titled ‘*Precautions in attack*’.

Pursuant to Articles 57(2)(a)(iii) and 57(2)(b) of AP I, “those who plan or decide upon an attack shall ... refrain from deciding to launch any attack which may be expected to cause [disproportionate damage]” and “an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause [disproportionate damage]”. These two provisions function as part of precautionary measures that decision-makers need to take in order to ensure compliance with the principle of proportionality. Article 57(2)(a)(iii) of AP I upholds the principle at the authorisation stage of an attack by prohibiting decision-makers from launching disproportionate attacks, while Article 57(2)(b) of AP I operates at the stage in which an attack that was previously authorised as being proportionate is already under way by requiring decision-makers to suspend or cancel an attack if its disproportionate nature “becomes apparent” in the post-authorisation stage.<sup>31</sup>

The rights and duties created by AP I are only legally binding on signatory state-parties. In other words, the applicability of the proportionality provisions prescribed under AP I on individual states is contingent on the ratification of AP I by such individual states.<sup>32</sup>

In any case, as can be seen, the language of AP I reflects the language of the ICRC customary international humanitarian law rules and in both sources, the proportionality principle is framed in a language that can best be described as malleable and flexible, if not broad, ambiguous and susceptible to wide degrees

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<sup>30</sup> Ryan Christian Else, ‘Proportionality in the Law of Armed Conflict: The Proper Unit of Analysis for Military Operations’ (2010) 5(1) University of St. Thomas Journal of Law and Public Policy 197 <https://ir.stthomas.edu/cgi/viewcontent.cgi?article=1058&context=ustjlp> accessed 3 March 2021

<sup>31</sup> Barnidge (n 28) 277-8

<sup>32</sup> Barnidge (n 28) 278

of interpretation. Arguably, this undermines the effectiveness of the principle even when applied in good faith. However, the argument is that this malleability and flexibility of language was necessary to ensure its inclusion in the Geneva Conventions and the Additional Protocols.<sup>33</sup> Moreover, the ambiguity of the principle may arguably derive from its very nature of being “an open-ended legal standard designed to accommodate an indefinite number of changing circumstances, not a hard and fast set of rules”.<sup>34</sup>

There are certain distinct conclusions that can be drawn from prevailing authoritative commentary relating to the principle. A town, for instance, may not be attacked to target a solitary soldier home on leave, as that would be implicitly disproportionate. In circumstances of state survival, however, the use of nuclear weapons might be considered proportionate.<sup>35</sup> The proportionality determination begs the question of what kind of analysis needs to be made for situations between these two extremes.

### **1.3 The Proportionality Principle under the Rome Statute of the International Criminal Court**

Following the emergence of the proportionality principle as part of positive international humanitarian law, the principle has also been included within the body of international criminal law. Article 8(2)(b)(iv) of the Rome Statute includes as a war crime:

“intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural

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<sup>33</sup> Dale Stephens & Michael W. Lewis, ‘The Law of Armed Conflict – A Contemporary Critique’ (2005) Vol. 6 Issue 1 Melbourne Journal of International Law section II(A) [http://classic.austlii.edu.au/au/journals/MelbJIL/200525\\_/3.html](http://classic.austlii.edu.au/au/journals/MelbJIL/200525_/3.html) accessed 7 March 2021

<sup>34</sup> Amichai Cohen, ‘Proportionality in Modern Asymmetrical Wars’ (2010) Jerusalem Center for Public Affairs 12 <https://din-online.info/pdf/jc2.pdf> accessed 14 March 2021

<sup>35</sup> International Court of Justice (n 23) 245, 320-1 (Dissenting Opinion of Vice-President Schwebel) <https://www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>; <https://www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-09-EN.pdf> accessed 7 March 2021

environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated”.

While the incidental damage to civilians is required to be “excessive” with regard to the military advantage under the language of AP I, the Rome Statute requires this damage to be “clearly excessive”. This means that criminal liability will only be attributed to the attacking party when the incidental damage to civilians considerably exceeds the military advantage. Moreover, for criminal liability to be granted, the attacking party must be proved to have possessed clear knowledge of the consequences of the attack.<sup>36</sup>

In addition, unlike AP I, the Rome Statute further adopted the word ‘overall’ in the last sentence of the relevant provision. This clarifies that the proportionality assessment should be carried out with regard to the overall military advantage anticipated and not in relation to a specific military operation. In other words, an attack should not be viewed in isolation.<sup>37</sup>

Another point to be made is that while proportionality is categorised as a criminal offence under Article 8(2)(b) of the Rome Statute, this is strictly within the context of “serious violations of laws and customs applicable in international armed conflict”. As it has been explained above, this does not guarantee that the principle is inapplicable to non-international armed conflicts because the principle simultaneously exists under customary international law too.

## **CHAPTER 2**

### **APPROACHES TO THE INTERPRETATION OF THE PROPORTIONALITY PRINCIPLE**

The principle of proportionality can be seen as an attempt to reach a compromise between two competing interests, which also constitute the two fundamental

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<sup>36</sup> Cohen (n 34) 21

<sup>37</sup> Cohen (n 34) 22

tensions of the prescriptive force of international humanitarian law – namely, state sovereignty and humanitarian protections.<sup>38</sup> Hence, the principle aims to create a balance between state prerogatives to meet national security objectives on the one hand and maximisation of the humanitarian protections accorded to individuals during war times on the other hand.<sup>39</sup> These two competing interests demonstrate themselves in the form of the human rights model of proportionality, which gives precedence to civilian protection, and the contractual model of proportionality, which prioritises the interests of states.

## 2.1 The Human Rights Model

The human rights model of proportionality promotes the need for complete protection of civilians, giving precedence to civilian interests that might be harmed by military action. It is preferred by non-governmental organisations, international war crimes tribunals, fact-finding bodies commissioned by the UN and other international humanitarian organisations because, in their views, the aim of international humanitarian is the achievement of civilian protection.<sup>40</sup> Under this model of proportionality, the possibility of classifying civilian injuries caused by armies as collateral damage is rejected because of a respective stance for life and human rights. Accordingly, the argument is that civilians cannot be justifiably subjugated to lethal attacks just because they are located in the neighbourhood of a military target.<sup>41</sup>

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<sup>38</sup> Barnidge and Sumanadasa (n 13)

<sup>39</sup> Barnidge (n 28)

<sup>40</sup> Eyal Benvenisti, 'Human Dignity in Combat: The Duty to Spare Enemy Civilians' (2006) 39 *Isr. L. Rev.* 83

<https://poseidon01.ssrn.com/delivery.php?ID=419112000078117085011011079116068067109042093053023044073118014124066087073009088023038097054120044049061081118025099082029031074069060046023116112108118091089066036040000064124082090091115003102064068088071118088100096074066024119015103082069105&EXT=pdf&INDEX=TRUE> accessed 15 April 2021

<sup>41</sup> David Kretzmer, 'Rethinking the Application of IHL in Non-International Armed Conflicts' (2009) 42 *Isr. L. Rev.* 8 14-17

<https://poseidon01.ssrn.com/delivery.php?ID=657067000092087108087068070120068122008074046028003082122090003026092112126011023093018101029058112004114069076069095006027031029041010037009116115014094086026025100072082000089102029026085103091089125085114018126086088119007029007010100098083092096003&EXT=pdf&INDEX=TRUE> accessed 15 April 2021

The proportionality principle is an exception to the general rule concerning the need to protect human life because it would be impossible to implement an outright ban on all civilian casualties. Indeed, it is the necessity of war that some type of attack against hybrid – civilian and military – targets should be permitted. If not, the enemy may achieve immunity to an attack simply by stationing its military resources near a civilian population. Hence, attacks that result in civilian casualties are allowed because there is no possible alternative. However, the human rights model of proportionality requires the principle to be interpreted in the strictest possible way.<sup>42</sup>

Accordingly, there is a strong presumption under the human rights model of proportionality that all civilian loss in war is illegal. To counter this presumption, a state needs to show almost beyond doubt the specific military advantage it obtained from its use of force on a target. This target needs to be a legitimate military target, and the military gains of the state must go beyond a reduced risk to the lives of soldiers. This is the same proof level that a government needs to meet to account for its deployment of force in domestic unrest cases. Indeed, when analysing the principle of proportionality, it is the tendency of NGOs to extract the legal standards applied in domestic unrest conditions and implement them to situations of armed conflict.<sup>43</sup>

With its strong presumption concerning the disproportionality of civilian deaths, the Report of the UN Fact-Finding Mission on the Gaza Conflict (the “Goldstone Report”)<sup>44</sup> offers an example of the human rights model of proportionality.<sup>45</sup> The Goldstone Report focused on Israel’s Operation Cast Lead in the Gaza Strip, which is a small self-governing territory in Palestine, between 27 December 2008 and 18 January 2009. In general terms, it condemned Israel for its disproportionate use of force.

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<sup>42</sup> Cohen (n 34) 14

<sup>43</sup> Cohen (n 34) 18

<sup>44</sup> UN Human Rights Council, *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, 25 September 2009, A/HRC/12/48 <https://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf> accessed 10 December 2020

<sup>45</sup> Cohen (n 34) 16

For example, it continuously rejected Israel's claims that shots were fired from mosques, which served as storage places for military supplies,<sup>46</sup> notwithstanding the fact that Israel had provided pictures showing the storage of weapons in a mosque along with a comprehensive report of an investigation of an arrested Hamas operative who listed specific mosque names where weapons were kept.<sup>47</sup> It also rejected assertions that ambulances and hospitals were exploited for military motives,<sup>48</sup> even though several independent, even Palestinian sources existed to the contrary<sup>49</sup>.

When Israel attacked the Gazan police force on December 27, 2008, this particularly raised an issue of proportionality. Israel's claim was that all Gazan police deputies were unquestionable members of Hamas. The Goldstone Report admitted that several Gazan police officers were indeed members of Izz ad-Din al-Qassam Brigades (the military wing of Hamas), therefore making them legitimate military targets of the Israeli attack. However, whether this presence in the Gazan police force permitted Israel to attack the whole police framework should have been solved on the basis of a proportionality assessment. This would require an analysis of a comprehensive account of the names of the killed police officers and verification of which of them could be classified as Hamas members, therefore making them legitimate military targets. The mission was not capable of conducting such a detailed study. Nevertheless, rather than drop the issue based on a lack of ample information, it still condemned the Israeli attack as disproportionate.<sup>50</sup>

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<sup>46</sup> Israel Ministry of Foreign Affairs, *The Operation in Gaza – Factual and Legal Aspects* (July 2009) para 164

[https://mfa.gov.il/mfa/foreignpolicy/terrorism/pages/operation\\_gaza\\_factual\\_and\\_legal\\_aspects\\_use\\_of\\_force\\_hamas\\_breaches\\_law\\_of\\_armed\\_conflict\\_5\\_aug\\_200.aspx](https://mfa.gov.il/mfa/foreignpolicy/terrorism/pages/operation_gaza_factual_and_legal_aspects_use_of_force_hamas_breaches_law_of_armed_conflict_5_aug_200.aspx) accessed 21 March 2021

<sup>47</sup> *Ibid.* para 164-165

<sup>48</sup> UN General Assembly, Human Rights Council, *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, 25 September 2009, A/HRC/12/48 para 464-5 <https://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf> accessed 21 March 2021.

