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CHAPTER 13

PROPORTIONALITY IN THE LAW OF ARMED CONFLICT

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1 INTRODUCTION

PROPORTIONALITY has long been a mysterious topic in international law. Its critics have tended to highlight its inherent indeterminacy and the subjective character of its assessment. They argue that this indeterminacy undermines the capacity of rules based on proportionality to define a predictable frame of reference for state conduct. Nonetheless, proportionality is over time becoming a constant presence in the international legal landscape. It is frequently referred to in legal scholarship and case law as a useful legal device, capable of explaining the functioning of an ever-increasing number of international rules.

The reasons for this success are manifold. First, proportionality offers an alternative model of law-making. In the classical model, general and abstract rules are based on a predetermined balance of values and interests that are presumed to remain stable over time. These rules consequently determine the conduct to be pursued, or the result to be achieved, and they distribute rights and duties accordingly. The change of the predetermined balance of interests entails the need to change the rule.

A different model is the one based on proportionality. This alternative model applies to situations in which a number of different interests entitled to legal

protection can be identified but cannot be *a priori* composed in a predetermined behavioural scheme. Rather, the various interests and values at stake can be combined according to a potentially infinite range of possible combinations, each for the potentially infinite range of concrete situations in which the legal rule can apply. It is from this combination, to be applied on a case-by-case basis, that concrete rules of conduct will ultimately emerge.

This changing balance of interests requires unusual capacities for a legal rule, in particular the capacity to adapt its content to the specific features of every single case: a property at odds with the structured theoretical character of legal rules. Whereas in the classical model the normative content is determined directly by the rule, in the case of proportionality the normative content emerges, rather, from a secondary process of law-making based on the assessment of proportionality.

A further reason that accounts for the extraordinary success of proportionality probably lies in the structural deficiencies of the process of change to international rules. Rules based on proportionality incorporate a mechanism that adapts their content to the evolving legal environment. By referring to a plurality of values and interests to be conveniently composed as each new case arises, rules based on proportionality are therefore not immutable over time. Rather, they change their content in correspondence with the changing content of the values and interests they refer to, and in correspondence with changes in their respective importance in the international community. In other words, proportionality can be seen as a law-making process that continuously adapts the content of the rule to changing social needs, circumventing the complexities of the rules of change in the international legal order.[1]

2 Proportionality as a Form of Legal Control of Armed Conflicts

These virtues of proportionality make it a normative device particularly appropriate to the law of armed force.[2] This is a highly politically sensitive field where states are particularly reluctant to accept strict rules imposing objective forms of control.

[1] See E. Cannizzaro, *Il principio della proporzionalità nell'ordinamento internazionale* (Milan: Giuffrè, 2000), 429ff; T.M. Franck, 'On Proportionality of Countermeasures in International Law', 102 *American Journal of International Law* (2008) 715–67.

[2] For a specific study on the role and contents of proportionality in the law of armed conflict, see J. Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge: Cambridge

Moreover, this field presents itself as a permanent ground of confrontation among competing interests and values: the interests of states to pursue their military objectives free from restraint, on the one hand; and humanitarian and other individual, collective and even universal interests, on the other hand. The precise identification of permitted conduct can therefore hardly be determined in the abstract. It emerges from the combination of a plurality of competing interests whose respective weight must be determined with specific reference to facts and circumstances existing on a given moment.[3] To determine the rules governing the conduct of military hostilities thus becomes an impossible exercise of law-making. It might thus prove to be impossible to encapsulate, in detailed legal rules, all the infinite situations in which states employ armed force. Recourse to rules based on proportionality thus makes it possible to cover an ample spectrum of conduct in a relatively small number of quite simple rules, which, moreover, evolve over time in correspondence to the development of social custom.

The purpose of this Chapter is to reappraise legally the notion of proportionality in humanitarian law (*ius in bello*), by itself and in its relations with the law governing the resort to the use of armed force (*ius ad bellum*). The relationship between the rules that determine the legality of the use of force and those which tend to impose restraints on military action, presents an interesting object of analysis and a litmus test for assessing the future development of the law of armed conflict.

This purpose also dictates the structure of the Chapter and explains the unequal space devoted respectively to *ius in bello* and *ius ad bellum*. The following two sections will separately analyse the structure and content of proportionality in *ius in bello*, and in *ius ad bellum*. The final section will be devoted to the role of proportionality in the relationship between the two regimes.

University Press, 2004). For detailed reference to proportionality in the frame of recent overall analysis on the law governing the use of force, see Y. Dinstein, *War, Aggression and Self-Defence* (5th edn, Cambridge: Cambridge University Press, 2011); C. Gray, *International Law and the Use of Force by States* (3rd edn, Oxford: Oxford University Press, 2008); O. Corten, *The Law Against Force: The Prohibition on the Use of Force in Contemporary International Law* (Oxford: Hart, 2010).

[3] Although sometimes referred to as a unitary normative tool, proportionality seems rather to be a general scheme, which includes a number of different techniques having as a common denominator the power of a state to determine the appropriate balance among a plurality of competing interests. In particular, a distinction must be drawn between two categories of rules: on the one hand, those rules which predetermine a dominant interest, which takes priority over other competing interests upon condition that this does not entail excessive damages to other competing values and interests and, on the other hand, those rules which refer to a plurality of competing interests, none of which taking priority over the other, which must be conveniently composed taking into account the circumstances of each specific situation.

3 PROPORTIONALITY IN *IUS IN BELLO*

A. Proportionality in symmetrical legal relations

The basic reference for proportionality in *ius in bello* is given by Articles 51(5)(b), and 57(2) of Additional Protocol I to the four Geneva Conventions of 1949.[4]

The first provision tends to complete the rules established in the other provisions contained in Article 51, which prohibit indiscriminate attacks against civilians. Article 51(5)(b) regards as 'indiscriminate' not only attacks directed against civilians and attacks that do not distinguish between military and civilian objectives, but also attacks directed against military objectives which cause disproportionate collateral damage. These are attacks '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'.[5]

Article 57(2)(a)(iii) and (b) lay down a detailed regime for belligerents in their decision to launch attacks likely to produce disproportionate collateral damage to civilians or civilian objects. The first makes it necessary to consider the proportionality between military advantage expected and prospective collateral damage in making the decision to launch an attack. The second imposes an obligation to consider proportionality also in the successive phase in which the decision has already been taken or the attack has already been launched. Attacks planned or being carried out must be respectively cancelled or suspended if they might be expected to cause excessive loss or damage.

