INTERNATIONAL LAW STUDIES

Published Since 1895

Strategic Proportionality: Limitations on the Use of Force in Modern Armed Conflicts

Noam Lubell & Amichai Cohen

96 INT'L L. STUD. 159 (2020)

Volume 96

2020

Published by the Stockton Center for International Law

ISSN 2375-2831

Strategic Proportionality: Limitations on the Use of Force in Modern Armed Conflicts

Noam Lubell[*] *& Amichai Cohen*[**]

CONTENTS

* Noam Lubell, Professor of International Law of Armed Conflict, School of Law, University of Essex, UK.

** Amichai Cohen, Faculty of Law, Ono Academic College, Israel. We would like to thank Noam Morris for excellent research assistance.

The thoughts and opinions expressed are those of the authors and not necessarily those of the U.S. government, the U.S. Department of the Navy, or the U.S. Naval War College.

I. INTRODUCTION

The ravages of war are tempered by the application of two international legal frameworks, the *jus ad bellum* and the *jus in bello*. Both legal bodies accept that there may be legitimate reasons for using force while seeking to minimize its destructive effects, especially with regard to civilian populations. Within the *jus in bello* or international humanitarian law (IHL),[1] the proportionality rule requires the expected collateral harm to civilians (and civilian objects) to not be excessive in relation to the anticipated concrete and direct military advantage.[2] Notably, the IHL proportionality rule focuses on specific attacks and requires the analysis of advantage and harm to consider only a particular military operation. In contrast, the grand question of overall force in a conflict is seen as belonging to the *jus ad bellum*.

The *jus ad bellum* framework, as found in the U.N. Charter, governs the resort to force and includes necessity and proportionality as its cardinal principles.[3] It is, as will be seen, often understood as applying to the initial decision to use force, and of less relevance once the conflict has begun. The nature of modern armed conflict has, in fact, posed serious challenges to the suitability of this structure. Underneath the formulation of the *jus ad bellum* rules, lies a host of problematic assumptions that risk undermining the foundations of the regulation of resort to force. First, in modern armed conflicts, and perhaps now more than ever, it is extremely difficult to discern which party to the conflict is the aggressor and which party is acting in self-defense. Second, most modern armed conflicts are not between States. Rather, they are fought between a State and a non-State actor. It is not clear which part, if any, of the *jus ad bellum* applies to these cases. Third, the specific content of the conditions of necessity and proportionality are under constant debate, and their application in modern armed conflicts is inadequately understood.[4]

---

1. This body of law is also referred to as the law of armed conflict (LOAC).

2. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 51(5)(b), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

3. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 176 (June 27).

4. *See*, *e.g.*, VAUGHAN LOWE, INTERNATIONAL LAW 279 (2007). Regarding the condition of proportionality Lowe writes, "it is not easy to pin down what the requirement of proportionality entails." *Id.*

In between the *jus ad bellum* focus on decisions to use force, and the IHL regulation of specific attacks, there is a far-reaching area in which the regulatory role of international law is bereft of much needed clarity. Perhaps the most striking example is in relation to overall casualties of war. Once a conflict has begun, it will invariably proceed in unexpected directions, including in relation to the harm it causes. If the *jus ad bellum* is understood as applying to the opening moments of the conflict, then it cannot provide a solution to growing numbers of casualties later in the conflict. Moreover, if the *jus ad bellum* does not apply to non-international conflicts, then it is of little use to alleviating the suffering of war for an overwhelming proportion of conflicts in the past half-century.[5] IHL is equally unsuited for dealing with overall casualties, as each individual attack may be proportionate, but over time, the cumulative number of civilian casualties could still reach intolerable figures. A similar problem arises when assessing other forms of accumulated destruction and harm that IHL rules might not capture.

This article sets out a new approach to proportionality in armed conflict and the regulation of war. It argues for the need to consider a particular form of proportionality, which we have termed "strategic proportionality," as *lex ferenda* stemming from general principles of law and reflected in State practice, and which requires an ongoing assessment throughout the conflict balancing the overall harm against the strategic objectives. Part II discusses the historical development of the principle of proportionality in the resort to force, how it came to be understood in relation to the U.N. Charter rules on the use of force, and why the current approach to proportionality is sorely lacking. Part III examines the space between the *jus ad bellum* and IHL through concrete examples, demonstrating the need for a new approach. Part IV presents the principle of strategic proportionality, outlining its scope and aims, and its place in relation to existing law. Part V provides a foundation for how such a principle can be operationalized in practice. Part VI concludes.