<sup>49</sup> Israel Ministry of Foreign Affairs (n 45) para 171-180

<sup>50</sup> Cohen (n 34) 16-7



The shelling incident near the UN school at al-Fakhura on January 6, 2009 raised a proportionality issue too. When confronted with hard evidence, the mission had to accept that mortar shots might have been fired from the street near the school towards an Israel Defence Forces (the "IDF") unit. As a response, the IDF responded with mortar fire to protect its own soldiers' lives. This was followed by a cease-fire, but there was an unidentified number of casualties. The mission accepted that a state had the right to protect its own soldiers, but claimed that the same military result could have been attained by Israel if weapons which would have resulted in fewer civilian injuries had been employed. Although there was no factual proof proving this point, it was concluded that the use of mortars by the IDF as a response was disproportionate even though the military commander had taken all requisite precautionary measures to confirm that the school would not be harmed and there were no fatalities from within the school compound. However, the Goldstone Report focused only on the results of the attack, without articulating the reasons as to why a reasonable military commander might have considered the usage of mortars to be disproportionate.<sup>51</sup>

At first glance, the human rights model of proportionality may appear to possess a moral leverage over the contractual model. This is due to the morally deplorable nature of killing innocent civilians. However, this model may be open to question due to at least two different reasons. First, the question of which belligerent created the state of affairs in which civilians find themselves at risk is important. In other words, proportionality may not be viewed separately from the matter of responsibility. Based on both moral and military perspectives, the burden is on the belligerent that opts to engage in combat from within civilian populations. While this does not free the other party from its international humanitarian law obligation of protecting civilian lives, it does shift moral culpability away from it.<sup>52</sup>

Second, the effort to protect civilians ends up placing them in danger further down the line. This is because once the enemy internalises the fact that the other side is committed to protecting civilian lives even at the expense of military success,

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<sup>51</sup> UN General Assembly, Human Rights Council (n 47) para 653-708

<sup>52</sup> Cohen (n 34) 27

they will be motivated to fight from within civilian populations and use civilians as human shields to shelter themselves from assault.<sup>53</sup> This is, in fact, the precise strategy endorsed by Hizbullah, a Shia Islamist political party and militant group based in Lebanon, and Hamas, a Palestinian Sunni-Islamic fundamentalist militant nationalist organisation based in the Gaza Strip, which situated their headquarters, fighter and weaponry within civilian populations.<sup>54</sup>

## 2.2 The Contractual Model

The contractual model of proportionality gives precedence to protecting state interests during military action rather than protecting civilian interests that might be harmed by military action. Some commentators propose that states themselves view their obligations on the basis of this model of proportionality, viewing international humanitarian law as a “compact between rival armies” attempting to reduce the cruelties of armed conflict.<sup>55</sup> Put otherwise, international humanitarian law is viewed as a mutual agreement between states to limit the barbarities of war.

The main argument is that if the enemy, including most prominently non-state actors, does not recognise and follow international humanitarian law rules while engaging in war, then the other belligerent should not be required to weaken itself by unilaterally abiding by these requirements. In its extreme category, this model denies the applicability of international humanitarian law to all armed conflicts. This standpoint appears to underline many of the resolutions adopted by the Bush government following the attacks of September 11, 2001, particularly with respect to Taliban and al-Qaeda combatants that were kept in Guantanamo.<sup>56</sup>

When one of the belligerents launches an attack from within civilian areas by utilising civilians as human shields, it forces the other belligerent to attack targets

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<sup>53</sup> Richard D. Rosen, ‘Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity’ (2009) 42 *Vanderbilt J. of Transnational Law* 751 <https://ttu-ir.tdl.org/bitstream/handle/10601/1320/Targeting%20Enemy%20Forces%20in%20a%20War%20on%20Terror%20Preserving%20Civilian%20Immunity.pdf?sequence=1> accessed 10 April 2021

<sup>54</sup> Cohen (n 34) 28

<sup>55</sup> Benvenisti (n 40) 28.

<sup>56</sup> Cohen (n 34) 19

in a way that could potentially harm civilians. Hays Parks, who is a proponent of the contractual model, asserts that when engaging in a proportionality analysis, those intentionally placed in danger by the defending army should be disregarded by the attacking army while calculating the civilians who might be incidentally injured. This is because if the lives of civilians are ignored by the defending side, then this should be allowed to the attacking side too.<sup>57</sup> According to Richard Rosen, military commanders faced with these kinds of situations should be granted a presumption of innocence.<sup>58</sup> It is argued that in such situations, a violation of the principle of proportionality does not exist unless the number of civilians killed exceeds the significance of the military objective and is excessive enough to raise doubt that the civilians were the principal target of the attack.<sup>59</sup> In contrast, proponents of the human rights model of proportionality would altogether disregard the question of who was accountable for the injury to civilians.

### 2.3 State Practice

Besides being a component of the definition of customary international law, state practice also serves as a practical interpretive tool to understanding international law commitments and how the law operates. That said, it is difficult to carry out a precise evaluation of states' behaviour within the context of warfare. This is because states rarely explicitly explain their decisions and the procedures used to arrive at them.<sup>60</sup>

One way of solving this dilemma is looking at state military manuals as reflections of state practice. Many military manuals provide guidelines affecting the proportionality principle. A large number of countries have further passed laws to make it an offence to engage in an attack that contradicts the principle.<sup>61</sup> This

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<sup>57</sup> Cohen (n 34) 20

<sup>58</sup> Rosen (n 52) 683

<sup>59</sup> Cohen (n 56)

<sup>60</sup> Cohen (n 34) 23

<sup>61</sup> International Committee of the Red Cross, Jean-Marie Henckaerts and Louise Doswald-Beck (n 27) 47-8

method, however, may be criticised due to the potential difference between *opinio juris* (i.e. what states believe is the law) and state practice.<sup>62</sup>

In particular, two issues tend to be emphasised in military manuals regarding matters affecting the proportionality principle. First, the military commander is expected to make decisions on the basis of intelligence that a person in his position may be reasonably regarded to have in his possession at the relevant time. Second, military gains need to be assessed from the viewpoint of the whole operation.<sup>63</sup> In any case, it is a pause for reflection that even the armies of the most liberal democratic states may not always operate in line with the guidelines provided in their military manuals, which is a matter that needs to be assessed by analysing a number of different military operations.

For instance, the Battle of Mogadishu, while not being the subject of detailed study, seems to have resulted in a disproportionate number of Somali civilian fatalities at the hands of American forces. In October 1993, the USA carried out a rescue operation aimed to liberate a force of US troops trapped inside the streets of Mogadishu, Somalia and a battle ensued in which women and children were used as human shields. According to Ambassador Robert Oakley, US special representative to Somalia, 1,500 to 2,000 Somalis were killed during the operation. During an interview given to American public TV, Captain Haad of the Somali militias stated that 133 of the deceased were members of the Somali National Alliance. If accurate, the estimates of Somali civilian fatalities indicate the relative importance that the USA accorded to the protection of its own forces during the Battle of Mogadishu.<sup>64</sup>

Unlike the Battle of Mogadishu, the North Atlantic Treaty Organisation (“NATO”) Serbia Air Campaign has been studied in detail. The NATO air campaign was launched against Serbia in 1999 as a humanitarian intervention measure after the Muslim residents of Kosovo were expelled by the Serbian government. Since

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<sup>62</sup> Cohen (n 59)

<sup>63</sup> International Committee of the Red Cross, Jean-Marie Henckaerts and Louise Doswald-Beck (n 27) 49-50

<sup>64</sup> Cohen (n 34) 24

the operation did not constitute a war that involved self-defence, NATO member states were worried about whether domestic public support for the campaign would be undermined by even a small number of civilian casualties. Nevertheless, around 500 civilian deaths resulted from the campaign, which was a relatively small number because the campaign had been waged against an enemy that had acted within the limits of international humanitarian law.

In reference to the abovementioned air campaign, NATO embraced a zero risk policy to its soldiers. Accordingly, pilots were ordered to fly at a moderately high altitude, which increased the chance of bombing inaccuracies and risk to civilian lives on the ground.<sup>65</sup> In the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (the “NATO Bombing Report”), an assessment was made as to the nature of the NATO actions during the air campaign, focusing on the question of whether any such action constituted war crimes. It was found that even though it resulted in higher civilian risks, the zero-risk policy did not violate the proportionality principle.<sup>66</sup>

The report also evaluated the legality of the NATO bombing of a Serbian TV and radio station on 23 April 1999, which caused the deaths of 10-17 civilians. The report made a number of points in respect of the attack. In particular, first, the operation was analysed as part of a larger-scale coordinated attack on the Serbian command, control and communications (“C3”) network. This meant that the TV station bombing incident was not to be examined in isolation and the proportionality of the attack was to be assessed not in relation to a specific attack, but with regard to the overall military advantage expected from the larger coordinated attack. Secondly, the blame for the civilian casualties were assigned to a great degree to Serbian leaders for failing to vacate the building despite having obtained an advance warning of the attack.<sup>67</sup>

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<sup>65</sup> Cohen (n 34) 25

<sup>66</sup> United Nations, International Criminal Tribunal for the former Yugoslavia, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* (2000) para. 56 <https://www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal> accessed 10 April 2021

<sup>67</sup> *Ibid.*

When Fallujah, a city in Iraq, became one of the centres of the Iraqi insurgency in 2003 and the beginning of 2004, it became clear to the USA that it had to be repossessed to restore order to the area. Operation Vigilant Resolve (called the first battle of Fallujah), which occurred in April 2004, was unsuccessful and caused many civilian casualties, creating internal pressure in Iraq to stop the attack. In November 2004, when the United States of America (the “USA”) and Iraq sought once more to retake Fallujah, the majority of the city’s inhabitants had escaped. Indeed, many of those persons that had stayed back were combatants. That said, the quantity of civilian casualties was not ratified, with statistics varying between several thousand and a few hundred.<sup>68</sup> The website Iraq Body Count, which is a public database of civilian deaths, puts the number at a few hundred.<sup>69</sup> Notably, the US forces in this operation employed extensive fire power in an urban location that housed the civilian population. This was done for the protection of the lives of American soldiers.<sup>70</sup>

Within this context, it is to be observed that the human rights model of proportionality is not fully accepted as a practical guideline by even the most democratic Western states. These states do not adopt the contractual model either. Many other examples may be provided to carry out an evaluation of states’ behaviour in a warfare context in relation to the principle of proportionality, but several conclusions may still be drawn from the examples of the Battle of Mogadishu, the NATO Serbia Air Campaign and the American operations in Fallujah.

First, what is apparent is that armies of democratic Western states are mindful of the necessity of protecting the lives of the other side’s civilians. They cannot overlook civilian casualties, even if these casualties are caused by the enemy itself, either because of a choice to take refuge within the civilian population or use civilians as human shields. The First Battle of Fallujah, for instance, was

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<sup>68</sup> Cohen (n 34) 26

<sup>69</sup> Iraq Body Count, ‘Besieged: Living and Dying in Fallujah’ [https://www.iraqbodycount.org/analysis/beyond/besieged\\_fallujah/](https://www.iraqbodycount.org/analysis/beyond/besieged_fallujah/) accessed 10 April 2021

<sup>70</sup> Cohen (n 67)

ceased because the number of people killed had become too high. Second, Western armies are very considerate of the necessity of protecting their soldiers' lives and may risk many civilian lives for this cause. Third, civilian lives may be forfeited to attain crucial military objectives. In particular, when the operation has a significant enough military advantage (such as defeating the insurgency in Iraq), states do not refrain from deploying great force, even if the combat occurs inside the civilian population, which may likely result in civilian casualties.<sup>71</sup>

## CHAPTER 3

### A CRITICAL EVALUATION OF THE PROPORTIONALITY PRINCIPLE

#### 3.1 Misnomer: A Principle of Proportionality or An Excessive Loss Formula?

Many international humanitarian law commentators, such as Robert P. Barnidge<sup>72</sup>, Janina Dill<sup>73</sup>, W.A.D.J. Sumanadasa<sup>74</sup> and Bernard L. Brown<sup>75</sup>, indicate that the proportionality principle comprises a compromising formula which requires trade-offs between dissimilar values that are on opposite sides of the scale, or in other words, the balancing of contradictory aims – namely, the realisation of civilian protection on the one hand and the achievement of military advantage on the other hand.

This position is vehemently repeated by numerous other legal personalities and authorities, such W.J. Fenrick, a senior legal advisor for the Office of the Prosecutor of the ICTY, who remarked that "... resolution of the proportionality equation requires a determination of the relative worth of military advantage

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<sup>71</sup> Cohen (n 34) 26-7

<sup>72</sup> Barnidge (n 28) 279

<sup>73</sup> Janina Dill, 'Applying the Principle of Proportionality in Combat Operations' (2010) Oxford Institute for Ethics, Law, and Armed Conflict, Policy Briefing 2 [http://www.elac.ox.ac.uk/downloads/proportionality\\_policybrief\\_%20dec\\_2010.pdf](http://www.elac.ox.ac.uk/downloads/proportionality_policybrief_%20dec_2010.pdf) accessed 20 April 2021

<sup>74</sup> Sumanadasa (n 24) 22-23, 26

<sup>75</sup> Bernard L. Brown, 'The Proportionality Principle in the Humanitarian Law of Warfare: Recent Efforts at Codification' (1976) Cornell International Law Journal Vol. 10, Issue 1, December 1976 146-7 <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1027&context=cilj>

gained by one side and the civilian casualties or damage to civilian objectives incurred in areas in the hands of the other side”.<sup>76</sup>

Another such example is the NATO Bombing Report, which also contained the following statement similar to the one above: “It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective.”<sup>77</sup>

Yet again, in *Public Committee against Torture in Israel [et al.] v The Government of Israel [et al.]*, the Israeli Supreme Court maintained that in international humanitarian law, “the requirement of proportionality ... focuses primarily upon what our constitutional law calls proportionality ‘*stricto sensu*’ [*sic*], that is, the requirement that there be a proper proportionate relationship between the military objective and the civilian damage”.<sup>78</sup>

The tension between the dissimilar values and contradictory aims of the realisation of civilian protection and the achievement of military advantage cannot be denied. However, it must not be forgotten that the calculus set forth under AP I is not one of strict proportionality – it does not require “some kind of ‘balancing’ or use of a ‘sliding scale’ to ensure that the military objective is ‘proportionate’, in the sense of being commensurate with the extent of civilian casualties or damage to civilian objects”.