From these two provisions, commonly considered part of customary law,[6] we can gather important information on the structure of the rule and, therefore, on the standard of proportionality.

First, they draw a link between interests equally entitled to legal protection: the need of the combatants to perform military action and the need of non-combatants to remain unaffected by the pursuit of hostilities. Since neither of them takes clear priority over the other, the balance must be struck among interests of equal rank. Belligerents do not enjoy complete freedom to determine the goal of their action and the means to attain it. Nor are humanitarian interests entitled to claim absolute immunity from damages arising from military operations. The degree and forms of

[4] There are also other rules of *ius in bello* incorporating reference to a technique of proportionality. See Additional Protocol I, Arts 35 and 51(5).

[5] Additional Protocol I, Art 57(2)(a)(iii).

[6] For a detailed analysis of international practice, see J.-M. Henckaerts and L. Doswald-Beck (eds), *Customary International Humanitarian Law*, vol II, part 1 (Cambridge: Cambridge University Press, 2005), 297ff.

the protection accorded to either interest strictly depend on the prejudice that this protection might inflict upon the other.

This observation is theoretically interesting, as it shows that proportionality in *ius in bello* does not include a previous assessment of necessity.[7] This is easily explained. In the classical *ius in bello* conception, belligerents do have an unfettered discretion to use force to overcome the defence of their respective enemy. In other words, in *ius in bello*, unlike in *ius ad bellum*, the use of force is not functionally linked to the achievement of a pre-determined goal. Belligerents do not possess a functional power to use force, but a fully-fledged right. This right is only curtailed by the competing rights of civilians to remain distinct from military objectives. Proportionality is thus a tool that determines the conditions of exercise of two competing and equally ranking rights.

In practical terms, the right to pursue a military attack depends upon the tolerability of the rights of the civilians to remain unaffected by military operation, namely upon proportionality, to be assessed prospectively, on the basis of the prognostic military advantage to be gained with the attack and the presumed damage it might cause.[8]

A second observation, of a systemic character, is that the duty to balance military gains expected with prospective collateral damage is also subjectively symmetrical since it is equally incumbent upon both sides, regardless of any inquiry upon the legality of their ultimate goal. As explained above, proportionality in *ius in bello* has no regard for the reasons which led a state to use force but only concerns the specific objective of each military action. None of the actors involved can claim to be exempted from this balance of interests on the basis of any alleged moral or legal superiority.

[7] For a discussion on the role of necessity in *ius in bello* and for its distinction from necessity as part of the proportionality equation, see Gardam (n 2), 7ff.

[8] The idea that the assessment of proportionality only requires the military commander to minimize the collateral damage deriving from the attack is inconsistent with the balancing philosophy of Arts 57(2)(a)(iii) and (b). The idea that a military commander has unfettered power to achieve a military objective has the effect of radically transforming proportionality into a standard of necessity. Instead of accommodating equally ranking competing interests, proportionality would have the more limited function to prohibit unnecessary collateral damage. See the decision of the ICTY, *Prosecutor v Galić*, IT-98-29-T, Appeal Judgment, 30 November 2006, § 190: 'One of the fundamental principles of international humanitarian law is that civilians and civilian objects shall be spared as much as possible from the effects of hostilities. This principle stems from the principles of distinction and the principle of protection of the civilian population, "the cardinal principles contained in the text constituting the fabric of humanitarian law", constituting "intransgressible principles of international customary law". According to the principle of distinction, warring parties must at all times distinguish between the civilian population and combatants, between civilian and military objectives, and accordingly must direct attacks only against military objectives. These principles establish an absolute prohibition on the targeting of civilians in customary international law, but they do not exclude the possibility of legitimate civilian casualties incidental to the conduct of military operations. However, those casualties must not be disproportionate to the concrete and direct military advantage anticipated before the attack (the principle of proportionality)'. For a different view, see S. Estreicher, 'Privileging Asymmetric Warfare (Part II)?: The "Proportionality" Principle under International Humanitarian Law', forthcoming in the *Chicago Journal of International Law* 11.

B. Objective vs. subjective proportionality

By nature, proportionality is an objective standard. There would be no use in requiring a state to consider humanitarian interests in the pursuit of its military objectives if the balance of interests could be struck according to the state's subjective perception.

There are obvious difficulties, however, in determining which standards apply for measuring the relative weight of highly heterogeneous interests such as, on the one hand, the military advantage expected from an attack and, on the other hand, prospective damages to humanitarian values. This is quite a complex logical operation, which entails the need to determine in advance what can be objectively considered a reasonable cost for the achievement of a military goal.

Protocol I provides some methodological guidance. Both Article 51(5) and 57(2) refer to the objectives of each individual attack. The idea that a higher humanitarian toll is more acceptable in the light of the overall strategic goals of military campaign is at odds with the conceptual structure of the proportionality assessment since the degree of protection of humanitarian values would vary—and indeed, considerably—in relation to the long-term objective of a military campaign.

But even confined to an assessment in the context of each military action, proportionality still remains a difficult exercise of combining competing interests. Under which conditions is an attack against a military installation located within an inhabited area to be regarded as proportionate? How can the military importance of the installation and the likely humanitarian damage be weighed against each other?

Neither international practice nor case law provides definite answers. The logic of proportionality seems to entail that relatively minor and indirect expected military advantages cannot justify massive casualties among civilians. However, in its decision of 20 December 2006, the Supreme Court of Israel, while identifying proportionality as the proper standard for measuring on a case-by-case basis the legality of targeted killings in the light of the military importance of the killing and of the likely collateral damage,[9] abstained from identifying appropriate tests.