As the conclusion notes, many questions require further consideration, and we hope that this article begins a much needed discussion and debate. The aim of this article is to highlight what we view as a major shortcoming with the current legal regulation of armed conflict, and to demonstrate that the foundations of a different approach to proportionality already exist.

5. *See infra* Section III.A.2.

The proposed principle of strategic proportionality, can, we believe, provide practical and effective guidance in the regulation of harm and benefit in armed conflict, and better reflects the aims originally envisaged in the U.N. Charter.

II. PROPORTIONALITY IN *JUS AD BELLUM*

For early international lawyers such as Vattel, Vitoria, and Grotius, war itself was not necessarily wrong. The question was whether it is justified or not.[6] As Neff notes, answering this question involved various procedures and conditions.[7] The principles proposed in relation to the waging of war were developed in the context of warfare that continued to be prevalent in the seventeenth and eighteenth centuries. War, in those times, was relatively limited, and purposefully so. As Whitman explains, "the result of fighting in a pitched battle is to limit violence at the community at large: if a conflict can be decided by a day of concentrated killing on the battlefield, then violence can be prevented from spilling over to the rest of society."[8] The whole notion of war in that period was based on the assumption that total war would always cause losses to both parties to the conflict.[9] The planned scale of any particular war was therefore an aspect that would have been considered in advance and calibrated to the particular circumstances, taking into account this approach of restricted warfare. In this period, therefore, limitations of proportionality were not external constraints on war, but ra-

6. *See generally* HUGO GROTIUS, 3 THE RIGHTS OF WAR AND PEACE: BOOK III 1246–69 (Richard Tuck ed., Liberty Fund 2005) (1625); EMER DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, WITH THREE EARLY ESSAYS ON THE ORIGIN AND NATURE OF NATURAL LAW AND ON LUXURY (Béla Kapossy & Richard Whatmore eds., Liberty Fund 2008) (1797); Gary D. Brown, *Proportionality and Just War*, 2 JOURNAL OF MILITARY ETHICS 171 (2003).

7. STEPHEN C. NEFF, WAR AND THE LAW OF NATIONS: A GENERAL HISTORY 350 (2005).

8. JAMES Q. WHITMAN, THE VERDICT OF BATTLE: THE LAW OF VICTORY AND THE MAKING OF MODERN WAR 3 (2012).

9. *See* Eliav Lieblich, *On the Continuous and Concurrent Application of Ad Bellum and In Bello Proportionality*, *in* NECESSITY AND PROPORTIONALITY IN INTERNATIONAL PEACE AND SECURITY LAW (Claus Kreß & Robert Lawless eds.) (forthcoming Oct. 2020) (manuscript at 7) (on file with authors and available on SSRN) [hereinafter Lieblich, *Continuous and Concurrent*]; *see also* ELIAV LIEBLICH, INTERNATIONAL LAW AND CIVIL WARS: INTERVENTION AND CONSENT 74 (2014).

ther were an inherent part of the nature of war. An important reason for this limitation was the emergence of professional and costly standing armies. In seventeenth-century Europe, kings began to have standing armies, as part of the strengthening of their internal powers.[10] Standing professional armies are costly to maintain, but even costlier to replace, and kings were reluctant to lose professional soldiers, and hence limited their wars to pitched battles. Thus, as early as the seventeenth century, one could claim that the limits on the use of force emanated from utilitarian considerations.

Of course, utilitarian considerations were not the sole justification for the limitations of the use of force. The Just War theory, as elucidated in these times, went further by advancing the principle of proportionality as a legal limitation on the use of force. Indeed, proportionality was a legal principle already recognized as far back as Roman law and mentioned in the Justinian Code.[11] As reflected in the works of Grotius, Vitoria, and others, the premise was that the evil caused by the war must not be greater than the good it achieves. For example, Francisco Suárez writes, "due proportion must be observed in its beginning, during its prosecution, and after victory."[12] Newton and May interpret the "during its prosecution" to refer to *jus in bello*.[13] But it seems that what Suarez actually meant is that proportionality is a requirement lasting throughout the entire war. Of course, Suarez did not know the rule of proportionality in the modern sense. Rather, he thought of proportionality—balancing good results versus evil results—as a requirement of all human activity that might cause damage. Why then would proportionality not be relevant during war?