Indeed, Estreicher suggests that “this type of calculus ... is not what [international humanitarian law] requires”, as it would invite “the second-guessing of military objectives in an ex post setting when the Protocol’s regulatory aim is, as Article 57(2) makes clear, to influence targeting and other military decisions before they

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<sup>76</sup> W.J. Fenrick, ‘Targeting and Proportionality during the NATO Bombing Campaign Against Yugoslavia’ (2001) *European Journal of International Law* 489, 501 <http://www.ejil.org/pdfs/12/3/1529.pdf> accessed 15 December 2020

<sup>77</sup> United Nations, International Criminal Tribunal for the Former Yugoslavia (n 65) para. 48

<sup>78</sup> International Committee of the Red Cross, ‘Case Study: Israel, The Targeted Killings Case’ section 7(b), para 44 <https://casebook.icrc.org/case-study/israel-targeted-killings-case>



are implemented". Furthermore, neither Article 51 nor Article 57 of AP I authorise disregarding the expected military advantage due to collateral damage considerations.<sup>79</sup>

Like Estreicher, Schmitt also makes a very sound argument against the idea that the test for proportionality includes a balancing of two dissimilar values, holding instead that the proper and truer test of proportionality is one of excessiveness. His arguments are elaborately put forth as follows:

"First, and perhaps foremost, there is the inherent difficulty of valuation. How does one, for instance, compare tanks destroyed to the number of serious civilian injuries or deaths caused by attacks upon them? Dissimilar entities cannot be compared absent a common currency of evaluation. And basic dissimilarity is exacerbated by the fact that differently situated parties will inevitably value specific collateral damage and incidental injury on the one hand, and military advantage on the other, differently. An apt example is the environment. Consensus exists that environmental damage constitutes collateral damage. Yet, the perceived 'value' of the environment will vary widely from country to country, culture to culture, vocation to vocation, and so forth."<sup>80</sup>

Schmitt continues by explaining that a confusion over the proper application of the proportionality test further complicates the situation:

"Complicating matters is pervasive confusion over how to conduct the proportionality 'test'. Many wrongfully characterize it as balancing, ie, does the concrete and direct military advantage 'outweigh' resulting collateral damage and incidental injury? If so, attack is permitted; if not,

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<sup>79</sup> Estreicher (n 4) 155

<sup>80</sup> Michael N. Schmitt, 'Fault Lines in the Law of Attack' in Susan C. Breau and Agnieszka Jachec-Neale (eds), *Testing the boundaries of International Humanitarian law* (British Institute of International and Comparative Law, 2006) 293  
<https://poseidon01.ssrn.com/delivery.php?ID=757114096124127115082093000012090023030092050084043069014030066120089113098112075110018011103047026000040102112121081006124122045037034011050080087086066110089084007063022004068113065001005098020113082069119026079010105114127030064092093004117124001086&EXT=pdf>

it is forbidden. The test is often portrayed as a scale, with the slightest difference tipping the balance. ... In fact, the test is one of 'excessiveness.' The rule only bans attacks in which there is no proportionality at all between the ends sought and the expected harm to civilians and civilian objects. The Rome Statute's addition of the adjective 'clearly' to 'excessive' in its articulation of the proportionality rule (as a war crime standard) reflects this interpretation. Focusing on excessiveness avoids the legal fiction that collateral damage, incidental injury, and military advantage can be precisely measured. Ultimately, the issue is reasonableness in light of the circumstances prevailing at the time. . . . and nothing more."<sup>81</sup>

Thus, the first observation to be made in relation to Articles 51(5)(b), 57(2)(a)(iii) and 57(2)(b) of AP I is that the use of the term 'proportionality' in terms of their content is actually a misnomer. This is because the relevant provisions put forth an excessive loss formulation, not a proportionality formulation. As a matter of fact, neither the term 'proportionality' nor any of its alternatives are used anywhere within the text of AP I.<sup>82</sup>

This state of affairs is not accidental either, as Articles 46 and 50 of the initial AP I (the "Draft AP I") put together by the ICRC – which are the precursors of Articles 51 and 57 of AP I – specifically spoke in terms of "disproportionate" loss.

To be precise, Article 46(3)(b) of the Draft AP I stated the following:

"the employment of means of combat, and any methods which strike or affect indiscriminately the civilian population and combatants or civilian objects and military objectives, are prohibited. In particular it is forbidden: ... to launch attacks which may be expected to entail incidental losses among the civilian population and cause the

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<sup>81</sup> *Ibid.*

<sup>82</sup> Estreicher (n 4) 146, 151-3

destruction of civilian objects to an extent disproportionate to the direct and substantial military advantage anticipated.”<sup>83</sup>

Article 50(1)(a) of the Draft AP I further stated that:

“those who plan or decide upon an attack shall ensure that the objectives to be attacked are duly identified as military objectives within the meaning of paragraph 1 of Article 47 and may be attacked without incidental losses in civilian lives and damage to civilian objects in their vicinity being caused or that at all events those losses or damage are not disproportionate to the direct and substantial military advantage anticipated.”<sup>84</sup>

Finally, Article 50(1)(b) stated that:

“those who launch an attack shall, if possible, cancel or suspend it if it becomes apparent that the objective is not a military one or that incidental losses in civilian lives and damage to civilian objects would be disproportionate to the direct and substantial advantage anticipated.”<sup>85</sup>

At the Draft AP I stage, the use of the term ‘disproportionate’ was strongly opposed by Syria, a number of Eastern bloc nations and Romania because of its subjectivity. Mainly, the countries seem to have felt uncomfortable that the use of proportionality language would denote a requirement of conducting a comparison between dissimilar values and would be open to manipulation. In response, the drafters replaced the term ‘disproportionate’ with ‘excessive’ in all the relevant AP I provisions.<sup>86</sup>

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<sup>83</sup> International Committee of the Red Cross, *Draft Additional Protocols to the Geneva Conventions of 1949, Commentary* 56-7 [http://www.loc.gov/rr/frd/Military\\_Law/pdf/RC-Draft-additional-protocols.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/RC-Draft-additional-protocols.pdf)

<sup>84</sup> *Ibid.* 64

<sup>85</sup> *Ibid.*

<sup>86</sup> Estreicher (n 4) 152

This drafting change in the final version of AP I and rejection of proportionality language should have legal consequences, as it was not accidental but intentional.

First, it prevents the likelihood of misrepresenting the notion of proportionality in the *jus in Bello* context, which, standing alone, “suggests the ‘just deserts’ premise of criminal law, ... an ‘eye for an eye’ or ‘tit-for-tat’ reading”. The AP I need for finding “excessive” civilian losses with regard to the “military advantage anticipated” clearly indicates that the provision should not be read in such a way as to understand that the use of force should be limited to not exceed the degree of the collateral damage caused by the assault of the enemy.<sup>87</sup>

Second, the excessive loss formulation cuts against the risk of equating ‘excessive’ losses with ‘extensive’ losses too. The ICRC commentary written in 1987 – ten years after the Additional Protocols were signed – in relation to AP I contained the following statement:

“The idea has also been put forward that even if they are very high, civilian losses and damages may be justified if the military advantage at stake is of great importance. This idea is contrary to the fundamental rules of the Protocol; in particular it conflicts with Article 48 ‘(Basic rule)’ and with paragraphs 1 and 2 of the present Article 5. The Protocol does not provide any justification for attacks which cause extensive civilian losses and damages. Incidental losses and damages should never be extensive.”<sup>88</sup>

However, despite this commentary, the alleged per se prohibition of extensive civilian losses has no textual basis under AP I. On the contrary, military commanders are simply obliged to make sure that they can meet their legitimate

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<sup>87</sup> Estreicher (n 4) 153

<sup>88</sup> International Committee of the Red Cross, *Commentary of 1987 – Protection of the Civilian Population*, Article 51, para. 1980 <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=5E5142B6BA102B45C12563CD00434741>

military purposes with the minimum possible collateral damage<sup>89</sup> in accordance with the principles of distinction, military necessity and proportionality. In fact, the overall language of all AP I proportionality provisions indicate that extensive civilian casualties could be acceptable too, provided they are not “excessive in relation to the concrete and direct military advantage anticipated”.<sup>90</sup>

This misunderstanding of the proportionality principle – namely, that AP I prohibits extensive as opposed to excessive collateral damage – can be observed in the largely negative reactions of the international community, international organisations and various states to Israel’s actions during Operation Cast Lead in the Gaza Strip between 2008 and 2009, which condemned Israel for its disproportionate use of force.<sup>91</sup>

For instance, a statement issued by Asma Jahangir, Chairperson of the coordinating body for independent United Nations (the “UN”) human rights experts included the following remarks:

“We call on all parties to immediately cease all actions that result in civilian casualties, or put them at great risk. Both air strikes by Israeli Government forces and rocket attacks from Gaza into Israel are resulting in inexcusable loss of life and placing the civilian populations in the affected areas in extreme danger. The use of disproportionate force by Israel and the lack of regard for the life of civilians on both sides cannot be justified by the actions of the other party. They constitute clear violations of international human rights and international humanitarian law.”<sup>92</sup>

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<sup>89</sup> Estreicher (n 4) 153-4

<sup>90</sup> Sumanadasa (n 24) 27

Furthermore, Pursuant to the Commentary of the ICRC pertaining to Article 51 of AP I, “... *the disproportion between losses and damages caused and the military advantages anticipated raises a delicate problem; in some situations there will be no room for doubt, while in other situations there may be reason for hesitation. In such situations the interests of the civilian population should prevail.*” See International Committee of the Red Cross (n 88)

<sup>91</sup> Barnidge (n 28) 283

<sup>92</sup> UN Watch, ‘UN experts on toxic waste, corporations, and Burundi slam Israel, ignoring context and their lack of mandate’ <https://www.unwatch.org/un-experts-on-toxic-waste-corporations-and-burundi-slam-israel-ignoring-context-and-their-lack-of-mandate/> accessed 15 January 2021

Miguel d'Escoto Brockmann, the President of the 63<sup>rd</sup> Session of the UN General Assembly, further defined Operation Cast Lead as the use of a “disproportionate military force”.<sup>93</sup> The UN Human Rights Council Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 also emphasised extensive civilian casualties and property damage in Gaza.<sup>94</sup>

Even the Fact-Finding Mission, which was the most prominent international investigation of Operation Cast Lead established by the UN Human Rights Council Resolution S-9/195 in order to “investigate all violations of international human rights law and international humanitarian law by the occupying Power, Israel, against the Palestinian people throughout the Occupied Palestinian Territory, particularly in the occupied Gaza Strip, due to the current aggression”, seems to have already presumed within its abovementioned underlying terms of reference that Israel had in fact breached its international humanitarian law obligations during Operation Cast Lead.<sup>96</sup>

It is unclear how the international community reached their judgments about Israel's violation of the principle of proportionality during Operation Cast Lead. Some commentators remark that Operation Cast Lead was “called disproportionate on day one before anyone knew very much about how many people had been killed or who they were”.<sup>97</sup> Whether or not the humanitarian catastrophe in the Gaza Strip was caused by a violation of the proportionality

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<sup>93</sup> UN General Assembly, Presidential Statement, *To the 32nd Plenary Meeting of the 10th Emergency Special Session on the Illegal Israeli Actions in Occupied East Jerusalem and the Rest of the Occupied Palestinian Territory* <http://www.un.org/ga/president/63/statements/onpalestine150109.shtml> accessed 11 January 2021

<sup>94</sup> UN General Assembly, Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, 7 June 2010 [http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.13.53.Rev.1\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.13.53.Rev.1_en.pdf) accessed 11 January 2021

<sup>95</sup> UN General Assembly, Human Rights Council Resolution A/HRC/RES/S-9/1 (2009), *The grave violations of human rights in the Occupied Palestinian Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip* <https://unispal.un.org/DPA/DPR/unispal.nsf/0/404E93E166533F828525754E00559E30> accessed 11 January 2018

<sup>96</sup> Barnidge (n 28) 284-5

<sup>97</sup> Dissent Magazine, Michael Walzer (January 8, 2009), ‘The Gaza War and Proportionality’, [https://www.dissentmagazine.org/online\\_articles/the-gaza-war-and-proportionality](https://www.dissentmagazine.org/online_articles/the-gaza-war-and-proportionality)

principle or if the principle was actually complied with remains a controversial matter.<sup>98</sup> In any case, the disproportionality criticisms levelled at Operation Cast Lead all seem to be based on a confusion of the term 'excessive' with 'extensive', and the mistaken idea that international humanitarian law somewhat definitively prohibits extensive collateral damage.