[9] Supreme Court of Israel sitting as the High Court of Justice, *The Public Committee against Torture in Israel and Others v The Government of Israel and Others*, HCJ 769/02, Judgment of 13 December 2006, § 46: 'Take the usual case of a combatant, or of a terrorist sniper shooting at soldiers or civilians from his porch. Shooting at him is proportionate even if as a result, an innocent civilian neighbor or passerby is harmed. That is not the case if the building is bombed from the air and scores of its residents and passersby are harmed'. In the same paragraph, the Court went on to say: 'The state's duty to protect the lives of its soldiers and civilians must be balanced against its duty to protect the lives of innocent civilians harmed during attacks on terrorists'. In spite of the intuitiveness of this statement, it does seem fully correct. The proper test for measuring the proportionality of collateral damages to civilians under Protocol I, indeed, is the 'military advantage' test. Whereas belligerents tend comprehensibly to minimize the risk for their own soldiers, this element does not come into consideration as a balancing factor and it cannot justify a higher level of casualties among 'innocent civilians'. This issue will be further discussed below in the text.

Absent substantive quantitative tests, an important role must be assigned to the procedure to be followed for measuring the relative importance of the diverse values at stake. In this regard, two issues emerge from recent practice.

The first concerns the perspective from which the various interests at stake must be evaluated and balanced against each other. Is that a subjective assessment, to be conducted by the acting agent with the best means at his disposal in the factual conditions in which the assessment is performed, or is it rather an objective assessment, entailing the use of best practices and the gathering of all the pertinent information?

The difference between the two options reveals different conceptions of proportionality. The best example comes from so-called aerial war. On a number of occasions, belligerents tended to justify excessive collateral damages caused by high altitude bombing with the difficulty of the agent, acting from a height adequate to ensure his safety, to assess the situation on the ground. A different assessment could have been made by the agent only at the cost of exposing himself to a higher risk: an impossible condition in the opinion of the supporters of the subjective test.[10]

This example clearly shows the philosophical dilemma between the underlying options: does the safety of the agent enter into account in the balancing of interests, and can it make the attack proportionate? In other words, is the agent entitled to minimize his own risk, and therefore to assess the proportionality of the attack from a perspective which guarantees to his person the highest degree of safety, or is the agent rather compelled to expose himself to a reasonable amount of risk in order to objectively assess the proportionality of the risk incumbent upon civilians and civilian objects?

This theoretical dichotomy has considerable implications in practice. What is the amount of information necessary to decide to launch an attack against a dual use building suspected of hosting a military unit? Is the agent justified to act on the basis of summary information on the presumed absence of civilians, or should he endanger himself, and also the success of the operation, with an effort to gather more accurate information on the ground? Which is to be preferred in such a situation: the safety of civilians, or the life of the agent and the success of the operation?

The scant available evidence of practice does not definitively uphold either of these two options. On the one hand, a certain indulgence emerges for the agents who minimized the risk for their own safety, even at the cost of increasing the imprecision of the calculation of prospective damage for civilians and, therefore, of transferring the higher risk on to them.[11]

[10] See the Report of the United Nations Fact-Finding Mission on the Gaza Conflict, *Human Rights in Palestine and Other Occupied Arab Territories* (Goldstone Report), UN Doc A/HRC/12/48, 25 September 2009, § 1888.

[11] This view emerges from certain conclusions adopted by the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia subsequently endorsed by the ICTY Prosecutor in 1998. The Committee was set up to review the consistency with humanitarian law of the actions carried out in the course of the NATO

The subjective approach seems to have been further stretched, becoming infused with a radical relativism, by the Eritrea–Ethiopia Claims Commission in its Partial Award, Central Front, with regard to Ethiopia's Claim 2, handed down within the context of a wider dispute between Ethiopia and Eritrea on 28 April 2004. The decision is pervaded by the idea that proportionality must be assessed in the light of the personal conditions of the acting agent, even if these conditions relate to inexperience or, perhaps, even ineptitude.[12]

A different course has been taken in other circumstances. There is a certain agreement that proportionality must be assessed from the perspective of the 'reasonable commander', a notion which on the one hand tends to locate the assessment of proportionality with the subjective situation of the agent, but on the other hand seems to require an objective degree of diligence.[13] The standard of the reasonable commander was also adopted by the Israeli Supreme Court in its decision of the lawfulness of targeted killings mentioned earlier. Whereas in some passages the idea seems to emerge that proportionality must be assessed

bombing campaigns in the former Yugoslavia. From the report, the idea seems to emerge that that proportionality of targeting a military objective from a bomber flying from a high altitude must be assessed from the viewpoint of the acting agent. The report also seems to support the idea that casualties caused by high-altitude bombers flying above the range of air-defence systems on the ground were proportionate inasmuch as the resulting damage could not, precisely because of the high altitude, be envisaged by the aircrew. The suggestion seems to rest on the premise that the decision to maximize the security of the military personnel aboard is beyond the reach of proportionality. Consequently, proportionality is not violated even if it were proven that a different strategy of attack would have allowed a better calculation of the ratio between the humanitarian cost and military benefits of the action.

[12] Partial Award, Central Front, Ethiopia's Claim 2, The Hague, 28 April 2004, § 110: 'the Commission believes that the governing legal standard for this claim is best set forth in Article 57 of Protocol I, the essence of which is that all feasible precautions to prevent unintended injury to protected persons must be taken in choosing targets, in the choice of means and methods of attack and in the actual conduct of operations. The Commission does not question either the Eritrean Air Force's choice of Mekele airport as a target, or its choice of weapons. Nor does the Commission question the validity of Eritrea's argument that it had to use some inexperienced pilots and ground crew, as it did not have more than a very few experienced personnel. The law requires all "feasible" precautions, not precautions that are practically impossible'.