---

10. MICHAEL HOWARD, WAR IN EUROPEAN HISTORY (updated ed. 2009) 69–70.

11. Mark Totten, *Using Force First: Moral Tradition and the Case for Revision*, 43 STANFORD JOURNAL OF INTERNATIONAL LAW 95, 105 n.36 (2007). Moreover, *The Digest of Justinian* states, "[t]he historical antecedents of necessity and proportionality lie at least as far back as the Roman law concepts of *incontinenti* and *modernamen inculpatae tutelage* in the context of individual self-defense . . . ." The latter term relates to the principle of proportionality and requires moderation in a forceful response relative to the circumstances. Both terms appear in this passage from the Digest: "Those who do damage because they cannot otherwise defend themselves are blameless . . . it is permitted only to use force against an attacker and even then only so far as is necessary for self-defense and not for revenge." 1 THE DIGEST OF JUSTINIAN 291 (Alan Watson ed. & trans., 1998).

12. FRANCISCO SUÁREZ, *Disputation XIII: On War*, *in* SELECTIONS FROM THREE WORKS 910, 916 (Thomas Pink ed., Gladys L. Williams, Ammi Brown & John Waldron trans., Liberty Fund 2015) (1610).

13. MICHAEL NEWTON & LARRY MAY, PROPORTIONALITY IN INTERNATIONAL LAW 62 (2014).

From the end of the eighteenth century, and in particular because of the Napoleonic wars, war and military doctrine changed considerably. Wars turned from a set of pitched battles to "total wars," with the parties employing all of their resources to achieve victory by annihilating the enemy.[14] Naturally, in these wars there was little sense in advocating a limitation on the amount of force used. Each party employed as much power as it could, requiring the opposing party to employ equal or greater power in response.[15] Because one party to the conflict is using all its might, the proportionate response by the other party would also be to use all its might in return.[16] In these circumstances, proportionality in the resort to force becomes virtually obsolete. Accordingly, since the mid-nineteenth century, limitation on the use of force focused not on the resort to force itself, but on the manner in which it was used during the conflict—what we now call IHL or the LOAC. In an era of total wars, proportionality as a legal limitation on the overall use of force had become almost obsolete.

Following the devastating effects of World War I, attempts were made to develop new frameworks that would prevent future "total wars." Notably, as Hathaway and Shapiro demonstrate,[17] a series of international documents beginning with the Kellogg-Briand Pact[18] rejected the just war tradition. These views are rooted in the work of scholars such as Ivan Bloch writing at the end of the nineteenth century,[19] and Samuel Levinson in the twentieth century.[20] These attempts were so successful that as early as 1935 Hersch Lauterpacht declared that aggressive war is illegal.[21] The guiding

14. DAVID A. BELL, THE FIRST TOTAL WAR: NAPOLEON'S EUROPE AND THE BIRTH OF WARFARE AS WE KNOW IT (2008).

15. GEOFFREY BEST, WAR AND SOCIETY IN REVOLUTIONARY EUROPE, 1770–1870 (rev. ed., 1998).

16. Provided that European powers and alliances were more or less of the same force, as was the case.

17. OONA A. HATHAWAY & SCOTT J. SHAPIRO, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD (2018).

18. General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S 57 (commonly referred to as the Kellogg-Briand Pact).

19. IVAN STANISLAVOVICH BLOCH, IS WAR NOW IMPOSSIBLE? BEING AN ABRIDGMENT OF THE WAR OF THE FUTURE IN ITS TECHNICAL, ECONOMIC, AND POLITICAL RELATIONS (London, Grant Richards 1899).

20. *See* HATHAWAY & SHAPIRO, *supra* note 17, at 109.