To be precise, the relevant test stipulated under AP I does not measure extensive damage. Instead, it measures excessive damage with regard to "the concrete and direct military advantage anticipated". What is excessive may or may not be extensive, and what is extensive may or may not be excessive. Thus, loss of civilian life does not single-handedly constitute a war crime under international humanitarian law, no matter how unfortunate. The reason for this is that insofar as the collateral damage can fit into the formal constraints of the so-called proportionality formula (which in fact should be called the excessive loss formula), there will be no violation of the law. Hence, it may be asserted that international humanitarian law and the proportionality principle paradoxically contribute to the facilitation of death and destruction in armed conflict despite their original aims.

### **3.2 Concrete and Direct Military Advantage Anticipated**

Another matter that must be examined in relation to the proportionality principle stipulated under AP I is the interpretation of the expression "concrete and direct military advantage anticipated". There are two stages to this interpretive issue. First, the terms (i) "military advantage", (ii) "concrete and direct" and (iii) "military advantage anticipated" "from the attack as a whole" must be interpreted. Second, the possibility of aggregation of attacks and the question of whether there needs to be geographical and temporal proximity between aggregated attacks must be analysed.

According to the 1987 ICRC commentary on AP I, "military advantage" can only "consist in ground gained and in annihilating or weakening the enemy armed

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<sup>98</sup> Dill (n 72) 3

forces”.<sup>99</sup> The US Department of Defence Law of War Manual further indicates that “military advantage is not restricted to tactical gains but is linked to the full context of a war strategy”.<sup>100</sup> It may, in fact, include operational and even strategic effects:<sup>101</sup>

“There must be a good faith expectation that the attack will make a relevant and proportional contribution to the goal of the military attack involved. Such goals may include: (1) denying the enemy the ability to benefit from the object’s effective contribution to its military action (e.g., using this object in its military operations); (2) improving the security of the attacking force; and (3) diverting enemy forces’ resources and attention.”<sup>102</sup>

Moreover, commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare noted that “[m]ilitary advantage does not refer to advantage which is solely political, psychological, economic, financial, social, or moral in nature” and that “forcing a change in the negotiating position of the enemy only by affecting civilian morale does not qualify as military advantage”.<sup>103</sup>

As for the expression “concrete and direct”, the 1987 ICRC commentary in relation to AP I indicates that the expression was “intended to show that the

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<sup>99</sup> International Committee of the Red Cross, *Commentary of 1987 – Precautions in Attack, Article 57 para.* 2218 <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/d80d14d84bf36b92c12563cd00434fbd> accessed 14 April 2021

<sup>100</sup> United States, Department of Defence, *Conduct of the Persian Gulf War: Final Report to Congress*, 10 April 1992, Appendix O, The Role of the Law of War (1992) 699, para. 2 <https://www.globalsecurity.org/jhtml/jframe.html#https://www.globalsecurity.org/military/library/report/1992/cpgw.pdf> accessed 15 April 2021

<sup>101</sup> M. N. Schmitt, ‘The Relationship between Context and Proportionality: a Reply to Cohen and Shany’, *Just Security* (11 May 2015) <https://www.justsecurity.org/22948/response-cohen-shany/> accessed 15 April 2021

<sup>102</sup> US Department of Defence, *Law of War Manual*, June 2015 305-6 <https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190> accessed 14 April 2021

<sup>103</sup> HPCR Manual on International Law Applicable to Air and Missile Warfare, Commentary on Rule 1(w), para. 4 45 <file:///Users/mistralcaydamli/Downloads/Commentary%20on%20the%20HPCR%20Manual.pdf> accessed April 2021



advantage concerned should be substantial and relatively close, and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded”.<sup>104</sup> In other words, very general advantages with no clear causal connection to the incident should be ignored.<sup>105</sup> One military manual explains that the military advantage gained should be “identifiable and quantifiable and one that flows directly from the attack, not some pious hope that it might improve the military situation in the long term”.<sup>106</sup> The *Tallinn Manual* on cyber operations states that “mere speculation” is removed “from the equation of military advantage” so that decision-makers can expect a “real and quantifiable benefit”.<sup>107</sup> Gardam confirms that the military advantage must be interpreted in a narrow way; focus must be given to the relatively short-term impact of an attack rather than its long-term cumulative impact.<sup>108</sup> Estreicher further uses the terms “real [and] nontrivial military objective” to define the concept of “concrete and direct military advantage”.<sup>109</sup>

Some experts at the International Expert Meeting on 22-23 June 2016 in Quebec on the “Principle of Proportionality in the Rules Governing the Conduct of Hostilities Under International Humanitarian Law” (the “Quebec Meeting”) explained that the term “concrete and direct” does not require the military advantage to be “significant”. While there will be some cases where the military advantage would need to be significant due to the magnitude of the anticipated incidental civilian harm, in cases where only minimal incidental harm is expected, even a trivial military advantage could suffice to make the attack legitimate. Furthermore, most experts agreed that the term “concrete” referred to the likelihood of obtaining the anticipated military advantage.<sup>110</sup>

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<sup>104</sup> International Committee of the Red Cross (n 88) para. 2209

<sup>105</sup> Cohen (n 34) 11

<sup>106</sup> UK Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict*, JSP 383, 2004 edition, para. 5.33.3 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/27874/JSP3832004Edition.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf) accessed 15 April 2021

<sup>107</sup> *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (2<sup>nd</sup> ed., Cambridge University Press 2017), Commentary on Rule 11, para. 9-473

<sup>108</sup> Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press 2004) 103

<sup>109</sup> Estreicher (n 4) 154

<sup>110</sup> Cohen (n 34) 18

Furthermore, while ratifying AP I, several states included interpretive statements that the expected military advantage must be “from the attack as a whole”.<sup>111</sup> According to the 1987 ICRC commentary on AP I, “an attack carried out in a concerted manner in numerous places can only be judged in its entirety”.<sup>112</sup> Thus, a frame of reference needs to be determined in respect of the expression “military advantage” expected from the attack in order to interpret the meaning of the concept. The key question here is whether military advantage must be interpreted on a case-by-case basis by looking at the specific tactical advantage of a single attack or on a cumulative basis by looking at the contribution of a specific attack to the belligerent’s overall military campaign.

The matter is surrounded with disaccord. Some commentators lend support to the latter, cumulative approach. For instance, Estreicher explains that the expected military advantage is “not limited to the immediate battle that causes the civilian loss at issue but relate to the attack as whole”.<sup>113</sup> Article 8(2)(b)(iv) of the Rome Statute refers to “overall military advantage” in this context as well:

“For the purpose of this Statute, ‘war crimes’ means: ... other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”<sup>114</sup>

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<sup>111</sup> International Committee of the Red Cross, *Treaties, States Parties and Commentaries*, Australia, Belgium, Canada, France, Germany, Italy, the Netherlands, New Zealand, Spain and the UK [https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_viewStates=XPages\\_NORMStatesParties&xp\\_treatySelected=470](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470) accessed 15 April 2021

<sup>112</sup> International Committee of the Red Cross (n 88)

<sup>113</sup> Estreicher (n 108)

<sup>114</sup> United Nations, *Rome Statute of the International Court* (last amended 2010), 17 July 1998, A/CONF.183/9 art. 8(2)(b)(iv) [https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf) accessed 20 April 2021

By contrast, some commentators lean on the former, case-by-case approach. For instance, Sumanadasa explains that “AP I requires that proportionality be assessed in relation to each individual attack, rather than an assessment on a cumulative basis”.<sup>115</sup>

The practical operation of this dilemma may be observed in modern warfare by looking at the two different interpretations accorded to “military advantage” by the USA and Japan during the bombings of Hiroshima and Nagasaki by the USA in 1945 at the final stage of World War II.

In this context, the Americans focused on a cumulative interpretation of military advantage by claiming that the bombings were strongly justified due to the military advantage gained from them, which was evidenced by the prompt Japanese surrender following the bombings. This arguably removed the need for an Allied invasion of Japan and the further infliction of heavy casualties on both sides. In contrast, a Japanese court focused on a case-by-case interpretation of military advantage in the 1963 case of *Shimoda v State*. The case was a lawsuit initiated by a number of people injured in the bombings against the government of Japan for failing to bring a claim on their behalf against the USA for the illegal bombing of the cities.<sup>116</sup>

It is highly unlikely that the bombings of Hiroshima and Nagasaki could in any event – if ever at all – be argued as being lawful or proportionate under international humanitarian law. Nevertheless, the comparison of these opposing interpretations of military advantage are useful in terms of making contextual sense of the expression.

Brown is another scholar that prefers the case-by-case interpretation of “military advantage”, arguing that fits more with the aim of the drafters of AP I – the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts – as it provides better

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<sup>115</sup> Sumanadasa (n 24) 34

<sup>116</sup> Brown (n 74) 141

protections to civilians than before. Indeed, a comparison of the cumulative and case-by-case basis approaches shows that the cumulative approach would undermine the humanitarian protections provided to civilians under AP I. Furthermore, Brown argues that the cumulative approach would render the criteria for evaluating the legality of an act too uncertain and unreliable, “due to the difficulty of assessing how, if at all, an act prevented undesirable future events and of determining how serious the adverse consequences would have been”.<sup>117</sup>

As for the matter of aggregation of attacks, the question is whether the proportionality of an attack should be determined by the military advantage of a single act or the larger campaign, provided aggregation is possible.

For the purpose of meaningful discussion concerning the aggregation of attacks in a proportionality assessment, some definitions must be provided. Article 49 of AP I defines attacks as “acts of violence against an adversary, whether in offence or in defence.” An individual attack or operation is a single act and may be defined as a “specific tactical operation”. A number of military operations for a particular purpose may be defined as a “campaign”. A tactical campaign is made up of a compilation of specific tactical operations targeted at singular enemy capacity. It involves a more restricted time period and a more succinct assemble of attackers. A strategic campaign is made up of a collection of tactical campaigns aimed at meeting a strategic goal such as winning the war or maintaining control of a region. It has no limitation of a time frame, and it does not involve a single unit attacking.<sup>118</sup>

So, when assessing proportionality, is it necessary to consider the military advantage of a single attack, *i.e.* specific tactical operation, or can a number of attacks be aggregated so that the military advantage of the larger campaign is considered?

