Reframing the Proportionality Principle

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ABSTRACT

*Proportionality functions as one of the most important legal constraints applicable to the conduct of hostilities. In that context, this short essay discusses the commonly encountered misapplications of Cicero's classic sentiment that "*salus populwe supremus est lex[1] . . . silent enim leges inter armes.*" Rather than serving as a necessary basis for a positive articulation of lawful force as an exception to the norm,* jus in bello *proportionality delineates the outer boundaries of the commander's appropriate discretion. The mere invocation of* jus in bello *proportionality cannot become an effective extension of asymmetric combat power by artificially crippling combatant capabilities. This essay ends by framing the modern content of the proportionality principle that remains fully applicable as a matter of law even during* in extremis *situations.*

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1. CICERO, *De Legibus*, III, iii, 8 [hereinafter CICERO *De Legibus*].

I. INTRODUCTION

Ours is the "era of proportionality" in the sense that proportionality is an integral aspect of legal and moral discourse in every effective legal system.[2] Within the law of war, termed *jus in bello*, proportionality is centrally important to achieving military efficiency and moral fairness. Combatants have affirmative rights under interconnected *jus in bello* principles, yet these rights carry correlative duties requiring that the loss of lives must be offset by equally serious matters if the conduct of war is to be justified. Military commanders see proportionality as an essential element of professional ethos that provides the necessary latitude to accomplish their strategic and tactical mandates. Proportionality simultaneously imposes concrete restraints over the conduct of armed conflicts when properly applied.

Proportionality may well be the most controversial imperative in waging modern conflicts from the legal, moral, and political perspectives. This is particularly problematic for war-fighters given the emergence of a globalized system of international accountability. The adversary's ability to broadcast (or perhaps fabricate) allegations of inappropriate conduct worldwide adds an unprecedented level of difficulty to modern proportionality determinations. The demonstrable gap between internationally accepted articulations of proportionality and its perceived application is not inevitable. The mere invocation of proportionality cannot become an effective extension of asymmetric combat power by artificially crippling combatant capabilities.

Rather than serving as a necessary basis for a positive articulation of lawful force as an exception to the norm, *jus in bello* proportionality delineates the outer boundaries of the commander's appropriate discretion. The difficulty in practice is that its parameters remain bounded by contextual challenges in every instance. Aharon Barak, of the Israeli Supreme Court, summarized this aspect of proportionality and its interrelationship with appropriate oversight as follows:

> The court will ask itself only if a reasonable military commander could have made the decision which was made. If the answer is yes, the court will not exchange the military commander's security discretion with the security discretion of the court. Judicial review regarding military means to be taken is within the regular review of reasonableness. . . . [T]he question is not what I

2. *See generally, e.g.*, AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (2012).

> would decide in a given circumstance, but rather whether the decision that the military commander made is a decision that a reasonable military commander was permitted to make. In that subject, special weight is to be granted to the military opinion of the officials who bear responsibility for security. . . . Who decides about proportionality? Is it a military decision to be left to the reasonable application of the military, or a legal decision within the discretion of the judges? Our answer is that the proportionality of military means used in the fight against terror is a legal question left to the judges . . . . Proportionality is not a standard of precision; at times there are a number of ways to fulfill its conditions . . . a zone of proportionality is created; it is the borders of that zone that the court guards.[3]

The precise parameters of this zone of proportionality are very much in dispute amidst the complexity of modern armed conflicts and the rise of a globalized media. This short essay accordingly seeks to preserve the proportionality principle while ensuring its appropriate role within larger debates over the role for military force and the responsibilities of ethical war-fighters. It will, *in seriatum*, address confusions that cloud the application of proportionality, describe its commonalities as applied across varying fields of usage, and conclude by reviewing its normative content. The next Part addresses a recurring and oft-repeated misunderstanding of the relationship between the rule of law and the onset of armed conflict as a condition of human conduct. That understanding in turn necessitates consideration in Part III of the broader implications of the proportionality principle as it straddles diverse domains and usages. Part IV outlines the normative parameters that inform invocation of proportionality as an aspect of military practices.

II. CORRECTING CICERO

Embodying the classical conception of hostilities, Hugo Grotius quoted the Roman philosopher Cicero for the proposition that *Inter bellum ac pacis nihil est medium* (e.g., "there is no medium between war and peace").[4] This archaic conception of conflict led to sharp intellectual cleavages drawn between the Law of War and the Law of Peace.[5] The conception of a legal firewall by which the normally prevailing body of law is automatically displaced by a wilder and

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3. Aharon Barak, President (ret'd) Supreme Court of Isr., Address at the Jim Shasha Center of Strategic Studies of the Federmann School for Public Policy and Government of the Hebrew University of Jerusalem (Dec. 18, 2007).

4. HUGO GROTIUS, THE LAW OF WAR AND PEACE 832 (Francis W. Kelsey trans., Oxford Clarendon Press 1925) (1625). Modern translation available online at http://oll.libertyfund.org/titles/grotius-the-rights-of-war-and-peace-2005-ed-vol-3-book-iii [https://perma.cc/ZK8X-EGU8] (archived Mar. 27, 2018).