[13] See *Prosecutor v Galić* (n 8), § 58: 'One type of indiscriminate attack violates the principle of proportionality. The practical application of the principle of distinction requires that those who plan or launch an attack take all feasible precautions to verify that the objectives attacked are neither civilians nor civilian objects, so as to spare civilians as much as possible. Once the military character of a target has been ascertained, commanders must consider whether striking this target is "expected to cause incidental loss of life, injury to civilians, damage to civilian objectives or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." If such casualties are expected to result, the attack should not be pursued. The basic obligation to spare civilians and civilian objects as much as possible must guide the attacking party when considering the proportionality of an attack. 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'.

under the given conditions of time and place, the opinion of the Court and the individual opinions of its members made frequent recourse to the notion of the 'responsible agent'.[14] The same standard was adopted in the Goldstone report, from which the implication seems to be drawn that proportionality prevents shifting the entire risk onto the civilian population, but requires a reasonable share of risk to be assumed by the actors involved.[15]

The subjective approach seems to be logically at odds with the basic premise on which the proportionality assessment rests. Proportionality does not require the agent simply to be prudent and charitable. It requires his or her actions to be based on a careful apprehension of facts and on an objective balance of interests. This character would be illusory if the agent were allowed to conduct the assessment on the basis of his subjective situation. If an agent does not possess sufficient information objectively necessary to proceed to the balance of interests, he or she cannot but abstain from acting. A different conclusion would run overtly against the logic of proportionality, which is based precisely on the objective character of the balancing of interests, which entails that all the interests at stake must be properly appreciated in their factual dimension.[16]

However, the objective standard is not completely free from inconvenience. A standard which requires states to adopt the best available practice is more easily complied with by states which possess the necessary technology. Yet it might seem inappropriate to assume that proportionality imposes conditions that cannot be complied with symmetrically by all belligerents.[17] In order to be realistic, proportionality must impose requirements that can be met by every state engaged in military action, and it should be based on a reasonable balance between the aim

[14] In *Prosecutor v Galić* (n 8), § 57, dealing with the scope of judicial review, the Court stated that the scope of judicial review does not extend to the executive decisions of military command provided that this is a decision made by a reasonable commander: 'the question is [...] whether the decision which the military commander made is a decision that a reasonable military commander was permitted to make'. Also the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (see n 11) refers to the standard of the 'reasonable commander'. See, in particular, § 50.

[15] See n 10: 'The Mission recognizes fully that the Israeli armed forces, like any army attempting to act within the parameters of international law, must avoid taking undue risks with their soldiers' lives, but neither can they transfer that risk onto the lives of civilian men, women and children. The fundamental principles of distinction and proportionality apply on the battlefield, whether that battlefield is a built up urban area or an open field' (at § 1888).

[16] See, albeit in a different context, *Prosecutor v Galić* (n 8), § 51: 'In case of doubt as to whether an object which is normally dedicated to civilian purposes is being used to make an effective contribution to military action, it shall be presumed not to be so used. The Trial Chamber understands that such an object shall not be attacked when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the object is being used to make an effective contribution to military action'.

[17] One might wonder whether the objective nature of the assessment of proportionality ends up favouring developed states, who possess sophisticate means of information, to the detriment of states which do not possess the necessary technology and which therefore must necessarily act on the basis

to protect civilians and the need to avoid exposure to excessive risk of military personnel.

The standard of the reasonable agent can appropriately balance the diverse needs respectively underlying the subjective and objective options. It does not impose excessive or impossible conditions. It also avoids the incongruence of making proportionality, and therefore the standard of security of civilians, dependent on the standard of security subjectively chosen by the military commanders or their troops. It certainly avoids the incongruence of making the standard of safety of civilians dependent upon the degree of experience or the degree of training of the military personnel.

C. Proportionality and the treatment of civilians

Asymmetric forms of warfare pose new challenges to the classical paradigm of proportionality in *ius in bello*. As seen above, this paradigm was developed with regard to conventional forms of conflict and presupposes the existence of two distinct entities, the belligerents and the civilians, each of which has a distinctive set of interests.

One may wonder whether this paradigm, and in particular the distinction between belligerents and civilians, still makes sense in new forms of conflict, erupting between military armies and irregular groups and which see an ever more active involvement of civilians.

These difficulties are epitomized by the illegitimate tactic of using civilians as human shields. This is a strategy mostly adopted by irregular militias, which consist of locating military operations in densely inhabited areas, thus making it highly problematic for the military response to comply with the principles of distinction and proportionality. The adoption of this strategy has the effect of deeply altering the symmetry in the legal position of the belligerents. Compliance with the principle of distinction and proportionality by one of the belligerents has the effect of limiting significantly the choice of the military strategies, whilst the other belligerents, namely the irregular militias, take advantage of these rules, careless of the possible harm to their own population (not to mention others).

of summary information or, alternatively, must give up the attack. However, the dichotomy between developed states, who can avail themselves of strategies which are out of the reach of developing states, appears misplaced. Proportionality does not require states to endow themselves with the most sophisticated technological equipment. It simply requires states not to launch an attack without collecting convincing evidence that the collateral damage will be proportionate to the military advantage. Thus, international law does not impose impossible requirements on states, but only requirements which can be complied with by every state which behaves in accordance with normal practice.

Not surprisingly, therefore, the idea has been put forward that, with regard to these forms of conflict, the distinction between belligerents and civilians is an obsolescent one and must be set aside.[18] Instead, the protection of civilians should be graduated according to the degree of their involvement in the conflict.

The assumption that the distinction between belligerents and civilians tends to be fuzzy in asymmetric conflicts appears correct and deserves attention. From this premise, however, the consequence can hardly be drawn that this basic paradigm of humanitarian law has lost its function and must be abandoned. Indeed, humanitarian law has developed a tool that can be employed in order to cope with the involvement of civilians in warfare. Article 51(3) reads: 'Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities'.