21. Lauterpacht edited and revised the fifth edition of Oppenheim's treatise on international law and added an important discussion on the illegality of war. *See* 2 INTERNATIONAL LAW 517 (Hersch Lauterpacht ed., 5th ed. 1935).

principle of this approach is that war itself is bad, whether just or unjust. Wars, especially modern wars, create so much suffering for all parties, for which no "victory," even if it is achievable, can compensate. Accordingly, in this period, proportionality was discussed primarily in relation to deterrence and prevention of war, as well as reprisals and measures short of war.[22]

The second half of the twentieth century, beginning with the post-World War II drafting of the U.N. Charter, saw a renewed attempt to limit the recourse to force, while recognizing the legitimacy of self-defense and the need to have a body of law regulating conduct during hostilities. The latter, as it developed over the ensuing decades, contains detailed rules on how force is used in specific military operations, including the *jus in bello* version of the proportionality principle covering collateral harm to civilians because of attacks on military targets. As for the resort to force, other than Security Council mandated operations, the primary focus was limiting its occurrence to circumstances in which it was strictly necessary for the aims of self-defense. The principle of necessity was therefore a key component of the *jus ad bellum,* while, as will be demonstrated, although proportionality may have been regularly invoked in the same breath its meaning was obscured and even neglected.[23]

Granted, almost all international law textbooks cite the famous *Caroline* test according to which, the "necessity of self-defense" must be "instant, overwhelming, leaving no choice of means, and no moment of deliberation," and that measures of self-defense should not be "excessive."[24] This standard has traditionally been interpreted as relating to a requirement of proportionality in self-defense. As we explain below, this requirement for proportionality in self-defense was usually interpreted as merely a corollary of the necessity requirement, and not as a real independent condition for the use of force. In essence, the divide between aggression and self-defense

22. Responsibility of Germany for Damage Caused in the Portuguese Colonies in the South of Africa (Port. v. Ger.), 2 R.I.A.A. 1011 (1928) (commonly referred to the Naulilaa Case).

23. Judith Gardam notes, "A significant factor contributing to the uncertainty surrounding the application of proportionality is that the issue is rarely carefully analysed. Proportionality is consistently referred to as a concept whose application and operation is self-evident. Such an assumption, however, is misplaced." JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 155 (2004).

24. *See* ANTONIO CASSESE, INTERNATIONAL LAW 298 (2d ed. 2005).

has overwhelmed the *jus ad bellum* discourse, relegating any meaningful discussion of proportionality to the sidelines.

A. The Opaqueness of the Necessity/Proportionality Divide in the Modern Jus ad Bellum

In the context of wars of self-defense, the requirement of necessity ensures that even in the event of an armed attack, the prohibition of force will only give way if there is a clear defensive need for a forcible response. Necessity therefore fulfills a normative role by providing valid reasoning for making an exception to the prohibition, while limiting the recourse to force as far as possible with the purpose of maintaining international peace and security. Necessity in the modern *jus ad bellum* is based on just war theory and was further developed in the nineteenth century.[25] It appears in the *jus ad bellum* in two distinct meanings:[26] the first is the requirement of last resort. Force cannot be used unless it is necessary to halt the attack. The second meaning of the term is that there is a high likelihood of success, that is, that force would actually achieve the desired legitimate goal.[27]

Any evaluation of the necessity of force will thus require first agreeing on the legitimate aim of the forcible response. This is because, in most cases, the force necessary to halt and repel a current attack will be less than the force required to prevent future attacks. Moreover, if the current attack is over, a "halt and repel" approach might mandate the conclusion that there is no necessity for any force, while a "prevent further attacks" approach could maintain that force is still necessary.[28] For our purposes, it is sufficient to note that while the aim of self-defense remains an unsettled debate, we concur with the view that if the armed attack is determined to be part of a larger offensive campaign set to continue, then the defensive respons-

25. GARDAM, *supra* note 23, at 35–39.

26. Mary Ellen O'Connell, *The Limited Necessity of Resort to Force*, *in* IMAGINING LAW ESSAYS IN CONVERSATION WITH JUDITH GARDAM 37, 52 (Dale Stephens & Paul Babie eds., 2016).

27. *Id.* at 48–59.

28. *See* Eighth Report on State Responsibility by Mr. Roberto Ago, Special Rapporteur – The Internationally Wrongful Act of the State, Source of International Responsibility (Part 1) [1979] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 16, U.N. Doc. A/CN.4/318/Add.3; *see also* Georg Nolte, *Multipurpose Self-Defence, Proportionality Disoriented: A Response to David Kretzmer*, 24 EUROPEAN JOURNAL OF INTERNATIONAL LAW 283, 285–88 (2013).

es can consider the need to prevent further attacks rather than just halting the specific attack of the hour.[29]

There are two levels at which the necessity of force might be judged. The first is whether it is necessary to use *any* force. For example, perhaps the Security Council is taking measures that would render the self-defense unnecessary. At this level, we must first ask, does this situation require a forcible response? The second is whether this *specific type and amount of force* is necessary to achieve the legitimate aim. Both of these questions should be considered part of the necessity test but, as will be seen below, the latter is often conflated with questions of proportionality. Thus, even when purporting to raise proportionality questions, most debate in the *jus ad bellum* sphere is dominated almost exclusively by concerns of necessity.