5. Notice that the very title of Hugo Grotius' classic work framed the issue in precisely this manner because that was the intellectual and philosophical fissure that he sought to explicate.

impliedly non-legal set of norms is often said to originate some two thousand years ago from the mind of the famed orator Cicero. The philosophical and legal notion that antagonists may properly discount legal constraints when facing *in extremis* situations is captured in the oft-repeated sentiment from Cicero that "*salus populwe supremus est lex*[6] . . . *silent enim leges inter armes*."[7] The quote is often (incorrectly) attributed to say that "in times of war, the law falls silent."[8]

The phrase has been invoked to argue that conduct that would otherwise be unlawful may be permissible if it is in furtherance of a public good,[9] or in defining times of peace (the courts are open and available for recourse) versus war (the courts are closed).[10] Some early British cases quoted Cicero in embracing the idea that military matters fall outside the jurisdiction of common law courts.[11] Courts in different jurisdictions repeatedly relied upon this notion during the Civil War and Reconstruction era cases, most famously in the government's arguments in favor of suspending *habeas corpus* in *Ex parte Milligan*. In modern times, the phrase is more often used in discourse related to civil liberties during investigation and prosecution of terrorists.

Heated debates over rejection of civil liberties during recent armed conflicts rest on the fullest implications of the misquoted phrase. Justice Scalia's dissent in *Hamdi v. Rumseld* represents one of the more widely known recent incantations:

> Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis—that, at the extremes of military exigency, *inter arma silent leges*. Whatever the general merits of the view that war

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6. CICERO *De Legibus*, *supra* note 1.

7. CICERO, *Pro Milone*, IV, xi.

8. *See, e.g.*, William H. Rehnquist, *Dwight D. Opperman Lecture: Remarks of the Chief Justice of the United States*, 47 DRAKE L. REV. 201, 205–208 (1999) ("Here we have an illustration of an old maxim of Roman law—Inter Arma Silent Leges—which loosely translated means that in time of war the laws are silent. All during the Civil War the courts were unable or unwilling to ride herd on the Lincoln administration's policies which seriously interfered with civil liberty. Only after the end of the war was a decision handed down which upheld that liberty . . . This is not necessarily a condemnation. Both Lincoln and FDR fit into this mold. The courts, for their part, have largely reserved the decisions favoring civil liberties in wartime to be handed down after the war was over. Again, we see the truth in the maxim Inter Arma Silent Leges—in time of war the laws are silent . . . perhaps we can accept the proposition that though the laws are not silent in wartime, they speak with a muted voice.").

9. *See, e.g.*, Smith v. Shaw, 12 Johns. 257, 261 (N.Y. 1815) (arguing, in a case challenging the detention of a Scottish individual, that in times of war necessity and the public good may justify certain acts in accordance with Cicero's maxim); *see also* York & Fenderson v. Z.M.L. Jeffreys & Sons, 109 S.E. 80, 82 (N.C. 1921) ("It is the inexorable law that regard be had to the public welfare, and, in times of war and peril, to the public safety.").

10. Griffin v. Wilcox, 21 Ind. 370, 378–79 (1863).

11. *See* Sir G. E. Hodgkinson, Knt. v. Fernie and Another, 2 Common Bench Reports (New Series) 415, 140 E.R. 479 (1857); Barwis v. Keppel, 95 E.R. 831, 833, 2 Wilson, K. B. 314 (1766).

> silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it. Because the Court has proceeded to meet the current emergency in a manner the Constitution does not envision. I respectfully dissent.[12]

When applied to the law of war domain, Clausewitz famously drew upon the mindset generally attributed to Cicero to postulate that:

> war is an act of force, and there is no logical limit in the application of force . . . Attached to force are certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it. . . . [In fact] kind-hearted people might . . . think that there was some ingenious way to disarm or defeat an enemy without bloodshed, and might imagine that this is the true goal of the art of war. Pleasant as it sounds, it is a fallacy that must be exposed; war is such a dangerous business that the mistakes which come from kindness are the very worst . . . .[13]

As recently as January 2018, a sitting judge on the Appeals Chamber of the International Criminal Court invoked this notion to infer in open court that the appeal of Jean Pierre Bemba from his conviction for war crimes might be unfounded.[14] However, despite its repeated incantations, the argument that Cicero advocated suspension of applicable law in times of warfare is unfounded.

Few lawyers have distinguished the popular mischaracterization from what Cicero actually said in its context. Cicero was arguing in defense of his close friend, Milo, who had been set upon by armed brigands under the leadership of a political foe while travelling. On trial for the killing of Clodius, Cicero argued (not unlike other defense attorneys through the centuries) that a limited right of self-defense displaces other norms that might otherwise prohibit killing.[15] Relying on this theory of self-defense under circumstances that rendered the killing understandable and perhaps even laudable, the relevant portion of Cicero's oration reads as follows:

> There is then, judges, a law of this kind—not written, but inborn—which we have apprehended, drank in and extracted from nature herself; in conformity to which we have not been taught, but made; in which we have not been educated,

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12. Hamdi v. Rumsfeld, 542 U.S. 507, 579 (2004) (Scalia, J., dissenting).

13. CARL VON CLAUSEWITZ, ON WAR 75, 77 (Michael Howard & Peter Paret, trans., Princeton University Press 1976) (1833).

14. Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Judgment pursuant to Article 74 of the Statute (Mar. 21, 2016).