Admittedly, the protection of civilians under this provision is an all-or-nothing notion lacking the flexibility necessary to follow the nuances of various forms of partial involvement in hostilities. However, the strictness of this approach is offset by the flexibility of the standard measuring the direct involvement in hostilities, which can be conveniently adapted in order to cope with different situations on the ground. It seems to require, as a minimum, active conduct entailing military benefits, performed with a certain degree of wilful participation to the pursuit of military objectives. This standard can be reasonably deemed to meet situations in which civilians, albeit not performing activities typically conducted by military troops, are nonetheless voluntarily contributing to the military operations. It is met, for example, by civilians who voluntarily consent to act as human shields in the awareness that their presence will constitute a deterrent for military attacks. Voluntary consent, however, must be ascertainable by the other belligerent party before they take action on this basis.

To go beyond this assumption, and to conclude that the protection of civilians which do not meet the standard of direct involvement in hostilities can nonetheless be graduated in relation to their conduct appears highly controversial and potentially unsound. From this suggestion one could infer that civilians, who are or must be aware of being utilized as human shields and do not actively avoid it, must bear an additional amount of risk in consequence of their indirect support for the military operations. In order to avoid this additional amount of risk, which would make collateral damage 'more acceptable' as a consequence of their 'indirect part' in hostilities, there would need to be a new rule that civilians must refuse to be used as human shields, abandoning the zone of operations or even actively resisting the presence of the militias in inhabited areas.[19]

[18] See eg M. Galchinsky, 'Quaint and Obsolete: The "War on Terror" and the Right to Legal Personality', 14 in *International Studies Perspectives* (2013) 255–68.

[19] The presumption that the civilians which do not follow the warning of belligerents are exposing themselves voluntarily to risk and, consequently, are entitled to a lesser degree of protection is a *caveat*

Although suggestively fashioned, the question cannot be answered but in the negative. The idea that civilians have a positive obligation to act in order to prevent belligerents from using them as human shields has two significant setbacks.

First, it has the effect of inverting the *onus probandi* in regard to the distinction between belligerents and civilians, which is incumbent upon the former. It appears unacceptable that the burden of proof concerning the principle of distinction should rest on the person used as human shield.

Secondly, and perhaps more importantly, it has the further effect of subverting the logic of the system of protection of civilians established by *ius in bello*. To presume that civilians who remain idle are taking 'indirect' part in hostilities and must therefore accept a higher risk of collateral damage has the effect of circumventing the principle of distinction and to make them indistinguishable from military personnel. The principle of proportionality, incorporated into humanitarian law in order to enhance the protection of civilians, would be used in order to attain the inverse objective, that is, to grant belligerents the right to demand from civilians of the other party a positive action and to punish their idleness.

4 PROPORTIONALITY IN *IUS AD BELLUM*

A. The structure of the proportionality assessment in asymmetrical legal relations

A different structure applies to the assessment of proportionality in *ius ad bellum*. The basic premise of this assessment is that the aggression is unlawful conduct, which justifies an armed response. In other words, international law establishes a clear hierarchy between the interests of the two classes of actors: whilst the victim

canem argument which, as such, has no place in contemporary humanitarian law. In *Public Committee Against Torture v Israel*, its decision on targeted killings (see n 9), the Supreme Court of Israel reasoned in the following way: 'what is the law regarding civilians serving as a "human shield" for terrorists taking a direct part in the hostilities? Certainly, if they are doing so because they were forced to do so by terrorists, those innocent civilians are not to be seen as taking a direct part in the hostilities. They themselves are victims of terrorism. However, if they do so of their own free will, out of support for the terrorist organization, they should be seen as persons taking a direct part in the hostilities' (§ 36). Yet the problem is precisely to determine the fate of those who neither are forced to serve as human shields nor do so with the specific intent intent to contributing to the military strategies of one of the belligerents.

of aggression is entitled to legal protection, the aggressor is protected only against excessive defensive measures.

It follows that proportionality is not a technique designed to combine conflicting interests and values entitled to the same level of protection. In *ius ad bellum*, proportionality is traditionally conceived as a means to establish a relation of appropriateness between asymmetrically protected interests: the paramount interest of the attacked state to repel the armed attack, on the one hand; and an open set of other interests which might be affected by the defensive action, be they individual, collective, or universal, on the other hand.

The different function of proportionality also explains its different logical structure. In *ius ad bellum*, proportionality traditionally limits the power conferred on a state to use force unilaterally for the achievement of a predetermined end. It therefore presents the classical three-step structure that typically defines the proportionality assessment in the context of functional powers: the military response must be suitable and necessary to achieve its goal, and must not entail an excessive sacrifice of other legally protected interests.

However, there is no unanimous view in legal scholarship or in the case law on the identification of the goal of a forcible response to an armed attack. Quite the contrary: this issue was addressed by a heated scholarly debate whose terms can be broadly grouped in two major streams. A restrictive view tends to regard the need to repel the attack as the only goal of a unilateral forcible response to an armed attack.[20] According to this view, the power to use unilaterally defensive force is an exception to the general prohibition on the use of force designed to give to the attacked state the means to resist the aggression, to avoid defeat and to restore its territorial sovereignty. The definitive removal of the threat, and the permanent restoration of conditions of peace and security, is a function to be discharged through collective action. From the opposite perspective, the objectives and the scope of unilateral resort to force are broader and include aims of prevention and deterrence or, more broadly, the aim to create a safe environment for the attacked state.[21]

Although the former view seems to the current author more in accordance with practice and the logic of the system, there is no need, for the limited purposes of the present contribution, to engage in a thorough analysis of this issue. We will see that the analysis of the structure and functioning of proportionality can also contribute, to an extent, to the identification of the ultimate goal of self-defence.

[20] See also for further reference, Corten (n 2), 480ff.

[21] A thorough presentation of the theoretical foundations of this thesis is contained in Dinstein (n 2), esp 185ff.

B. Applicable standards: quantitative proportionality and qualitative proportionality

The idea that proportionality is measured by quantitative standards stems from a primitive view of proportionality as a requirement of rough quantitative equivalence between attack and defence. Equivalence, in turn, could be measured in terms of the means employed or the damage inflicted by each.