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<sup>117</sup> Brown (n 74) 142

<sup>118</sup> Else (n 30) 200-1

Because of the singular use of the word “attack” in Article 51(5)(b) of AP I, at first, it might be presumed that the proportionality assessment of attacks is limited to single acts. However, this interpretation contradicts most of the interpretations found in case law as well as the academic circle. Likewise, the 1987 ICRC commentary on Article 57 of AP I indicates that “... an attack carried out in a concerted manner in numerous places can only be judged in its entirety.”<sup>119</sup> The Reservations to Article 51 of AP I also show that many states did not intend to prohibit aggregation of attacks in a proportionality assessment:

“the expression ‘military advantage’ employed in Articles 51 (Protection of the civilian population), 52 (General protection of civilian objects) and 57 (Precautions in attack) refers to ‘the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.’”<sup>120</sup>

Furthermore, the ICRC’s survey of national military manuals shows that many of them, including the German Military Manual, the United States Naval Handbook and the Spanish Law of Armed Conflict Manual, require the proportionality assessment to be carried out by looking at the attack “as a whole” and “not from isolated parts of an operation” too.<sup>121</sup>

The NATO Bombing Report states that “[t]he proportionality of otherwise of an attack should not focus exclusively on a specific incident.”<sup>122</sup> The attack referred to in the report was the NATO bombing of a Serbian TV and radio station. The attack led to the deaths of 10-17 civilians, but it was analysed as part of a larger-scale coordinated attack on the Serbian C3 network. This incident set the precedent that a specific tactical operation may be individually disproportionate as a single act, but still be considered proportionate as part of a larger

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<sup>119</sup> International Committee of the Red Cross (n 99)

<sup>120</sup> International Review of the Red Cross, ‘The reservations to the Protocols additional to the Geneva Conventions for the protection of war victims’ (2003) 16 [https://www.icrc.org/en/doc/assets/files/other/irrc\\_849\\_gaudreau-eng.pdf](https://www.icrc.org/en/doc/assets/files/other/irrc_849_gaudreau-eng.pdf) accessed 3 March 2021

<sup>121</sup> Else (n 30) 205

<sup>122</sup> United Nations, International Criminal Tribunal for the former Yugoslavia (n 65) para. 78

coordinated attack, provided it is carried out within the same day and has the same military advantage.<sup>123</sup>

The report did not give clear reasoning for this decision, basing it on the principles employed in the *United Nations Prosecutor v Kupreskić*, which stated that even if their parts were proportionate, a group of attacks may be disproportionate provided the sum total of civilian losses was excessive. For the NATO bombing, this logic was reversed to find that a single disproportionate incident within a group of attacks might be justified if the total military advantage of a group of attacks is proportionate.<sup>124</sup>

Therefore, it would appear that aggregation of attacks is possible in a proportionality assessment and that in such a situation, the military advantage of the larger campaign must be considered.

Finally, considering that aggregation of attacks is possible, the question to be asked is whether such attacks have to be related in time and space. The necessary geographic and temporal relation of attacks is not well established.<sup>125</sup> For instance, the one-day collective NATO attack on Serbia's C3 network was evaluated as a single attack.<sup>126</sup> It would appear that the geographic and temporal relationship between attacks only becomes crucial if its scope becomes so broad that a reasonable military commander cannot predict the anticipated incidental civilian costs with regard to the military advantage any longer. Hence, multiple attacks must not be aggregated, provided they are separated enough in time or space so that the military commander cannot foresee the expected incidental civilian losses with regard to the military advantage during the planning of an operation.<sup>127</sup>

### **3.3 The Subjective Element of the Proportionality Principle: Judgment Calls of Military Commanders**

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<sup>123</sup> Else (n 30) 203

<sup>124</sup> United Nations, International Criminal Tribunal for the former Yugoslavia (n 65) para. 52

<sup>125</sup> Else (n 30) 208

<sup>126</sup> United Nations, International Criminal Tribunal for the former Yugoslavia (n 65) para. 71-2

<sup>127</sup> Else (n 30) 209-10

In international humanitarian law, the proportionality evaluation of attacks in armed conflicts remains subjective to some extent. A transparent set of fixed criteria does not exist in AP I to decide in a court of law whether an operation is proportionate or not. The language of the applicable proportionality test does not provide tangible clarity, failing to assist in its interpretation and application. Anticipating the collateral damage to be caused as a result of a particular attack before the attack is launched and assessing its proportionality are difficult tasks to be handled during an armed conflict.

As observed by Kennedy, these tasks necessarily require complex value judgments or judgment calls to be made by military commanders concerning the value of securing military goals against the price of attacking and meeting such goal.<sup>128</sup> According to the 1987 ICRC commentary on AP I, the application of the principle allows for a “fairly broad margin of judgment” too, with the matter of proportionality being a question of “common sense and good faith for military commanders”.<sup>129</sup> Unfortunately, since the law does not provide an absolute standard concerning how exactly these judgment calls are to be made, the only criterion that can be asserted is this – that the judgment calls must be reasonable and made in good faith.<sup>130</sup> Hence, the proportionality principle is ultimately contingent on the common sense and good faith of military commanders, leaving them with a fairly broad margin of evaluation when making their judgment calls.<sup>131</sup>

The 1987 ICRC commentary on Article 51 of AP I states that the adopted text is not always explicit as it could have been, but this was deemed necessary since the aim was to allow those who would have to apply the rules a margin of appreciation. Therefore, the efficacy of the text will be based largely “on the good faith on the part of the belligerents, as well as the desire to conform with the general principle of respect for the civilian population”.<sup>132</sup> Support for this position

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<sup>128</sup> Stephens & Lewis (n 33) section II(A)

<sup>129</sup> International Committee of the Red Cross (n 99) para. 2208-10

<sup>130</sup> Roy Lee & Hakan Friman (eds), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001) 151

<sup>131</sup> Dill (n 72) 3; Sumanadasa (n 24) 26-27

<sup>132</sup> International Committee of the Red Cross (n 88) para. 1978

can also be found in the NATO Bombing Report, which leaves the burden of decision-making on the shoulders of the “reasonable military commander” too.<sup>133</sup>

In *Galic*, the Trial Chamber of ICTY explained the norm in the following way:

“In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.”<sup>134</sup>

Thus, it would appear that the proportionality assessment must be made based on the data available to the military commander at the time of the attack. This is also apparent from the language of Article 51(5)(b) of AP I, which refers to the “expected” incidental harm and “anticipated military advantage”.

The judgment calls expected to be made by military commanders are essentially subjective and personal matters that depend on the values, personal morality, background, education and professional and combat experience of the decision-makers. Different individuals could possibly come to different conclusions in the same situation about whether the collateral damage exceeds the military advantage expected from a particular attack, *i.e.* whether a particular attack is proportionate or not, even if they act sensibly and in good faith.<sup>135</sup>

In this context, the potential conflict between Western and non-Western values and sensibilities and the lack of universality of virtues becomes problematic, as it may result in judgment calls made by military commanders producing differing results due to normative relativism.<sup>136</sup> In this regard, Schmitt notes that:

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<sup>133</sup> United Nations, International Criminal Tribunal for the former Yugoslavia (n 65) para. 50

<sup>134</sup> ICTY, *Prosecutor v. Galic*, Trial Chamber Judgment, IT-98-29-T, 5 December 2003, para. 58 <https://www.icty.org/x/cases/galic/acjug/en/gal-acjud061130.pdf> accessed 16 April 2021

<sup>135</sup> United Nations, International Criminal Tribunal for the former Yugoslavia (n 132)

<sup>136</sup> David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press, 2004) 275-20



“[...] in some societies, death, poverty, and deprivation tragically are so widespread that their population can become desensitised to death in the more general sense. [...] This notion flies in the face of the objective valuation of life sought by humanitarian law, but represents an unfortunate reality that shades proportionality calculations. Among makers of proportionality calculations, therefore, the value attributed to the human suffering caused by a military operation may vary widely with social or cultural background.”<sup>137</sup>

It could, however, also be argued that there is agreement among professional military officers as to the indispensable values affecting the targeting procedure in practice. This consensus is strengthened by the increasingly globalised scale of military training as well as the on-going internationalisation of military operations, whether it be through coalitions of the willing or UN operations.<sup>138</sup>

Furthermore, there are various military decision-making tools and procedures that aid military commanders when they make proportionality calculations. These tools often require “a study of the total operating environment, including physical (infrastructure, weather, terrain etc.) and social (political, legal, cultural, ROE [rules of engagement] etc.) influences and their cumulative effects on possible threat and friendly forces COA [courses of action].”<sup>139</sup> Science and mathematical indicators in the form of percentages also serve as objective indicators for evaluating the proportionality of attacks to allow for more informed decision-making. Collateral damage estimation (“CDE”) methodology presents a sophisticated process which factors in the time, the location, the munitions that are going to be used, whether the area is crowded etc. Matrixes run collateral damage and military advantage on a scale of high, medium or low or utilising other classifications, allowing for an operation anticipated to offer a minimal

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<sup>137</sup> Michael N. Schmitt, ‘The Principle of Discrimination in 21<sup>st</sup> Century Warfare’ (1998) 2 Yale Human Rights and Development Law Journal 151 <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1010&context=yhrdlj> accessed 7 March 2021

<sup>138</sup> Stephens & Lewis (n 33) section III(D)

<sup>139</sup> Australian Defence Force Warfare Centre, *The Joint Military Appreciation Process* (2004) para. 1.35 <https://docplayer.net/100059754-The-joint-military-appreciation-process.html> accessed 16 April 2021

military advantage while causing high incidental harm to be categorised as excessive right away.<sup>140</sup>

Nevertheless, the difficulty of applying proportionality in real-time must also be addressed. In addition to the myriad of tactical and strategic variables that need to be considered by military commanders when making judgment calls about the proportionality of attacks and the time constraints and stress posed by the severity of war conditions, other relevant problems can come into play. An example would be the practice of counter-targeting, which entails the use of civilians or civilian objects as shields in armed conflicts. For instance, during Operation Cast Lead, Hamas used civilians as human shields, stored weapons in mosques and in buildings where civilians lodged, launched attacks from urban centres, and took over civilian residences so that they could be utilised by Palestinian forces for strategic military advantage and as weapons depots. Surely, applying proportionality to military attacks in real-time becomes an even more daunting task in such situations.<sup>141</sup>

The subjective element of the proportionality principle poses another danger too. To be precise, the subjective element allows external considerations to be factored into the planning of combat decisions and the determination of what are acceptable civilian losses. Within this scope, the danger is that military commanders may interpret the law malevolently. In other words, the broad discretion afforded to military commanders might leave them with an open license to initiate destruction. Indeed, Normand and af Jochnick indicate that "... the law may actually legitimise, and thereby encourage, the commission of atrocities."<sup>142</sup>

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<sup>140</sup> International Committee of the Red Cross & Université Laval, 'International Expert Meeting 22-23 June 2016 – Quebec: The Principle of Proportionality in the Rules Governing the Conduct of Hostilities Under International Humanitarian Law' (2016) 56, 65 <https://www.icrc.org/en/document/international-expert-meeting-report-principle-proportionality> accessed 12 April 2021

<sup>141</sup> Barnidge (n 28) 290; and Sumanadasa (n 24) 36-37

<sup>142</sup> Roger Normand and Chris af Jochnick, 'The Legitimation of Violence: A Critical Analysis of the Gulf War' (1994) 35 Harvard International Law Journal 387, 414 <https://dokumen.tips/documents/the-legitimation-of-violence-2-a-critical-analysis-of-the-gulf-war-chris-jochnick-roger-normand.html> accessed 25 April 2021

Indeed, while analysing the first Gulf War in Iraq, the authors seem to be assuming *mala fides* on behalf of the United States-led Coalition, arguing that the legitimacy attributed to the war based on legal compliance with the laws of war was in fact used to conceal a cataclysmic agenda of justifying every action behind the curtain of military necessity.<sup>143</sup>

Gardam also takes issue with the subjective element of the proportionality principle, arguing it to be a result of the ambiguity of the proportionality test set forth by AP I and customary international law. She argues that the extrinsic considerations allowed to factor into the decisions include the armed conflict's perceived legitimacy. With regard to the first Gulf War, she claims that the principle of proportionality was effectively ignored, with the target determinations in Iraq and Kuwait being accounted for both on the expected military advantage to be obtained from them and from "Iraq's flagrant disregard of existing legal rules", with more destruction being regarded as legitimate than may have been otherwise in the situation due to the nature of the hostilities engaged in by Iraq. Thus, the principle of proportionality is influenced by "just cause" considerations.<sup>144</sup>

Christian Else, on the other hand, disagrees with the above position on the first Gulf War, arguing that the war was a clean and legal one in which military commanders showed a good amount of restraint at the specific tactical operation level when faced with doubts concerning their abilities to avoid civilian casualties.<sup>145</sup> For instance, 25% of the Coalition aircraft was ordered to return to base without attacking because of their inability to hit a designated target safely. The military consulted with a number of laboratories before attacking chemical facilities to obtain information about confining the spread of spores after an attack and undertook deliberate measures to limit their release into neighbouring civilian areas.<sup>146</sup>

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<sup>143</sup> Stephens & Lewis (n 33) section III