15. *See* Mark Edward Clark & James S. Ruebel, *Philosophy and Rhetoric in Cicero's "Pro Milone"*, 128 RHEINISCHES MUSEUM FÜR PHILOLOGIE, Neue Folge 57, 65 (1985) ("The notion of justifiable self-defense was of course thoroughly accepted at Rome long before the advent of Stoicism, but the two ideologies converge conveniently here; somewhat later on, Cicero appeals again to this doctrine, in terms which ring increasingly Stoic.").

> but ingrained; and this law is, that if our life fall under peril from any ambush, violence, or weapon, whether of robbers or of personal enemies, recourse should be had to every honorable means to safety. For the laws are silent in the midst of arms.[16]

With respect to *jus in bello*, the takeaway is plain. Of course the law applies, but it does so in modified form and with an entirely different set of normative benchmarks. Grotius implicitly recognized this truism in the Prolegomena to his classic work by noting that "[i]f 'laws are silent among arms,' this is true only of civil laws and of laws relating to the judiciary and the practices of peacetime, and not of the other laws which are perpetual and appropriate to all circumstances."

Ironically enough, the U.S. Department of Defense Manual as modified in December 2016 implicitly reinforces the suspicion arising from the frequent misunderstanding of Cicero's maxim that *jus in bello* serves as a convenient rationale to undermine rights that would otherwise be sacrosanct. The Manual's formulation that *lex specialis* law of war requires other bodies of law either to remain fully subordinated to *jus in bello* norms or be interpreted in such a manner as to remain consistent with accepted law of war principles does not fully accord with accepted international law.[17] Proportionality serves as a bridging principle that preserves the right to life within the context of all armed conflicts. From the perspective of normally applicable human rights norms, the very idea that proportionality affirmatively countenances the deaths of civilians or others not participating in conflict at the precise moment of their demise seems heretical. Nevertheless, when applied appropriately, the principle of proportionality operates in precisely that manner.

Phrased with slightly more precision, the *jus in bello* concept of proportionality balances military expediency and larger military interests (such as ensuring strategic or tactical victory, preserving the lives of friendly forces, and bringing the conflict to its optimal and swiftest conclusion) against countervailing humanitarian interests. As properly understood and applied, *jus in bello* proportionality does not faintly resemble a lawless invocation of convenience; by definition, it rebuts those who would inappropriately argue that the very nature of war negates utility of a carefully constructed legal regime. This conclusion logically necessitates examination of the similarities between the *jus in bello* law of proportionality and the application of the same terminology in a variety of other legal and litigation contexts. Part III will address those commonalities.

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16. Fremont Contract Cases, 2 Ct. Cl. 1, 25 n.1 (1866).

17. Michael A. Newton, *The DoD Law of War Manual as Applied to Coalition Command and Control*, *in* MICHAEL A. NEWTON, THE UNITED STATES DEPARTMENT OF DEFENSE LAW OF WAR MANUAL: COMMENTARY AND CRITIQUE (forthcoming 2018).

III. COMMONALITIES AMONG DIFFERENT USES OF PROPORTIONALITY

Proportionality is an imperfect tool, but it is nonetheless essential in a wide variety of legal and philosophical disciplines.[18] Despite its linguistic consistency, the principle of proportionality is not a homogenous terminological template in usage across different disciplines.

Proportionality provides a standard of non-arbitrariness by which to assess compelling operational, legal, or moral imperatives but operates against the backdrop of other applicable norms. Damage to civilians during military operations that is not grounded firmly in accompanying military necessity would by definition not be subject to proportionality analysis.

Similar to usages in other areas of international practice, proportionality as applied must remain practicable because "rules that are incompatible with all effective military action risk being ignored and, thereby, not preventing any harm from occurring."[19] Thus, the starting point for an affirmative vision of proportionality as a viable *jus in bello* precept is identifying its points of commonality across disciplines. This is rather like the process of identifying specific comparators when doing fingerprint analysis. After discussing these shared traits, Part IV will describe the contours of *jus in bello* proportionality as it has been defined.

A. *The Pervasive Use of Negative Phraseology*

Because proportionality provides an indispensable balancing function, yet defies precise and overarching description, it is most frequently expressed in the negative rather than the positive form as a rule of decision. There is no area in which the law of proportionality is defined with clarity on an abstract basis due to its inherently contextual nature. This is foundational because proportionality always involves competing factors and shifting relationships amongst relative values. The actual content of proportionality in any given context is irreducible to a soundbite or easily extrapolated judicial test. Therefore, as a logical extension, it is described in the negative.

In human rights parlance, for example, governments may restrict the rights conveyed by the European Convention for the

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18. MICHAEL A. NEWTON & LARRY MAY, PROPORTIONALITY IN INTERNATIONAL LAW 28–61 (2014) (discussing the multiplicity of applications for the term 'proportionality' in, *inter alia*, trade, bioethics, countermeasures, jus ad bellum, jus in bello, maritime delineation, and criminal sentencing).

19. On the need to construct enforceable rules of IHL, see Janina Dill & Henry Shue, *Limiting the Killing in War: Military Necessity and the St. Petersburg Assumption*, 26 ETHICS & INT'L AFF. 311, 324 (2012).