Although quite simplistic, the tendency to anchor proportionality to quantitative terms of measurement nonetheless has deep roots in the international legal thought.[22] Its success is probably due to the belief that quantitative standards are easily measurable and therefore bestow a certain degree of objectivity on the highly indeterminate standard of proportionality. In other words, objective standards might prove to limit better unilateral use of force and to reduce arbitrariness.[23]

Other reasons, however, plead for the adoption of a different standard. The most obvious is that the primary objective of the rules of *ius ad bellum* is not so much to give to the states the power to punish unlawful conduct, but rather to repel the attack or even, according to some, to prevent or deter it. If the use of lawful force were determined by recourse to a standard of equivalence, that primary goal might remain unattained.

This consideration might prompt the adoption of qualitative standards of measurement of proportionality. A qualitative approach tends to measure proportionality not by reference to equivalence between material goods, but rather by reference to the appropriateness of the means to achieve their ends. In the case of *ius ad bellum*, force is lawfully employed if it proves to be necessary and appropriate and does not unduly interfere with other interests and values.

The adoption of a qualitative standard highlights the exceptional function attributed to the unilateral use of force in contemporary international law. The use of force does not have the function of inflicting retribution on the counterpart, which could in principle be governed by a standard of equivalence. Rather, it is a means necessary to discharge the essential function of self-defence. In international law, self-defence is therefore conceived as a temporary remedy for responding to an aggressive use of force, thus complementing the function of the institutional

[22] See Art 51 of the International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts, UNGA Res 56/83, UN Doc A/RES/56/83, 12 December 2001, Art 51, according to which 'Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.'

[23] A mixed approach was taken by the International Court of Justice in *Oil Platforms (Islamic Republic of Iran v United States of America)* [2003] ICJ Rep 161, 6 November 2003. At §§ 75 and 76 the Court seems to point out that necessity and proportionality must be measured by different standards: a qualitative standard will measure the necessity of the response, whereas its proportionality should be assessed by a quantitative standard. This reasoning appears at § 77, where the Court compared the relatively minor scale of the Iranian attack alleged with the large scale of the response adopted by the United States and concluded that the response was disproportionate.

mechanism of collective security. It follows that a state acting in self-defence must have at its disposal all the means necessary to respond to an armed attack. To impose a quantitative limit of equivalence on the means employed by the attacker or on the damage inflicted would be tantamount to denying the essence of the function that the armed response is designed to serve.

This explains why proportionality in *ius ad bellum* must be measured in purely qualitative terms,[24] thus allowing the use of the means necessary and proportionate to the strategic goal of self-defence. Unlike proportionality in *ius in bello*, which looks only to the short-term goal of each military action, proportionality in *ius ad bellum* is measured against the strategic objective of self-defence.

The adoption of qualitative standards, however, does create additional questions. Beyond the rhetoric of self-defence, determining the long-term goal of military actions is a difficult exercise. States would then have an ample degree of discretion at their disposal. This degree of discretion would further increase if self-defence were considered not to be necessarily limited to create security within one's border, but as extending to the means necessary to create overall conditions of security and to remove permanently the source of threat even beyond borders.

Furthermore, a qualitative standard establishes a direct relationship between the purported objective and the means appropriate to achieve it. The appropriateness of the armed action must be measured by reference to the interest that the acting state is entitled to pursue. It follows that the level of protection of that interest, and not only the interest itself, must be determined objectively. Otherwise a paradoxical situation would arise: by setting unilaterally the level of protection of its own interest, the defending state could circumvent the limits set up by reference to a standard of proportionality. This proposition is valid whatever the ultimate objective of self-defence might be. The higher the level of protection which a state tends to secure for its defensive interest, the more extensive the set of means employed and the damage that constitutes a fair 'price' for its attainment.

This observation also seems to highlight the different functions of necessity and proportionality in *ius ad bellum*. Whereas the former tends to secure the existence of a functional link between military action and the defensive purpose, the latter has a wider scope and includes a comparison of the benefits and the costs entailed by the full achievement of that purpose. In particular, the adoption of a qualitative standard implies that not only the means of the action, but also ultimate strategic goals must be determined through a 'balance of interests' analysis.

We are thus led, through a logical analysis of proportionality, to conclude that the strategies of the state acting in self-defence cannot be determined on the basis

[24] See R. Higgins, *Problems and Process. International Law and How We Use It* (Oxford: Clarendon Press, 1994), 231: 'What marks the transition from the *ius in bello* to the *ius ad bellum* is that, in the former, the hostile act should be proportionate to the specific injury received, while in the latter the use of force should be proportionate to the legitimate objective to be achieved'.

of the state's subjective perception of the level of security needed but must be rather based on a cost-benefit analysis which must take into account, beyond the interest of the attacked state, other interests and values prospectively affected by the action in self-defence.[25] Since these interests and values are primarily, even if not exclusively, expressed by *ius in bello*, we now proceed to an analysis of the relationship between *ius ad bellum* and *ius in bello*. This analysis epitomizes the complex interplay between the security and non-security based interests that underlie the assessment of proportionality.

5 The Relationship between Proportionality in *Ius in Bello* and Proportionality in *Ius ad Bellum*

A. The independence paradigm

As noted at the beginning of this Chapter, *ius in bello* and *ius ad bellum* are traditionally regarded as two set of limits which apply fully independently of each other. Both must be complied with by belligerents, since they pertain to different situations. The victim of aggression must comply with proportionality in choosing the means to respond to the attack; both belligerents must ensure that performance of a single military action does not entail excessive collateral damage.[26]

The idea that *ius ad bellum* and *ius in bello* apply independently of each other is probably due to the historical vicissitudes of the two notions. It is common knowledge that *ius in bello* developed at a time in which, supposedly, no legal restraint was deemed to curtail the discretion of states to use force unilaterally. A further argument militating in favour of the independence of the two legal regimes derives from their antithetical logic. *Ius ad bellum* is pervaded by the idea of the moral and legal superiority of the interest of the attacked state, whereas *ius in bello* is based

[25] On this point, see the critical remarks by D. Kretzmer, 'The Inherent Right to Self-Defence and Proportionality in *Jus Ad Bellum*', in 24 *European Journal of International Law* (2013) 235–82.