<sup>144</sup> Judith Gardam, 'Proportionality as a Restraint on the Use of Force' (1999) 20 Australian Year Book of International Law 161  
<http://classic.austlii.edu.au/au/journals/AUYrBkIntLaw/1999/9.html#:~:text=Proportionality%20in%20earlier%20Christian%20and,criticism%20by%20just%20war%20scholars>. Accessed 22 April 2021

<sup>145</sup> Else (n 30) 206-7

<sup>146</sup> Stephens & Lewis (n 33) section III(B)

The targeting analysis conducted in the NATO campaign in Kosovo shows the decision-making variables factored into the missing planning stage by military commanders to evaluate potential civilian losses. These variables notably include potential computer simulation and modelling, populace concentrations, particular munition blast ramifications, historical information concerning munition accuracy and probabilities of mistake.<sup>147</sup>

To sum up, the principle of proportionality is fraught with subjective interpretive choices that need to be made by the reasonable military commander before the launching of an attack in order to determine its permissiveness under international humanitarian law. Its application requires “complete good faith on the part of the [military commanders], as well as the desire to conform with the general principle of respect for the civilian population”.<sup>148</sup> Great trust seems to be put in these concepts of good faith, reasonableness, common sense and respect for the civilian population as interpretative tools. However, their substance as a matter of law is not explained.<sup>149</sup>

Consequently, since the principle remains ambiguous with design flaws and limited useful precedent, it is hard to interpret and challenging to enforce. Its lack of precision operates in the interests of the military rather than that of civilians.<sup>150</sup> All of these factors significantly reduce the effectiveness of the proportionality principle to adequately lead well-intentioned combatants in their military actions and provide sufficient protection to civilians in armed conflict. Accordingly, proportionality fails to work as the law should and loses its normative force.<sup>151</sup>

### **3.4 Security of Attacking Forces and Popularity of War**

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<sup>147</sup> Andru Wall, ‘Legal and Ethical Lessons of NATO’s Kosovo Campaign’ (2002) 78 *Naval War College International Law Studies Series* 189, 194

<sup>148</sup> International Committee of the Red Cross (n 88) para. 1978

<sup>149</sup> Barnidge (n 28) 28

<sup>150</sup> Dill (n 72) 3; Sumanadasa (n 24) 34-35

<sup>151</sup> Dill (n 72) 4

Under Articles 48 and 51(1) of AP I, a general objective of protecting civilians exists.<sup>152</sup> However, this is not to say that the rights and security of a country's own military officers are not taken into account when making proportionality assessments. While requiring for a nation to minimise incidental civilian injury and losses, international humanitarian law does not call for a needless sacrifice of a nation's own military officers.<sup>153</sup> The prohibition of bona fide targeting of non-combatant civilians to safeguard them from the disadvantageous results of armed conflict is one thing. However, as Dunlop notes, "[the law of armed conflict] does not per se place a higher value on the lives of civilians over those in uniform".<sup>154</sup>

Some states have expressly addressed this issue during their ratification of AP I too, confirming that the safety of attacking forces are to be taken into consideration while undertaking the proportionality assessment. For instance, New Zealand and Australia declared that "[...] the term 'military advantage' involves a variety of considerations including the security of attacking forces".<sup>155</sup> While not being a party to AP I, the USA makes exactly the same commentary in the Commander's Handbook on the Law of Naval Operations under section 8.2 titled "military objectives".<sup>156</sup> Furthermore, the NATO Bombing Report concluded that states are permitted to resort to aerial attacks to protect their soldiers, even though this places more civilian lives in danger.<sup>157</sup>

Some scholars have voiced extremist views in the matter of the security of attacking forces. For instance, Walter and Margalit maintain that the protection of civilians is the most critical rule of armed conflict and that this protection is

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<sup>152</sup> International Committee of the Red Cross, *Additional Protocol I*, articles 48 and 51(1) <https://ihl-databases.icrc.org/ihl/WebART/470-750061?OpenDocument>, <https://ihl-databases.icrc.org/ihl/WebART/470-750065> accessed 10 December 2020

<sup>153</sup> Stephens & Lewis (n 33) section III(C)

<sup>154</sup> Charles Dunlap, 'Kosovo, Causality Aversion, and the American Military Ethos: A Perspective' (2000) 10 United States Air Force Academy Journal of Legal Studies 99 <https://www.law.upenn.edu/live/files/2826-dunlapkosovocausality-aversion-and-the-american> accessed 7 March 2021

<sup>155</sup> International Review of the Red Cross (n 119)

<sup>156</sup> Department of the Navy Office of the Chief of Naval Operations and Headquarters, U.S. Marine Corps, Department of Homeland Security and U.S. Coast Guard, 'The Commander's Handbook on the Law of Naval Operations' (2017) 119 <https://www.hsdl.org/?view&did=806860> accessed 7 March 2021

<sup>157</sup> United Nations, International Criminal Tribunal for the former Yugoslavia (n 65)

forfeited by soldiers. Therefore, soldiers must always be faced with more risk than civilians because their lives are worth less than civilians.<sup>158</sup> Kasher and Yadlin, on the other hand, argue that the lives of soldiers should not be jeopardised, despite the fact that this may cause a risk to the lives of enemy civilians. This is based on the view that states are indebted to their soldiers, especially mandatory enlistment officers. Hence, the lives of soldiers are considered to be more valuable than those of enemy civilians.<sup>159</sup>

In practice, both of these opposite stances may be considered inappropriate, since the draft does not in itself make the lives of soldiers inconsequential and states are obliged to provide some protection to enemy civilians too.

In any case, to what extent may civilian lives be put at risk to ensure the security of a nation's own military members? How much more heavily should civilian casualties be weighed than military ones? In this regard, Kennedy argues that the answer is "as much more heavily as their death would delegitimise [the] campaign". Hence, the perceived legitimacy or justness of the armed conflict, which includes the public opinion and support for the conflict, may come into play while answering these questions, albeit in an indirect manner.

Kennedy further explains that, in the context of the *jus ad Bellum*, armed conflict is inevitable and that despite having high aims, the Charter of the UN has only created a new language to authorise using force, providing us with new justifications for it such as collective security and self-defence. At any rate, whether the armed conflict in question sells to the international audience is a matter of political and moral considerations. Ultimately, the death of innocent non-combatant civilians delegitimises military campaigns. If a military campaign is viewed as illegitimate at home, in the enemy society or third countries, this may result in a number of problems centred around the "CNN effect", including

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<sup>158</sup> Michael Walzer and Avishai Margalit, 'Israel: Civilians and Combatants' *New York Review of Books*, vol. 56, no 8 (May 14, 2009) <http://www.nybooks.com/articles/22664> accessed 14 March 2021

<sup>159</sup> Asa Kasher and Amos Yadlin, 'Military Ethics of Fighting Terror: An Israeli Perspective' (2005) 4(1) *J. Military Ethics* 3-32  
[https://www.researchgate.net/publication/249007840\\_Military\\_Ethics\\_of\\_Fighting\\_Terror\\_An\\_Israeli\\_Perspective](https://www.researchgate.net/publication/249007840_Military_Ethics_of_Fighting_Terror_An_Israeli_Perspective) 15 March 2021

undermining the support of the campaign at home or among the attacking force's allies, strengthening opposition and hardening the enemy's resolve.<sup>160</sup>

A typical example showing the importance of public support for the ultimate success of military interventions is the Vietnam War. In this war, the North Vietnamese carried out a "value-based asymmetrical strategy", manipulating democratic values and turning public support in the USA against the Vietnam War. In the words of a previous North Vietnamese military commander, "[t]he conscience of America was part of its war-making capability, and we were turning that power in our favour. America lost because of its democracy; through dissent and protest it lost the ability to mobilize a will to win."<sup>161</sup>

Thus, when planning an attack, military commanders are duty-bound to weigh all loss of life, including the lives of civilians and the members of their own force as well as the enemy's. Their decisions will necessarily have a subjective element and include judgment calls shaped by their values, personal morality, background, education and professional and combat experience. The importance of the military objective and the price of securing it will also be factors that shape these decisions. To conclude, the popularity of a war may indirectly affect military commanders' calculation of what losses are sustainable in their proportionality assessment.

### **3.5 Different Types of Incidental Harm**

The term incidental harm used in Article 51(5)(b) of AP I is a catch-all phrase that covers harm to both individuals and objects. The three forms of incidental harm listed explicitly in AP I with regard to the principle of proportionality are "loss of civilian life", "injury to civilians" and "damage to civilian objects". A number of different types of harm other than these also exist, but there exists controversy

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<sup>160</sup> Kennedy (n 135) 275-6

<sup>161</sup> Charles Dunlap, 'A Virtuous Warrior in a Savage World' (1998) 8 United States Air Force Academy Journal of Legal Studies 71 <https://cupdf.com/document/virtuous-warrior.html> accessed 7 March 2021

regarding their relevancy to proportionality calculations within the framework of AP I. This thesis will only focus on three of these, which are as follows:

- (i) illness and mental harm,
- (ii) harm to the civilian use of dual-use objects and
- (iii) economic losses and displacement.

### 3.5.1 Illness and Mental Harm

While Article 51(5)(b) of AP I refers to “injury to civilians”, it does not define what injury specifically encompasses. Nor does it deliberately limit it to physical injury. The dictionary meaning of injury is “harm or damage”.<sup>162</sup> The question is whether this also covers illness and mental harm suffered by civilians. The answer appears to be based on whether there is (i) foreseeability and (ii) a cause and effect relationship between specific illnesses and mental harm on the one hand and a specific attack on the other hand.

Attacks on the civilian population may lead to illness in several ways. For example, exposure to poisonous agents used as warfare methods such as depleted uranium, exposure to chemical products due to an attack on an industrial factory that uses such products or the destruction of water and sanitation facilities leading to waterborne diseases are possible ways in which civilians may fall ill due to military operations.<sup>163</sup>

Since incidental “loss of civilian life” is explicitly included in the language of AP I, provided they are expected, civilian deaths caused by an illness that was the result of a military action are relevant within the context of proportionality assessments.<sup>164</sup> For instance, the US CDE Methodology specifies that “[s]pecial consideration must be given to secondary and tertiary effects of engaging environmental hazard targets” because they “present the significant danger of widespread and long-term lethal effects on civilians and non-combatants from

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<sup>162</sup> *Concise Oxford Dictionary* (12<sup>th</sup> ed., Oxford University Press, 2011) 732

<sup>163</sup> International Committee of the Red Cross & Université Laval (n 139) 33

<sup>164</sup> *Ibid.*



ground water contamination, flooding, uncontrollable fire, and spread of disease”.<sup>165</sup>

However, should expected illness not resulting in deaths also be considered when making proportionality calculations? Illness is understandably much more difficult to calculate through CDE methodologies than physical injury. Therefore, it may be difficult to prove that a particular illness was a foreseeable result of a specific attack, and that there was a causal link between the same. To this end, some experts at the Quebec Meeting argued that incidental injury only encompasses violent physical trauma.<sup>166</sup>

Nevertheless, there were a few experts who argued that the interpretation of injury should cover illnesses. In this context, the scenario of incidental damage to a sewer causing it to overflow into a kindergarten was suggested, where one expert found it preposterous for the resulting illness endured by children to be not factored into proportionality assessments when the damage to the pipe itself would in fact be taken into consideration. Furthermore, the fact that international humanitarian law requires belligerents to equally respect and protect the wounded and the sick could be seen as an argument supporting the inclusion illnesses in the definition of incidental injury with regard to proportionality assessments.<sup>167</sup>

Turning to mental harm, there is an increased understanding of the psychological results of war. An example would be post-traumatic stress disorder (PTSD), which is a serious and well-documented form of mental harm with significant and long-term effects on individuals.<sup>168</sup>

As it is, Article 51(2) of AP I prohibits “acts or threats of violence the primary purpose of which is to spread terror among the civilian population”. In *Galic*, this

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<sup>165</sup> US Chairman of the Joint Chiefs of Staff Instruction, *No-Strike and the Collateral Damage Estimation Methodology*, CJCSI 3160.01, 2009, D-A-33 [https://www.aclu.org/sites/default/files/field\\_document/drone\\_dod\\_3160\\_01.pdf](https://www.aclu.org/sites/default/files/field_document/drone_dod_3160_01.pdf) accessed 12 April 2021

<sup>166</sup> International Committee of the Red Cross & Université Laval (n 139) 37

<sup>167</sup> International Committee of the Red Cross & Université Laval (n 139) 33, 36-37

<sup>168</sup> International Committee of the Red Cross & Université Laval (n 139) 34

prohibition was discussed by the ICTY Appeals Chamber as a war crime, and it was noted as a case of “extensive trauma and psychological damage being caused by attacks [which] were designed to keep the inhabitants in a constant state of terror”.<sup>169</sup> Hence, it would seem that the law of armed conflict is somewhat involved in protecting civilians against at least some types of mental damage.