Protection of Human Rights and Fundamental Freedoms only when "the means employed are not disproportionate."[20]

Similarly, the International Court of Justice relied upon the proportionality principle as the rule of decision in its first environmental law ruling in the *Case Concerning Gabcikovo-Nagymaros Project (Hungary/Slovakia)*[21] over the construction and operation of dams on the river Danube. In finding in Hungary's favor on the Slovak dam project, the court held that Slovakia's countermeasure to Hungary's breach of a prior treaty "failed to respect the proportionality which is required by international law" and was consequently unlawful.[22] Slovakia's countermeasure to Hungary's breach of the 1977 treaty was "not proportionate."[23]

In his dissent, Judge Vereschetin more clearly described proportionality as a "basic condition for the lawfulness of a countermeasure," which is to be determined "in the circumstances of the case."[24] He conceded that "there is no uniformity . . . in the practice or the doctrine [in international law] as to the formulation of the principle, the strictness or flexibility of the principle and the criteria on the basis of which proportionality should be assessed." As a result,

> reference to equivalence or proportionality in the narrow sense . . . is unusual in State practice . . . [which] is why in the literature and arbitral awards it is suggested that the lawfulness of countermeasures must be assessed by the application of such *negative criteria* as "not [being] manifestly disproportionate," or "clearly disproportionate," "*pas hors de toute proportion*" [quoting the original French text] . . . .[25]

This practice in other arenas mirrors the design of the *jus in bello* framework. The ICRC Commentary on Additional Protocol I notes with some understatement that the language applicable to precautions in the attack "gave rise to lengthy discussions and

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20. Mathieu-Mohin and Clerfayt v. Belgium, App. No. 9267, 10 Eur. H.R. Rep. 20, 23, ¶ 52 (1987). The same phraseology appears in ICSID decisions as well; one tribunal compared the relative costs incurred by the defendant against the damage caused to the Russian budget with the conclusion that "[t]he sequestration orders were legitimate and *not disproportionate*." Spyridon Roussalis (Claimant) v. Romania (Respondent), ICSID Case No. ARB/06/1 (Award), ¶ 520 (Dec. 7, 2011) (emphasis added), https://www.italaw.com/sites/default/files/case-documents/ita0723.pdf [https://perma.cc/L2RW-MHD7] (arhcived Feb. 17, 2018).

21. Press Release, International Court of Justice, Case concerning Gabčíkovo-Nagymaros Project (Hungary/Slovakia) Judgment, Press Release 1997/10 (Sept. 25, 1997) http://www.icj-cij.org/files/case-related/92/092-19970925-PRE-01-00-EN.pdf [https://perma.cc/6M3W-Z5LW] (archived Feb. 17, 2018).

22. Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia), 1997 I.C.J. Rep. 7, ¶ 85 (Sept. 25).

23. *Id.* ¶¶ 85, 87.

24. *Id.* at 223 (Vereschetin, J., dissenting).

25. *Id.*

negotiations among delegations."[26] The 1973 ICRC working draft of what became the proportionality provisions in the 1977 Protocol (i.e., Articles 51(5)(b), 57(2) and 85(3)) cautioned that lawful attacks were those deemed "not disproportionate to the direct and substantial military advantage anticipated."[27]

Geoffrey Best noted that although the textual incarnations of proportionality came after more than a century of development within the field that gap should not be attributed to unfamiliarity with the basic precepts of the precautions expected to be taken by attackers and defenders alike. In his words, the developmentally delayed formulation of the treaty language was "because it was thought to be too slippery and in its potential implications embarrassing to commit to a set form of words."[28] Thus, the discretion given to decision makers by the widespread use of the negative form "not disproportionate" reflects the inability of drafters to define the term "proportionate" as a rigid template. Indeterminacy of its precise application is baked into the very design of the proportionality principle.

B. *Breadth of Permissible Discretion*

By extension, proportionality is a comparative exercise involving dissimilar values. As Professor Michael Schmitt points out, "How does one, for instance, compare tanks destroyed to the number of serious civilian injuries or deaths caused by attacks upon them?"[29] The use of markedly strong modifiers is a core truism that recurs in virtually every contextual application. Judicial decisions around the world and in a variety of usages evaluate the actions of litigants by considering whether conduct "grossly"[30] or "markedly" or "strikingly" or "plainly" lacked proportionality. This elevated threshold simultaneously empowers actors by recognizing the rightful boundaries of their discretion even as it places the burden of proof onto the party attempting to overturn or discredit the decision.

Judge Vereschetin's observation quoted above that international practice requires a finding that a particular countermeasure is "manifestly" or "clearly" out of balance is completely accurate. Such qualifiers span courts and contexts. The European Court of Justice upheld a series of EU agricultural directives in July 2012, reasoning

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26. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 ¶ 2204 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS].

27. *Id.*

28. GEOFFREY BEST, WAR AND LAW SINCE 1945, at 323 (1994).

29. Michael N. Schmitt, *Fault Lines in the Law of Attack, in* TESTING THE BOUNDARIES OF INTERNATIONAL HUMANITARIAN LAW 277, 293 (Susan C. Breau & Agnieszka Jachec-Neale eds., 2006).

30. R. v. Khawaja, [2012] 3 S.C.R. 555, 584 (Can.).

that "notwithstanding the fact that they may involve adverse economic consequences for some traders, [the Directives] do not appear, in the light of the economic interests of those traders, to be *manifestly disproportionate* in relation to the aim pursued."[31] Similarly, in *Afton Chemical Limited v. Secretary of State for Transport*, the disputed EU action was upheld because a "measure adopted in the exercise of that discretion, breaches the principle of proportionality only if it is manifestly unsuitable for achieving the objective pursued by the competent body, if there are clearly less onerous measures which are equally effective or if the measures taken are *clearly out of proportion* to the objectives pursued."[32]

Within the *jus in bello* realm, the United Kingdom included an express reservation to the grave breaches provisions of Protocol I, Articles 85(3)(c) and 56.[33] The reservation rejected an absolute standard of protection for "works or installations containing dangerous forces" because states merely must "avoid severe collateral losses among the civilian population."[34] Rather than an absolute bar, a substantial degree of property damage or loss of life might well be permissible.