[26] See *Prosecutor v Boškoski and Tarculovski*, IT-04-82-A, Appeal Judgment, 19 May 2010, esp at §§ 31, 44 and 51. At § 31, the Court said: 'The fact that a State resorted to force in self-defence in an internal armed conflict against an armed group does not, in and of itself, prevent the qualification of crimes committed therein as serious violations of international humanitarian law'. To make it even more explicit, at § 51 the Court added: 'The fact that a State is acting in lawful self-defence (*jus ad bellum*) is irrelevant for a determination as to whether a representative of this state has committed a serious violation of international humanitarian law during the exercise of the state's right to self-defence which constituted part of an armed conflict (*jus in bello*).' See also ICTY, *Prosecutor v Kordic and Cerkez*, IT-95-14/2-A, Appeal Judgment, 17 December 2004.

on the opposite premise of equal moral and equal legal legitimacy of the various interests at stake.

However, this premise is fallacious. As observed in previous sections, far from being two separate and distinct legal regimes, *ius in bello* and *ius ad bellum* continuously overlap. Proportionate action according to one sub-system might prove to be disproportionate according to the other.[27] The full achievement of the aims of one might even make more difficult, and even impossible, the achievement of the aims of the other. It might prove difficult to determine the standard to measure the proportionality of a military action aimed at destroying a missile base located in densely inhabited area. Yet, according to the standard chosen, the conclusion could drastically change. The action could appear indispensable to respond to an actual or prospective armed attack but disproportionate against the more stringent standard of protection of civilians from the perspective of *ius in bello*.

Not surprisingly, therefore, in international practice it is not uncommon for these two conceptually very different techniques of proportionality to be used interchangeably and even, in the grey area of overlap, for them to be conflated in a sort of global assessment of proportionality.[28] A word of clarification might thus be opportune.

B. Expansive vs restrictive view

According to a first option, proportionality in *ius ad bellum*, and the need to give to the attacked state the power necessary to respond to the aggression, has the effect of enlarging its discretion in determining the expected advantage of the military

[27] See the Final Award on Ethiopia's Damages adopted by the Ethiopia-Eritrea Claims Commission (2009). At § 316, the Commission addressed the issue of the compensation to be awarded for violations of *ius ad bellum* which did not amount to violations of *ius in bello* and found that 'if [...] a State initiating a conflict through a breach of the *jus ad bellum* is liable under international law for a wide range of ensuing consequences, the initiating State will bear extensive liability whether or not its actions respect the *jus in bello*. Indeed, much of the damage for which Ethiopia claims *jus ad bellum* compensation involves conduct that the Commission previously found to be consistent with the *jus in bello*. Imposing extensive liability for conduct that does not violate the *jus in bello* risks eroding the weight and authority of that law and the incentive to comply with it, to the injury of those it aims to protect. The Commission believes that, while appropriate compensation to a claiming State is required to reflect the severity of damage caused to that State by the violation of the *jus ad bellum*, it is not the same as that required for violations of the *jus in bello*.'

[28] In the course of the second Lebanon war, many states argued that the violation of proportionality under *ius in bello* also entailed the illegality of the intervention under *ius ad bellum*. For more specific reference, see A. Zimmermann, '*Jus ad bellum, jus in bello* and the Issue of proportionality', 11 *MaxPlanck Yearbook of United Nations Law* (2007) 99–141. I refer to my writing 'Contextualizing Proportionality: *Jus ad Bellum* and *Jus in Bello* in the Lebanese War', 88 *International Review of the Red Cross* (2006) 779–92. An interesting case of conceptual overlap might be found in *Public Committee Against Torture v Israel* before the Israeli Supreme Court. At § 40 the Court said: 'Second, a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means

action. The second, and logically antithetical option is rather to use proportionality in *ius in bello* as a limit to the discretion conferred by *ius ad bellum* to the attacked state to determine its strategy of reaction.

The first option tends to highlight the impact of *ius ad bellum*, a deeply asymmetrical legal regime establishing a clear hierarchy among the belligerents, on the egalitarian legal regime of *ius in bello*. This perspective is grounded on the premise that the need to repel the attack represents the essential yardstick against which the lawfulness of every military action must be assessed. If the only means to repel the attack consists in using means or methods entailing a high number of casualties, this should be nonetheless acceptable because the only alternative would be defeat. *Salus rei publicae suprema lex esto!*

The supporters of this perspective would have at their disposal a wide range of arguments. The most insidious is a systematic argument; namely that the two sub-systems, *ius in bello* and *ius ad bellum*, must be construed consistently. Compliance with one cannot entail disregarding the other. Moreover, a logical and practical argument should also be considered. To require a state to forgo its indispensable means of defence and to submit to inexorable defeat in order to avoid excessive civilian damage might seem a morally and legally untenable proposition. No damage is excessive if the ultimate end is self-preservation.

These arguments, very seductive indeed, seem however to highlight the limits of legal analysis in situations of extreme danger. The idea that law imposes upon states confronted with an armed attack the obligation not to use disproportionate force when they have no other means to avoid the defeat is an extreme and somewhat artificial position. Indeed, it presents a situation that even the ICJ was unprepared to prejudge.[29]

can be employed. In our domestic law, that rule is called for by the principle of proportionality. Indeed, among the military means, one must choose the means whose harm to the human rights of the harmed person is smallest'. The Court did not unveil the source of this rule, which, interestingly, seems to apply only to civilians taking direct part in the hostilities and not to military personnel. It might be argued that such a rule derives from human rights law, which, unlike humanitarian law, requires that any deprivation of life must be based on necessity. This view was suggested in M. Milanovic, 'Norm Conflicts, International Humanitarian Law and Human Rights Law', in O. Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (Oxford: Oxford University Press, 2011), 95. This view seems to be upheld by a short reference to human rights law contained in the decision a few lines below. However, it is interesting to note that a similar structure also inspires the rule of proportionality in *ius ad bellum*, where a state can use force only insofar as it is necessary to repel the attack. One might plausibly assume that the notion of proportionality in *ius in bello* employed by the Supreme Court was also, if not even pre-eminently, inspired by *ius ad bellum*. This would be a case in which a standard of proportionality in *ius ad bellum* also has the effect of limiting proportionality in *ius in bello*. Indeed, classical humanitarian law seems to accord to the belligerents a full-blown right to kill the enemy, be it a regular soldier or a civilian actively involved in the conduct of hostilities, only limited by an obligation to avoid unnecessary suffering.