Furthermore, in the Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations (the “Tallinn Manual”), the definition of injury incorporates “severe mental suffering that [is] tantamount to injury”<sup>170</sup> too. That said, “inconvenience, irritation, stress or fear”<sup>171</sup> and “a decline in civilian morale”<sup>172</sup> are excluded from proportionality assessments.

It must, however, be noted that the prohibition of Article 51(2) of AP I only addresses acts with the primary purpose of terrorising civilians, and that this fact has been quoted both in favour of and against the relevance of incidental mental harm in proportionality assessments.<sup>173</sup>

To date, the role of mental harm has not been considered by international jurisprudence in proportionality assessments. It has, however, been addressed within the context of the crimes of genocide, torture and crimes against humanity. In this context, mental damage is understood to exceed the threshold of a “minor

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<sup>169</sup> ICTY (n 133) para 102

<sup>170</sup> *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (no 136) Commentary on Rule 92, para. 8-417

<sup>171</sup> *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (no 136), Commentary on Rule 113, para. 5-472

<sup>172</sup> *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (no 136), Commentary on Rule 100, para. 26-443

<sup>173</sup> In favour: Eliav Lieblich, ‘Beyond Life and Limb: Exploring Incidental Mental Harm Under International Humanitarian Law’, in D. Jink *et al.* (eds), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies* (Asser Press 2014) 201 <https://poseidon01.ssrn.com/delivery.php?ID=039009127112022126070115112082123006004043010035052042110121112108112111002006022026011054008027021002125019018086000012091082001043025043093123120091119090092091122036023003120076087090127115008114095020015119123112071007064015071027093120020108090027&EXT=pdf&INDEX=TRUE> accessed 12 April 2021; *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (n 169). Against: Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2<sup>nd</sup> ed., Cambridge University Press 2010) 126

or temporary impairment of mental faculties”<sup>174</sup>, without having to be “permanent and irremediable”.<sup>175</sup> Furthermore, the Statutes of the ICTY<sup>176</sup> and the International Criminal Tribunal for Rwanda<sup>177</sup> define genocide in a way as to include the infliction of “serious bodily or mental harm”. This effectively elevates mental harm to the same level as physical harm. This attribution of criminal liability for mental harm in international criminal law strengthens the case for the notion to be tangible enough to be included in proportionality assessments too.

Nonetheless, while CDE methodologies have developed to allow a better evaluation of the expected extent of loss of life and physical damage or injuries, this does not apply to mental injuries. Thus, the assessment of mental illness *ex ante* during a war is arguably much more problematic than the assessment of physical injury as it cannot be predicted by CDE methodology, which even for physical injury cannot distinguish between the types of predicted injury. Mental illness is arguably too hypothetical and not a foreseeable result of a specific attack. The mental reaction of different individuals to different incidents varies greatly. Furthermore, establishing a causal relationship between a specific military action and mental harm is likely to be problematic.<sup>178</sup>

### 3.5.2 Harm to Civilian Use of Dual-Use Objects

According to Article 52(1) of AP I, objects that do not qualify as military objects are civilian objects.<sup>179</sup> Objects which effectively contribute to military action “by

<sup>174</sup> International Criminal Tribunal for Rwanda (ICTR), *The Prosecutor v. Athanase Seromba (Trial Judgement)*, ICTR-2001-66-I, 13 December 2006 para. 46 <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-01-66/appeals-chamber-judgements/en/080312.pdf> accessed 15 May 2021

<sup>175</sup> ICTY, *Prosecutor v. Akeyasu*, ICTR-96-4-T, Judgment (Trial Chamber), 2 September 1998, para. 502 <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-96-4/trial-judgements/en/980902.pdf> accessed 12 April 2021

<sup>176</sup> UN Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002)*, 25 May 1993, art. 4(2) [https://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf) accessed 12 April 2021

<sup>177</sup> UN Security Council, *Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006)*, 8 November 1994, art. 2 [https://legal.un.org/avl/pdf/ha/ictr\\_EF.pdf](https://legal.un.org/avl/pdf/ha/ictr_EF.pdf) accessed 12 April 2021

<sup>178</sup> International Committee of the Red Cross & Université Laval (n 139) 35-36

<sup>179</sup> International Committee of the Red Cross, Additional Protocol I, art. 52(1) <https://ihl-databases.icrc.org/ihl/WebART/470-750067> accessed 14 April 2021

their nature, location, purpose or use” and whose “total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage” qualify as military objects.<sup>180</sup>

The problem emerges when objects used for civilian purposes are simultaneously used for military purposes too, consequently qualifying them as military objectives. Such objects are called dual-use objects. An example is an apartment building in which one flat or floor is utilised for military goals, or an electricity generating plant used for both military and civilian purposes so that an attack will significantly impact public health. In this scenario, should damage to the civilian part of the building or the civilian function of the plant be factored into the proportionality assessment?

From a legal perspective, a classification of dual-use objects does not exist – an object is either a civilian object or a military objective. Thus, one argument is that the damage to civilian parts of a dual-use object should not affect proportionality assessments since such object is a military objective by definition.<sup>181</sup>

Another argument is that the damage to civilian parts of such an object should, in fact, be calculated into proportionality assessments.<sup>182</sup> This view is supported by a number of official declarations and manuals. For instance, the US Joint Publication 3-60 on Joint Targeting states that “[i]f the attack is directed against dual-use objects that are legitimate military targets but also serve a legitimate civilian need (e.g., electrical power or telecommunications), then this factor must be carefully balanced against the military benefits when making a proportionality determination”.<sup>183</sup> This view was endorsed by the ICTY Trial Chamber in *Prlić et*

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<sup>180</sup> International Committee of the Red Cross, Article 52(2) of Additional Protocol I <https://ihl-databases.icrc.org/ihl/WebART/470-750067> accessed 14 April 2021; International Committee of the Red Cross (n 8)

<sup>181</sup> Cohen (n 34) 37

<sup>182</sup> Marco Sassòli and Lindsey Cameron, ‘The Protection of Civilian Objects: Current State of the Law and Issues *de lege ferenda*’, in N. Ronzitti and G. Venturini (eds), *The Law of Air Warfare: Contemporary Issues* (Eleven International 2006) 57 <https://archive-ouverte.unige.ch/unige:9742> accessed 14 April 2021

<sup>183</sup> United States, Joint Publication 3-60, *Joint Targeting*, 31 January 2013 1-5 [https://www.justsecurity.org/wp-content/uploads/2015/06/Joint\\_Chiefs-Joint\\_Targeting\\_20130131.pdf](https://www.justsecurity.org/wp-content/uploads/2015/06/Joint_Chiefs-Joint_Targeting_20130131.pdf) accessed 14 April 2021

*al.*, where the destruction of a bridge was considered disproportionate as it made it impracticable for the residents to obtain food and medical supplies.<sup>184</sup>

### 3.5.3 Economic Losses and Displacement

During armed conflict, civilians may suffer economic losses in the form of loss of livelihood and damage to their property. They may also be displaced because they want to protect themselves from being exposed to harm either presently or in future attacks. Displacement can be detrimental to civilians' wellbeing due to a number of reasons, including loss of income and limited or non-existing access to public facilities.<sup>185</sup> Since forced displacement is banned by the law of armed conflict, the point specifically concerns instances of incidentally caused displacement.<sup>186</sup>

The US Department of Defence Law of War Manual specifically mentions that “the attacker would not be required to consider the economic harm that the death of an enemy combatant would cause to his or her family, or the loss of jobs due to the destruction of a tank factory”.<sup>187</sup> Thus, the indirect economic impacts of the engagement of legitimate targets are considered too remote to be relevant. Neither does overall harm to business in the vicinity of military actions need to be taken into account. For instance, during an attack that occurred in Fallujah in May-June 2016, blockage of entry to the city's markets or loss of potential customers by said markets were not relevant considerations when planning the operation.<sup>188</sup>

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<sup>184</sup> ICTY, *Prosecutor v. Prlic et al.*, IT-04-74-T, Judgment (Trial Chamber), 29 May 2013, Vol. 3, para. 1582-84 <https://www.icty.org/x/cases/prlic/tjug/en/130529-3.pdf> accessed 14 April 2021

<sup>185</sup> Cohen (n 34) 41

<sup>186</sup> International Committee of the Red Cross, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287 art. 49 <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=77068F12B8857C4DC12563CD0051BDB0> accessed 12 May 2021; International Committee of the Red Cross (n 26) art. 17 91; International Committee of the Red Cross, *Customary International Humanitarian Law Rules*, Rule 129-133 [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter38](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter38) accessed 12 May 2021

<sup>187</sup> US Department of Defence (n 101) 262

<sup>188</sup> International Committee of the Red Cross & Université Laval (n 141)

On the other hand, the NATO Bombing Report specified that “[e]ven when targeting admittedly legitimate military objectives, there is a need to avoid excessive long-term damage to the economic infrastructure and natural environment with a consequential adverse effect on the civilian population”.<sup>189</sup> Hence, it may be argued that displacement and direct economic loss may be factored into proportionality calculations.

This view was also supported by some experts at the Quebec Meeting, who emphasised that the economic loss or displacement in question must be foreseeable and not too remote in order to be factored into proportionality calculations. The problem, however, is that of relating economic losses and displacement in question to specific attacks, since these may occur over a long time frame with several influencing factors, including more general and protracted consequences such as limited access to markets and labour.

## **CHAPTER 4**

### **MAKING PROPORTIONALITY WORK**

#### **4.1 Utilising the Test of Necessity**

The first step in creating a more effective test for proportionality is to analyse ‘necessity’ as a precondition of the fulfilment of the principle. Unnecessary collateral damage can never be proportionate. Military practitioners tend to consider proportionality fulfilled once further minimisation of the collateral damage expected from a chosen target cannot be achieved, for instance, through making a change in the weapons employed or in the time or angle of the attack, at which stage the planned attack will probably be authorised. This is a necessity judgment, albeit an insufficient one. Fulfilling the test of necessity also involves routinely looking for alternate targets, weapons, methods and courses of action

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<sup>189</sup> United Nations, International Criminal Tribunal for the former Yugoslavia (n 65) para. 18

that are available at the time and then picking the one with the best proportionality calculation to implement the anticipated military goal.<sup>190</sup>

Thus, the proper test for determining whether the collateral damage to be potentially caused by a particular attack would be excessive with regard to “the concrete and direct military advantage anticipated” is the test of necessity. This means that, so long as an attack is considered to have a concrete and direct military advantage, the decisive point in confirming compliance of the attack with the proportionality principle is whether the military commander has used the least deleterious means of achieving that objective in terms of the collateral damage caused by the attack in question. Put differently, the question is whether different targets, weapons and courses of action available at the time could have led to the attainment of the same military objective as successfully while at the same time causing less civilian suffering or injury. This is not to undermine the difficulty of investigating alternate courses of action in combat, but this problem could be addressed by drawing up a list to determine and eliminate alternate courses of action in average military scenarios by an international body.<sup>191</sup>

What, then, is the difference between necessity and proportionality? The difference is that proportionality cannot imply an absolute standard of law, whereas necessity can, albeit in theory. The reason for this is that an attack could only have been necessary if there was no alternative course of action which could reasonably meet the same military advantage by causing less collateral damage. Difficult choices will, of course, still have to be made by military commanders in the military field because the epistemic conditions under which a military commander can establish the necessity of a particular attack will hardly ever be present during hostilities. But the theoretical scenario in which the requirement of necessity is fulfilled forms the grounds on which a certain and stable set of criteria may be established for its application in practice. This is not the case for proportionality, mainly due to the subjective nature of inflicting excess collateral damage.<sup>192</sup>

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<sup>190</sup> Dill (n 72) 5-6

<sup>191</sup> Estreicher (n 4) 156

<sup>192</sup> Dill (n 72) 6

Nevertheless, it is crucial to note that the test of necessity does not replace the proportionality formula. Rather, it acts as a complement to unguided discussions about ‘excessive’ losses by offering a place to start with.<sup>193</sup>

#### **4.2 Procedural Requirements of Article 57 of AP I and *Ex Ante* – *Ex Post* Reviews of Proportionality**

The second step in making more efficient use of the proportionality test is to apply it by systematically drawing on the procedural requirements stipulated under Article 57 of AP I, which are already considered as being implicit parts of the proportionality calculus set forth under AP I. These procedural requirements can be divided into three categories: (i) the duty to avoid launching a potentially disproportionate attack as found under Article 57(2)(iii) of AP I; (ii) the duty to suspend or cancel a potentially disproportionate attack as found under Article 57(2)(b) of AP I; and (iii) the duty to choose the target with the most agreeable proportionality calculation as found under Article 57(2) of AP I.