The ICTY has indirectly reinforced this higher threshold by repeatedly declining to convict perpetrators on the basis of *post hoc* evaluations of their proportionality analysis. In particular, Appeals judges overturned the conviction of Croatian Generals Ante Gotovina and Mladen Markač by holding that the Trial Chamber improperly created an evidentiary standard, which then became the basis for inferring disproportionate and indiscriminate artillery attacks, using its own judicial construct as the dispositive principle.[35] Though the majority decision generated vigorous dissents that are "perhaps unprecedented in international tribunal history decision[s]," the Appeals Chamber unanimously found that the judicially fabricated standard was inappropriate largely because it inappropriately weighed the permissible discretion accorded to General Gotovina.[36]

By noticeable contrast, other ICTY opinions based liability on an inference of direct intention to conduct prohibited attacks on civilians rather than second guessing a commander's proportionality

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31. Case C-59/11, Ass'n Kokopelli v. Graines Baumaux SAS, 2012, ¶¶ 68–69 http://curia.europa.eu/juris/document/document.jsf?docid=118143&doclang=EN (emphasis added).

32. Case C-343/09, Afton Chemical Ltd. v. Sec'y of State for Transp., 2010 E.C.R. I-07027, ¶ 57 (emphasis added).

33. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of June 1977, Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

34. *Id.*

35. Prosecutor v. Gotovina et al., Case No. IT-06-90-A, Appeal Judgment, ¶ 49–67 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012).

36. Julian Elderfield, *Introductory Note to the International Criminal Tribunal for the Former Yugoslavia: The Prosecutor v. Gotovina et al.*, 52 I.L.M. 72, 72 (2013).

assessments. Avoiding what would be a sticky proportionality analysis, the Blaškić Trial Chamber used the principle of distinction to conclude that an attack against civilians was criminal if it was "conducted intentionally in the knowledge, or when it was impossible not to know, that civilians or civilian property were being targeted not through military necessity."[37] On this score, the authoritative ICRC Commentary recognizes that in these subjective evaluations "the interpretation must above all be a question of common sense and good faith for military commanders. In every attack they must carefully weigh the humanitarian and military interests at stake."[38] Reinforcing the need for respecting the zone of permissible discretion, the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign in Kosovo observed that:

> It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to noncombatants. Further, it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree in close cases. It is suggested that the determination of relative values must be that of the "reasonable military commander."[39]

Lastly, proportionality cannot be encapsulated without reference to a larger totality of the circumstances examination. Proportionality is never a simple extrapolation or mathematical theorem. Media accounts that reduce military operations to numerical comparisons of casualty figures create misimpressions over the nature of proportionality. For example, one account of the sinking of the Argentine cruiser *General Belgrano* during the Falklands War commented that the deaths of 368 seamen "seems all out of proportion to the threat posed by the ship at the time of the attack. Was this an instance of an excessive or disproportionate use of force?"[40] This simple numerical comparison is qualified as only presenting the appearance of disproportionality, yet it incorrectly reinforces the erroneous impression that *jus in bello* proportionality is grounded in the immediate tactical threat posed by a particular military target.

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37. Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, ¶ 180 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000); *see also* Prosecutor v. Galić, Case No. IT-98-29-A, Judgment, ¶ 140 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006).

38. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 25, at 683–84.

39. *See* FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA (June 13, 2000), *reprinted in* 39 I.L.M. 1258, 1271 (2000). For analysis, see Michael N. Schmitt, *Precision Attack and International Humanitarian Law*, 87 INT'L REV. RED CROSS 445 (2005).

40. A.J. COATES, THE ETHICS OF WAR 209–10 (1997).

The proportionality principle unquestionably forms an essential component of the backbone of the law of armed conflict (*lex lata*). The standard for imposing criminal sanctions for violations of *jus in bello* proportionality is "clearly excessive" when assessed against the broader "concrete and direct overall military advantage anticipated."[41] Yoram Dinstein is surely correct that "[m]any people confuse excessive with extensive."[42] Thus, damage to civilians or their property can "be exceedingly extensive without being excessive, simply because the military advantage anticipated is of paramount importance."[43] Proportionality is not a prohibition on *extensive* damage or loss of civilian life if they are not clearly *excessive* in relation to the concrete and direct military advantage anticipated, assuming that the value of the military advantage is itself very high.

IV. NORMATIVE CONTENT OF THE PROPORTIONALITY PRINCIPLE

The principle of proportionality developed as one of the primary mechanisms to protect non-combatants during armed conflicts. The word "proportionality" does not appear as such in any treaty text, but its essence is suffused through a number of key provisions. The formal articulations of proportionality within the bounds of treaty law represent the pinnacle of the developmental arc of law as nations sought to negotiate legal documents to address the moral complexities of combat while extending appropriate protections to civilians and other protected persons.