Stepping back from the specific use of force to the fundamental differences between the concepts helps to elucidate the matter. At its most basic sense, the concept of necessity asks the question of "Is it necessary to do X to achieve Y?" Proportionality questions, however, are based on a different structure: "Is X proportionate in relation to Y?" When proportionality is described as "did they use more force than needed," this is in fact a formulation of necessity, as defined above. Proportionality, as a general principle of law,[30] is concerned with measuring the effects of X in relation to Y, and is a separate step that follows from the necessity question. In other words, it may be that X force is necessary to achieve Y, but even so, X might be disproportionate in relation to this aim.

To borrow an example from domestic criminal law, imagine a situation in which the conditions (distance from the suspect, no means to identify the suspect and apprehend him or her later, no other viable options, etc.) mean that the only way a police officer can stop a person for a traffic violation is by shooting them. A police officer stopping a person violating the law is a legitimate aim, and there may be circumstances in which shooting the suspect could be necessary as there is no lesser way to achieve the aim. Nonetheless, shooting a person for a traffic violation is grossly disproportionate. Necessity and proportionality are, as should be clear, two legal concepts with distinct standards that must not be conflated.

---

29. INTERNATIONAL LAW ASSOCIATION, FINAL REPORT ON AGGRESSION AND THE USE OF FORCE (2018) [hereinafter ILA REPORT]. For further discussion, see David Kretzmer, *The Inherent Right of Self-Defense and Proportionality in* Jus ad Bellum, 24 EUROPEAN JOURNAL OF INTERNATIONAL LAW 235, 239 (2013).

30. *See infra* p. 189.

The variables in the proportionality formula change from one context to the next, but the structure remains the same. For example, in the sphere of conduct of hostilities and the *jus in bello*, the variables balanced against each other are the anticipated concrete and direct military advantage in relation to the expected harm to civilians and civilian property.[31] The challenge before us, then, is to identify the correct variables to be used in the proportionality equation in the context of the resort to force.

In his comprehensive article on the subject, David Kretzmer suggested that there are two ways to understand proportionality in the *jus ad bellum*, noting that scholars are in disagreement regarding their interpretation of the notion.[32] One view understands proportionality as "tit for tat."[33] This would mean measuring the force used in self-defense directly against the harm caused by the armed attack. Such an understanding seems to think of self-defense as a "punitive" measure, more like a reprisal. The other view, a "means-end" interpretation of self-defense proportionality supported by a number of commentators,[34] measures the use of force against the legitimate aim. Kretzmer calls for the adoption of a more nuanced understanding of the latter view in light of the differing approaches to the legitimate aims of self-defense.[35]

We agree that the "tit-for-tat" view cannot address the range of cases in which the *jus ad bellum* should be considered. Moreover, we submit that such an approach places the wrong variables in the proportionality formula by measuring the force used not against the aim of self-defense, but against the original injury. It creates the impression that self-defense is akin to playground violence governed by archaic notions of an eye for an eye.

---

31. *See* AP I *supra* note 2, art. 51(5)(b); *see also Rule 14. Proportionality in Attack*, INTERNATIONAL COMMITTEE OF THE RED CROSS, IHL DATABASE: CUSTOMARY IHL, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule14 (last visited June 12, 2020).

32. Kretzmer, *supra* note 29, at 237–38; *see also* Lieblich, *Continuous and Concurrent*, *supra* note 9 (manuscript at 17).

33. For a discussion of a range of possible approaches to understanding proportionality, see Kretzmer, *supra* note 29 and Eighth Report on State Responsibility by Mr. Roberto Ago, *supra* note 28.

34. Kretzmer, *supra* note 29, at 269–73; Enzo Cannizzaro, *The Role of Proportionality in the Law of International Countermeasures*, 12 EUROPEAN JOURNAL OF INTERNATIONAL LAW 889, 891–93 (2001); Lieblich, *Continuous and Concurrent*, *supra* note 9 (manuscript at 17).