These duties function as part of precautionary measures that need to be employed by decision-makers in order to ensure compliance with the principle of proportionality. Article 57(2)(a)(iii) of AP I prohibits decision-makers from launching disproportionate attacks at the authorisation stage. On the other hand, Article 57(2)(b) of AP I requires decision-makers to suspend or cancel an attack if its disproportional nature becomes obvious in the post-authorisation stage.<sup>194</sup>

Accordingly, belligerents are obliged to undertake “all feasible precautions” and exercise “constant care” to cut down on collateral damage in combat. Nonetheless, the question of what it means to take all feasible precautions and exercise constant care to implement the proportionality principle remains elusive and needs to be clarified.<sup>195</sup>

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<sup>193</sup> Dill (n 72) 6

<sup>194</sup> Barnidge (n 28) 278

<sup>195</sup> Dill (n 191)



The precautionary measures introduced by Article 57 of AP I somewhat resonate in the decision of the Israeli Supreme Court in the Public Committee Against Torture in Israel v. Government of Israel<sup>196</sup>, which examined whether Israel's preventative targeted killings of terrorist members of militant Palestinian organisations were legal or not. As it is, these actions were held to be legal provided they met certain criteria. The main limitation imposed by the court on targeted killings operations was that the collateral damage sustained by civilians not taking direct part in hostilities, *i.e.* innocent civilians, during the course of operations had to be minimised.

In its judgment, the court referred to the need to proceed on a case-by-case basis and appreciated that the test is riddled with uncertainty:

“Take an ordinary case of a combatant or terrorist sniper who is shooting at soldiers or civilians from the balcony of his home. Shooting at him will be proportionate even if as a result an innocent civilian who lives next to him or who passes innocently next to his home is hurt. This is not the case if the house is bombed from the air and dozens of residents and passers-by are hurt. ... The difficult cases are those that lie in the area between the extreme examples.”<sup>197</sup>

The court offered only limited guidance on the hard cases, stating that “the military advantage should be concrete and direct” and that “[a] balance should be struck between the duty of the state to protect the lives of its soldiers and civilians and its duty to protect the lives of innocent civilians who are harmed when targeting terrorists”.<sup>198</sup>

While delivering his judgment, Justice Aaron Barak submitted that *ex ante* and *ex post* examinations needed to be carried out in respect of targeted killings

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<sup>196</sup> Supreme Court of Israel, *The Public Committee Against Torture in Israel v. Government of Israel* HCJ 769/02 [2006] <https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Public%20Committee%20Against%20Torture%20in%20Israel%20v.%20Government%20of%20Israel.pdf> accessed 11 April 2021

<sup>197</sup> *Ibid.* para. 46, 137-8

<sup>198</sup> *Ibid.*

operations. *Ex ante* means before the event and concerns making predictions concerning future events. *Ex post*, the opposite of *ex ante*, means after the event and concerns making evaluations after an event has already occurred. With regard to *ex ante* reviews, the judge required a careful inspection to be carried out in respect of each case that could potentially result in collateral damage. This is in line with the precautionary obligations laid down in Article 57 of AP I. As for *ex post reviews*, they were envisioned as a review process that would eventually be judicially supervised.<sup>199</sup>

The first thing to mention with regard to *ex ante* reviews is that proportionality is concerned with reasonableness – it is founded on the basis of decisions made by the reasonable military commander. Needless to say, this is a very general standard. When courts supervise the actions of administrative bodies, they are reluctant to dispute these bodies' decisions because most governmental bodies are experts in their respective fields. Thus, in this case, the test for reasonableness is primarily procedural and concerns (i) whether the administrative body followed the correct procedure, (ii) whether it possessed all the applicable information, (iii) and whether it gave a proper hearing to all views. In a nutshell, what is being judged is the decision-making process itself. This formula can also be applied to military commanders' field decisions concerning the proportionality principle.

Naturally, then, a military operation should only be initiated if a suitable inquiry is made concerning the extent of the potential collateral damage to be sustained by civilians. This needs to be done by asking the right questions. Israel's Operation Cast Lead in the Gaza Strip is one example where successful *ex ante* reviews of compliance with international law were carried out. During this operation, the IDF specifically asked military commanders to take international humanitarian law into consideration while planning an operation and got legal advisors involved in this planning stage by requiring them to provide advice regarding specific targets too.

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<sup>199</sup> Cohen (n 34) 30

In this case, it appears that damage to civilians was limited by asking the right questions and making the right controls.<sup>200</sup>

Today, most Western armies are in fact employing legal advisors to confirm that *ex ante* reviews of proportionality are carried out. However, how can we be sure that military commanders who are deemed reasonable are in fact asking the correct questions before making a proportionality calculus?

In administrative law, courts making judicial review of administrative issues both before and after their occurrence are obliged to ensure that the right questions are asked by administrators before they embark on an action. That said, courts are hesitant to intervene in military operations before they are initiated. This is mainly because judicial review takes time and could result in a delay in the timely deploy of a military action. In other words, courts are not willing to shoulder the responsibility of damages caused by a delay. Despite demonstrating a general willingness to intervene in military operations, even the Israeli Supreme Court has normally refrained from intervening in them while they are under way by limiting itself to making general comments about suitable ways to proceed.<sup>201</sup>

Thus, a further form of investigation in the form of *ex post* review may be required. Courts are hesitant to intervene in military matters even in the post-operation stage because they believe their knowledge of the conditions to be less than that of military commanders. Nevertheless, if a military commander knows that an operation will be reviewed after it has been carried out, he is likely to take more care to carefully contemplate all the possibilities before arriving at a decision. Effectively, *ex post* review usually means internal army investigations carried out to evaluate the effectiveness of a mission. However, it is crucial that the military commander are not investigated by officials who form integrant members in the same chain of command. Otherwise, the investigation would be likely to yield untrustworthy results.<sup>202</sup>

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<sup>200</sup> Cohen (n 34) 35

<sup>201</sup> Cohen (n 34) 31-32

<sup>202</sup> Cohen (n 34) 32

In human rights violation cases, a number of courts have made declarations on how an investigation should be conducted. For instance, the European Court of Human Rights gave an expansive definition in the *Isayeva* case<sup>203</sup> concerning the death of a few hundred Russian-Chechnyan civilians during the war in the area. In this case, the court held that the internal Russian investigation, which had exonerated all relevant persons, was inadequate. The court explained that an investigation conducted in these matters could only be considered sufficient if four criteria are met. First, investigators must be formally and practically independent from the individuals whose actions will be examined. Second, the investigation should be able to culminate in effective remedies, including criminal investigations if appropriate. Third, investigations must be carried out promptly. And fourth, the investigation must have an adequate public scrutiny component to result in practical as well as theoretical accountability.<sup>204</sup>

These are not the only possible criteria for investigating the adequacy of internal investigations, nor is there a precise formula for their manner of application and the respective weights that ought to be accorded to each of them. Nonetheless, they indicate a general framework for the type of investigation that should be carried out concerning military operations involving civilian casualties. There is no specific need for the investigation to be of an international nature, even though such an investigation would appear to yield more independent results. That said, the enquiry committee needs to include military officials who are able to assess the reasonableness of the relevant military actions of the attacking force in order for the investigation to be successful. Indeed, this is the practice of the UN when appointing enquiry committees.<sup>205</sup> For instance, the commission appointed by the UN to investigate the 1996 Qana incident in Lebanon was led by a retired general.<sup>206</sup>

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<sup>203</sup> Application no. 57950/00 *Isayeva v. Russia*, European Court of Human Rights [2005] <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-68379%22%7D> accessed 11 April 2021

<sup>204</sup> Application no. 57950/00 *Isayeva v. Russia*, European Court of Human Rights [2005] para. 209-14 Application no. 57950/00 *Isayeva v. Russia*, European Court of Human Rights [2005] <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-68379%22%7D> accessed 11 April 2021

<sup>205</sup> Cohen (n 34) 33

<sup>206</sup> UN Security Council, Report of the Secretary's General Military Advisor Concerning the Shelling of the United Nations Compound at Qana on 18 April 1996 (1 May 1996), UN Doc. S/1996/337 annex <https://unispal.un.org/UNISPAL.NSF/0/62D5AA740C14293B85256324005179BE> accessed 11 April 2021

## CONCLUSION

Under international humanitarian law, the principle of proportionality prohibits belligerents from launching “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”. As a *jus in Bello* document, AP I does not determine what military goals military commanders or countries can or should have. Instead, in accordance Article 36 and Articles 51-58 of AP I in general, it prohibits certain weapons from being used, defines certain objectives as being off limits, and requires certain precautions to be taken when launching attacks during armed conflicts.

The requirement of the proportionality principle as set forth by AP I is not that the military should inflict as few civilian losses or cause as little collateral damage to civilian objects as possible in some abstract sense. The proportionality test that is stipulated under AP I is not an ‘extensive’ loss formula. On the contrary, it is an excessive loss formula, and ‘excessive’ losses should not be confused with ‘extensive’ losses, because the two terms are not the equivalent of each other. This formula also avoids the “apples and oranges” comparison of dissimilar, incomparable values or aims present in stricter interpretations of the proportionality principle. The military determines the concrete and direct military objective; the military commander’s duty is to implement that objective by reasonably minimising damage to civilians and civilian objects.

Whether the proportionality of an attack should be determined on a case-by-case basis by looking at the military advantage of a specific tactical operation, or on a cumulative basis by looking at the contribution of a specific tactical operation to the belligerent’s overall military campaign is not clear. There is academic and judicial support for both positions. That said, aggregation of attacks seems to be possible and in such a situation, the military advantage of the larger campaign rather than that of a single attack must be considered.

Furthermore, it is highly likely that the security of attacking forces is factored into proportionality assessments. The popularity of a war may indirectly influence military commanders' decisions concerning the sustainability of specific losses in their proportionality assessment.

In addition, the implementation of the proportionality principle by the military commander in real life necessarily involves the making of complex and subjective judgment calls in the military field, which are affected by the specific decision-maker's background, professional experience and moral calculus, hence leading to the likelihood that different military commanders may come to different conclusions regarding the proportionality assessments of the same situation. Moreover, the principle remains too ambiguous due to the language of AP I and puts great trust in the operation of such abstract concepts common sense and good faith, with its lack of precision operating in the interests of the military rather than that of civilians. As a result, the effectiveness of the proportionality principle to adequately guide well-intentioned combatants in their military actions and provide sufficient protection to civilians in armed conflict is significantly reduced.

Finally, it is possible that illness and mental health may be included in the notion of incidental harm as used within AP I, provided it is possible to establish foreseeability and a causal link between these occurrences and a specific attack, which is difficult to achieve through CDE methodologies. There is also support for the view that harm to civilian use of dual-use objects should be factored into proportionality calculations. As for economic loss and displacement, while indirect economic effects are considered to be too remote to be relevant, direct economic loss and displacement appear to be relevant for proportionality assessments.

One suggestion for increasing this effectiveness is to apply proportionality by implementing the test of necessity as a precondition and by systematically drawing on the procedural requirements stipulated under Article 57 of AP I. The test of necessity essentially requires asking if the predicted collateral damage to could be further decreased through choice of weapons, timing or angle of attack. While the difficulty of investigating alternate courses of action in combat should not be undermined, this is a problem which could be addressed by drawing up a

list of steps to determine and eliminate alternate courses of action in average military scenarios by an international body.

As for the precautionary measures that should be undertaken by decision-makers under Article 57 of AP I, what follows is that a military operation should not be allowed unless an effective inquiry can be made as to the amount of potential collateral damage by asking the right questions and making the right controls. This serves to prohibit decision-makers from launching disproportionate attacks at the authorisation stage and requires decision-makers to suspend or cancel an attack if its disproportionate nature becomes clear in the post-authorisation stage.

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