International law restricts the class of persons against whom violence may be applied during armed conflicts, even as it bestows affirmative rights to wage war in accordance with accepted legal restraints. Because of the central importance of these categorizations, the standards for ascertaining the legal line between lawful and

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41. Rome Statute of the International Criminal Court, art. 8(2)(b)(iv), *opened for signature* July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002) [hereinafter Rome Statute].

42. LEGAL AND ETHICAL LESSONS OF NATO'S KOSOVO CAMPAIGN, *Part III: Targeting, in* 78 INT'L. L. STUD. 135, 215 (Andru Wall ed., 2002).

43. *Id*. Gary Solis describes the instance where "bombing of an important army or naval installation (like a naval shipyard) where there are hundreds or even thousands of civilian employees need not be abandoned merely because of the risk to these civilians." GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 280 (2010)*; see also* Military and Paramilitary Activities in and against Nicaragua, Nicar. v. U.S., Dissenting Opinion of Judge Schwebel, 1986 I.C.J. 14, ¶ 9 (June 27) ("To the extent that proportionality of defensive measures is required – a question examined below – in their nature, far from being disproportionate to the acts against which they are a defence, the actions of the United States are *strikingly proportionate*.") (emphasis added).

unlawful participants in conflict provided the intellectual impetus for the evolution of the entire field of *jus in bello*.[44]

From the outset, states sought to prescribe the conditions under which they owed particular persons affirmative legal protections derived from the laws and customs of war.[45] The recurring refrain in negotiations can be described as "to whom do we owe such protections?" The constant effort to be as precise as possible in describing the classes of persons entitled to legal protections was essential because the same criteria prescribe the select class who may lawfully conduct hostilities with an expectation of immunity. The declarative humanitarian limitation that the "right of belligerents to adopt means of injuring the enemy is not unlimited"[46] is one of the organizing principles that unifies the framework of the law of armed conflict and provides the intellectual underpinnings of the proportionality principle.

Persons outside the framework of international humanitarian law who commit warlike acts do not enjoy immunity from prosecution and are therefore common criminals subject to prosecution for their actions.[47] The imperative that logically follows is that the right of *non-belligerents* to adopt means of injuring the enemy is *nonexistent*. Those persons governed by the law of armed conflict derive rights and benefits but are also subject to bright line obligations. Prisoners of war, for example, enjoy legal protection *vis-á-vis* their captors; because they are legally protected, they have no right to commit "violence against life and limb."[48] Yet, lawful combatants become "war criminals" only when their actions transgress the established boundaries of the laws and customs of war.[49] Treaty-based

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44. The field is frequently described as international humanitarian law. This vague rubric is increasingly used as shorthand to refer to the body of treaty norms that apply in the context of armed conflict as well as the less distinct internationally accepted customs related to the treatment of persons.

45. BEST, *supra* note 27, at 128–33.

46. Hague Convention IV Respecting the Laws and Customs of War on Land, 1907, Annex art. 22, Jan. 26, 1910, *reprinted in* ADAM ROBERTS & RICHARD GUELFF, DOCUMENTS ON THE LAWS OF WAR 73, 77 (3d ed. 2000).

47. In a classic treatise, Julius Stone described the line between lawful participants in conflict and unprivileged or "unprotected" combatants as follows:

> The . . . distinction draws the line between those personnel who, on capture, are entitled under international law to certain minimal treatment as prisoners of war, and those not entitled to such protection. "Non-combatants" who engage in hostilities are one of the classes deprived of such protection . . . Such unprivileged belligerents, though not *condemned* by international law, are not protected by it, but are left to the discretion of the belligerent threatened by their activities.

JULIUS STONE, LEGAL CONTROLS ON INTERNATIONAL CONFLICT 549 (1954).

48. *See* Geneva Convention Relative to the Treatment of Prisoners of War art. 93, Aug. 12, 1949, 75 U.N.T.S. 135.

49. *See Military Prosecutor v. Omar Mahmuh Kaseem and Others, in* 42 INT'L L. REP. 470, 481 (E. Lauterpacht ed., 1971) ("Similarly, combatants who are members of the armed forces, but do not comply with the minimum qualifications of belligerents or are proved to have broken other rules of warfare, are war criminals as such . . . .");

articulations of proportionality in turn do not redefine these basic tenets. Simply put, the proportionality principle is not implicated when combatant activities or the lawful conduct of hostilities have no effects on persons or property entitled to protections under the established *lex lata* during armed conflicts.

A. *Additional Protocol I Formulations*

The idea of proportionality operates in the shadow of Article 51 of Protocol I, which in its initial clause implements the categorical admonition that:

> [T]he civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.

This entitlement functions properly only against the backdrop of the modern principle of distinction, or discrimination as the philosophers call it, captured in the ringing imperative of Article 48:

> In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

The negotiating text that became Article 51 in the final adoption of Protocol I was adopted by a vote of seventy-seven votes in favor, one against (France), and sixteen abstentions. French opposition was premised on the position that the very complexity of the proportionality test would seriously hamper military operations against an invader and prejudice the exercise of the sovereign and inherent right of defense as recognized by Article 51 of the United Nations Charter. The French delegation pointed out that it would be difficult to define the dispositive limits of a "specific military objective."[50] Even the phrasing of Article 51 indicates that proportionality is to be considered as only one piece, albeit perhaps the most prominent piece, of an interconnected mosaic of protections for the civilian population. The overarching prohibition is followed by the more specific and pointed application in Article 51(4) that "indiscriminate attacks are prohibited."