[29] See the famous finding of the International Court of Justice in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, 8 July 1996: 'In view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would belawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake' (*Dispositif*, § 2E).

Much more frequent is the situation in which a self-defending state has at its disposal a number of strategies of defence which combine, in different measures, humanitarian and security interests: from those giving paramount or exclusive importance to security objectives to those which accept that the level of security sought by a state acting in self-defence also depends upon humanitarian needs.

The difference is easily understood. In the first option, humanitarian values are protected only incidentally, to the extent that might prove possible without impairing the full attainment of the primary goal of self-defence. Thus, for example, a state can use all the means at its disposal to remove a source of insecurity, such as a group of irregulars performing raids across its borders, even if the attainment of this goal entails a high number of casualties. In the second option, the requirement of self-defence and humanitarian interests must be balanced against each other in order to determine their appropriate combination. In the example referred to above, the primary goal of permanently removing this source of threat becomes legally unattainable, and the state must tolerate a certain degree of instability across its borders if the full attainment of security entails excessive collateral damage to civilians.

The first solution, which corresponds to the expansive option, has the effect of giving the defending state the power to determine unilaterally the degree of protection of its security. By elevating the standard of its own security, that state can correspondingly diminish the standard of security imposed by humanitarian law. The effectiveness of humanitarian law would be sacrificed on the altar of the protection accorded by *ius ad bellum* to the attacked state.

The second perspective is one that tends to include the assessment of proportionality in *ius in bello* as part of the assessment of proportionality in *ius ad bellum*. This would imply that proportionality is not only a technique curtailing the discretion of a state in the choice of the means designed to achieve the objective of military action. Its primary function seems, rather, to limit the appropriate standard of protection of the interest of the attacked state to act in self-defence.[30]

By nature, proportionality can offer a suitable means to reconcile the apparently disparate requirements of *ius in bello* and *ius ad bellum*. More precisely, the proportionality in *ius in bello* can be regarded as part of proportionality in *ius ad bellum* insofar as it helps to determine the appropriate balance of interests underlying the adoption of a defensive strategy by the attacked state. If the achievement of that standard subjectively sought by the defender prospectively entails too many casualties, it must be abandoned and a new standard, guaranteeing a lower level

[30] The consideration that lack of proportionality of *ius in bello* can also affect the proportionality of the action under *ius ad bellum* also seems to emerge from the Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident (September 2011), concerning the legality of the attack carried out by the Israeli navy on certain neutral vessels which attempted to reach Gaza past the sea blockade. See, in particular, §§ 69ff and 77ff. See also Appendix I to the Report: The Applicable International Legal Principles.

of security at a much lesser humanitarian cost, must be adopted. *Salusreipublicae* must be balanced with humanitarian values and other collective values that have emerged in contemporary international law.

6 Conclusions: Towards a Common Standard of Proportionality in the Law of Armed Conflict?

The analysis undertaken in the previous sections seems to suggest a unitary notion of proportionality in the law of armed conflict. Proportionality rules out measures which are unnecessary or unsuitable to achieve the legitimate aim of forcible action, or which entail excessive or inappropriate sacrifice to other competing values and interests. Measures which do not pursue a legitimate end, such as those involving use of force short of self-defence, or measures which, while pursuing a legitimate end, nonetheless entail excessive collateral damages, are unlawful, albeit for different reasons and to different degrees.

Proportionality not only represents a flexible tool capable of establishing an objective standard of measurement of unilateral use of force. It also serves as a tool that connects *ius in bello* and *ius ad bellum*. Each of these regimes has its own scope and has developed a substantive and procedural test for assessing the proportionality of armed actions. However, experience has proven that neither regime is self-contained. It is common to find that the one refers to the other in order to provide for a comprehensive evaluation of proportionality. Thus, far from constituting fully independent legal regimes, *ius in bello* and *ius ad bellum* may be regarded as constituting sub-systems of a basic but comprehensive system of rules governing the use of force.

This assumption confirms the prevailing opinion that the proportionality of the use of force under one of the two regimes does not condone disproportionality under the other.[31] Thus, compliance with humanitarian law does not condone the illegality of aggressive action and, vice versa, the defensive character of forcible action does not grant immunity under *ius in bello*.

[31] See C.J. Tams and J.G. Devaney, 'Applying Necessity and Proportionality to Anti-Terrorist Self-Defence', 45 *Israel Law Review* (2012) 91–106.

Beyond these obvious conclusions, however, there are other implications. This contribution has dealt mainly with the impact of *ius in bello* on the balancing of values underlying the assessment of proportionality in *ius ad bellum*. The conclusion has been drawn that *ius in bello* requires a state acting in self-defence to consider the humanitarian cost of the prospective actions before adopting a defensive strategy. This strategy should balance the various interests at stake: the interest in responding effectively to armed attacks, on the one hand, and other individual, collective, or universal interests presumably to be affected by the defensive action, on the other hand.

A different line of research could be undertaken with a view to examining the potential impact of *ius ad bellum* on the assessment of proportionality in *ius in bello*. In particular, a comprehensive assessment of proportionality might bridge the gap consisting in the absence of a requirement of necessity in *ius in bello*. This makes it possible for belligerents to decide to launch attacks causing unnecessary loss among military personnel of the other party, the sole limit being the need to respect other rules of humanitarian law, including those prohibiting the employment of means and methods of warfare that cause unnecessary suffering.[32] If and to what extent such a development has already taken place, and if it might be likely to further develop in the future, is left to other scholarly inquiries.

[32] Compare Ch 11 in this volume.