Protocol I, *supra* note 32, art. 85 ("Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes.").

50. Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977), Vol. 3, 161–62 (1978) (referencing concerns raised by the Polish delegation among others).

Article 51(5) of Protocol I then defines indiscriminate attacks, using the non-exhaustive caveat that "among others the following types of attacks are to be considered as indiscriminate":

> (b) 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.

This language of "incidental loss of civilian life . . . excessive in relation to . . . the military advantage anticipated" is the core of the modern proportionality conversation. The balancing test of Article 51(5)(b) represents the modern basis for assessing a proportionate, hence permissible, attack. When the composite snippets of Protocol I are consolidated and considered as a whole, the tenets of proportionality change from discordant pieces into a clear roadmap that can help military decision makers accurately judge the lawfulness of their conduct and effectively protect civilians.

In addition to the precepts embedded in Articles 51 and 48 of Protocol I of 1977, described above, Articles 57 and 58 further crystallized the concept of proportionality: Article 57 restates the baseline of protections enjoyed by civilians at all times and all places. Article 57 imposes the foundational duty to take "feasible precautions in the choice of means and methods of attack" and then requires that an attacker must "refrain from deciding to launch any 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."[51]

These provisions must be understood in light of state practice. The governments of the United Kingdom, the Netherlands, Spain, Italy, Australia, Belgium, New Zealand, Germany, and Canada each published a virtually identical reservation with respect to Articles 51 and 57 as they acceded to Protocol I.[52] The overwhelming weight of the reservations made clear that state practice did not intend to put the warfighter into a straightjacket of rigid orthodoxy. The New Zealand reservation for example (virtually identical to those of other states listed above) reads as follows:

> In relation to paragraph 5 (b) of Article 51 and to paragraph 2 (a) (iii) of Article 57, the Government of New Zealand understands that the military advantage

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51. Protocol I, *supra* note 32, arts. 57, 58 (obligating parties to abide by the specified precautionary measures "to the maximum extent feasible."

52. The numerous texts of state declarations expressing similar views using almost identical language are available at *Treaties, State Parties and Commentaries*, INT'L COMM. OF THE RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp? xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470 (last visited Feb. 2, 2018) [https://perma.cc/X6YE-4AM6] (archived Feb. 2, 2018).

> anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of that attack and that the term "military advantage" involves a variety of considerations, including the security of attacking forces. It is further the understanding of the Government of New Zealand that the term "concrete and direct military advantage anticipated", used in Articles 51 and 57, means a bona fide expectation that the attack will make a relevant and proportional contribution to the objective of the military attack involved.

Secondly, in reaching the legally defensible assessment of proportionality, the perspective of the commander (or warfighting decision maker) is entitled to deference based on the subjective perspectives prevailing at the time. The Italian declaration with respect to Protocol I states that:

> [In] relation to Articles 51 to 58 inclusive, the Italian Government understands that military commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time.[53]

This understanding is replicated in a number of other state pronouncements. Another reservation from the government of Austria declares that "Article 57, paragraph 2, of Protocol I will be applied on the understanding that, with respect to any decision taken by a military commander, the information actually available at the time of the decision is determinative."[54] Thus, modern incantations that would make proportionality into a binding straitjacket only deduced on the basis of *post hoc* assessments are erroneous.

B. *The ICC Crime of Disproportionate Attacks*

With respect to determining the contours of any chargeable offenses related to proportionality, the formulations of Protocol I have been superseded by the adoption of the 1998 Rome Statute of the International Criminal Court. At the time of this writing, 123 States

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53. Italy's Declarations at the time of Ratification of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of June 1977, Dec. 12, 1977, 1125 U.N.T.S. 3, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=E2F248CE54CF09B5C1256402003FB443 (last visited Feb. 2, 2018) [https://perma.cc/CL9Z-8V5D] (archived Feb. 2, 2018).

54. Austria's Declarations at the time of Ratification of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of June 1977, Dec. 12, 1977, 1125 U.N.T.S. 3, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf./Notification.xsp?action=openDocument&documentId=C5CD201B43C3E56AC1256402003FB262 (last visited Feb. 2, 2018) [https://perma.cc/4NZS-EPHV] (archived Feb. 2, 2018).

Party[55] have adopted the statute as a binding treaty. In contrast, the Elements of Crimes required by Article 9 were adopted by the consensus of all states, to include the United States, China, and other major non-States Party. Article 8(2)(b)(iv) describes proportionality in a manner consistent with modern state practice following the adoption of Protocol I as:

> 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 severe damage to the natural environment which would be *clearly* excessive in relation to the concrete and direct *overall* military advantage anticipated.[56] (emphasis added to show contrast to Protocol I text)

In addition, the Elements of Crimes (adopted by consensus of all states as mentioned above) included a key footnote that reads as follows:

> The expression "concrete and direct overall military advantage" refers to a military advantage that is foreseeable by the perpetrator at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack. The fact that this crime admits the possibility of lawful incidental injury and collateral damage does not in any way justify any violation of the law applicable in armed conflict. It does not address justifications for war or other rules related to *jus ad bellum*. It reflects the proportionality requirement inherent in determining the legality of any military activity undertaken in the context of an armed conflict.[57]

Modern attempts in the media to mischaracterize the proportionality principle in violation of the reservations to Protocol I would be unfounded, as the Rome Statute embedded precisely those elements as part of the permanent court.

However, the inclusion of a proportionality requirement to mark off a specific war crime under the Rome Statute is significant for two reasons. In the first place, the consequence required for conviction of a grave breach under Protocol I is omitted. The crime is committed simply by the deliberate initiation of an attack, provided that the prosecutor can produce evidence sufficient for the finder of fact to infer that the perpetrator believed that the attack would cause an anticipated disproportionate result. The *actual* result is not necessarily relevant.

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55. As of this writing, the 123 ICC States Party include 33 African nations, 19 from the Asia-Pacific realm, 18 from Eastern Europe, 28 from Latin American and the Caribbean, and 25 from Western Europe. *See The States Party to the Rome Statute,* INT'L CRIM. COURT, https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties% 20to%20the%20rome%20statute.aspx (last visited Feb. 2, 2018) [https://perma.cc/PYW9-ZUUC] (archived Feb. 2, 2018).

56. Rome Statute, *supra* note 32, art. 8(2)(b)(iv).

57. *See* Int'l Criminal Court, *Assembly of States Parties First Session September 2002* at 256 n.36 (Sept. 26, 2002).

Unlike the grave breach formulation found in Protocol I, the criminal offense in the Rome Statute is completed based on the intentional initiation of an unlawful attack. The highest possible *mens rea* standard implicitly concedes that some foreseeable civilian casualties are lawful. Thus, the Rome Statute standard strongly mitigates against the inference of a criminal intent just based on evidence sufficient to show that the commander might have had knowledge that a particular attack might cause some level of damage to civilians or their property.

In addition, the Elements include an explicit footnote to stipulate that the perpetrator must intentionally launch the attack (i.e., as a volitional choice) and do so in the knowledge that the attack would be expected to cause disproportionate damage. Footnote 37 of the Elements of Crimes makes plain that the perpetrator's knowledge of the foreseeably disproportionate effects of an attack requires an explicit value judgment. The standard for any *post hoc* assessment of the action taken by an alleged perpetrator is clear: "As opposed to the general rule set forth in Paragraph 4 of the General Introduction, this knowledge element requires that the perpetrator make the value judgement described herein. An evaluation of that value judgment must be based on the requisite information available to the perpetrator at the time."[58]

The Rome Statute crime of disproportionate attack thus widens the scope of the military advantage that can be considered in the proportionality analysis (through inclusion of the word overall) and narrows what level of collateral damage is considered excessive (by specifying that the damage needs to be *clearly* excessive to generate criminal liability). These revisions to the treaty terminology employed by the drafters of Protocol I could be discounted as an ICC-specific clause of convenience. In other words, similar to the heated debates that led to the compromise language related to proportionality in Protocol I, one might well discount the caveats introduced into the Rome Statute as a *sui generis* necessity based on diplomatic convenience. But this assumption would be inaccurate.

In fact, the text of the Rome Statute reflects the broadly accepted view of state practice. To be more precise, the text of the Rome Statute, as understood in light of the Elements of Crimes text with explanatory footnotes adopted by consensus, accurately embodies preexisting customary international law. The language of the United Kingdom Law of War Manual summarizes the state of the law that was captured in the prohibition of Article 8(2)(b)(iv) as it should be understood in light of the Elements of Crimes:[59]

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58. *Id.* n.37.

59. THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 5.33.5, at 87 (2004).

> The military advantage anticipated from the attack refers to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack. The point of this is that an attack may involve a number of co-ordinated actions, some of which might cause more incidental damage than others. In assessing whether the proportionality rule has been violated, the effect of the whole attack must be considered. That does not, however, mean that an entirely gratuitous and unnecessary action within the attack as a whole would be condoned. Generally speaking, when considering the responsibility of a commander at any level, it is necessary to look at the part of the attack for which he was responsible in the context of the attack as a whole and in the light of the circumstances prevailing at the time the decision to attack was made.

V. CONCLUSION

Jus in bello in general, and the proportionality principle in particular, does not operate as a self-justifying and infinitely malleable framework. Modern articulations of the proportionality principle deliberately leave a wide margin of discretion to belligerents as described above. Yet, the textual proportionality provisions of the applicable treaties (to include the elevated comparative threshold) "do not appear to be contested by any state, including those that have not ratified" Protocol I.[60] Public perceptions may see precisely the same actions from a distance and conclude that the doctrine accords commanders with more latitude than should be permitted. It often does not help that the details of the debate are hidden from public view; nor is there precise popular agreement on the interface between competing bodies of law and moral principles. More ominously, there are indicators that international judges and prosecutors may not appreciate the depth of the discretion when properly applying the law.

Implications that the modern formulation and application of the proportionality principle are somehow rooted in a notion that there are no meaningful constraints on the conduct of hostilities are nonetheless erroneous. The commonly encountered inference that military lawyers and the commanders that they serve invoke the law merely as a subterfuge for unbridled cruelty towards civilians is unwarranted based on the modern state of the law. The very notion that the proportionality principle provides *sub rosa* excuse to justify mere military convenience runs counter to the very construction of the law. Moreover, it ignores the normative content of the field, and in particular the carefully designed balances between military utility and unbending constraints that are embedded in the fabric of the field.

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60. KNUT DÖRMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 168 (2002).