35. Kretzmer, *supra* note 29, at 276–79.

On the other hand, while the "means-end" approach would seem to be the better-supported view, it continues to harbor significant disagreement, as the legitimate aim section of the formula could be a narrow "halt and repel" or a wider "prevention and deterrence" approach.[36] It is also here that, in our opinion, much of the proportionality discussion begins to unravel. More often than not, the issue is posited as a question of whether the force used was more than actually required to achieve the aim. This same question is repeated in many iterations, whether by those who measure it against a narrow aim or a wider one.[37] This is a crucial question, no doubt, but it is in fact simply a repetition of an element of the necessity principle.

B. The Temporal Challenges of Jus ad Bellum *Proportionality*

Even when necessity and proportionality are not confused, the latter sometimes is presented as a notion that carries little meaning for full-fledged wars. "Once war is raging" writes Dinstein in his classic summary of the issue, "the exercise of self-defense may bring about 'the destruction of the enemy's army', regardless of the condition of proportionality."[38] Indeed, interpreting proportionality as allowing for massive force so long as it is necessary may have been an appropriate position for those advocating the legitimacy of "all-out" wars designed to bring the enemy to its knees, but such an approach is outdated in light of modern conflicts.[39] Moreover, in our view, it fails to take account of the true meaning of proportionality.[40] It also, as we shall explore later, exposes the fallacy of temporally restricting proportionality evaluations to the opening moments of the conflict.[41]

---

36. *See* Lieblich, *Continuous and Concurrent*, *supra* note 9 (manuscript at 3).

37. *See* Cannizzaro, *supra* note 34, at 890–92; OLIVIER CORTEN, THE LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW 482 (2010).

38. YORAM DINSTEIN, WAR, AGGRESSION AND SELF DEFENCE 282–83 (6th ed. 2017) (citing Denis Alland, *International Responsibility and Sanctions: Self-Defense and Countermeasures in the ILC Codification of Rules Governing International Responsibility*, *in* UNITED NATIONS CODIFICATION OF STATE RESPONSIBILITY 143, 183 (Marina Spinedi & Bruno Simma eds., 1987).

39. *See generally* Gabriella Blum, *The Fog of Victory*, 24 EUROPEAN JOURNAL OF INTERNATIONAL LAW 391 (2013).

40. *Cf.* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶¶ 41–43 (July 8).

41. *See infra* notes 66–75 and accompanying text.

One of the foundations on which the modern concept of the *jus ad bellum* was erected is the idea that there is a beginning to the conflict and therefore that an informed evaluation of the legality of the response can be made at a specific point in time. In the nineteenth century, war had a clear beginning with a formal declaration of war. During the second half of the twentieth century, after the "first" use of force was prohibited, it became even more important to define which party used force unlawfully and which party responded in self-defense. Two important U.N. General Assembly resolutions[42] and several judgments of the International Court of Justice dealt with the issue,[43] as did countless academic writings. All of these efforts sought to draw a bright line between the unlawful use of force and a lawful self-defense response.

But with the change in the nature of conflicts, the suitability of these documents seemed detached from reality. Many conflicts did not suddenly "start," but had deep historical roots and went on for decades in some form or another, at various levels of intensity.[44] There was no clear point at which one party to the conflict "started" the conflict, and the other side responded. As a result, the main pillar upon which modern *jus ad bellum* relies is not always easily identifiable. Accordingly, some scholars now claim that the *jus ad bellum* applies throughout the conflict, although it is not clear that States accept this assumption, and what exactly is meant by this continuous application.[45]

---

42. For the definition of friendly relations, see G.A. Res. 2625 (XXV), Declaration on the Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations (Oct. 24, 1970). For the definition of aggression, see G.A. Res. 3314 (XXIX), Definition of Aggression (Dec. 14, 1974).

43. *See, e.g.*, Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4 (Apr. 9); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14 (June 27); Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. Rep. 161 (Nov. 6); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168 (Dec. 19).

44. Judges had to define an armed conflict for the purpose of applying IHL. Therefore, they came up with a definition of an armed conflict even if the parties were not States. However, this definition, discussed below, was not really intended to define when the armed conflict began. Rather, it merely served to identify its existence.

45. The most detailed discussion on the contemporary application of proportionality in the *jus ad bellum* in these circumstances is Lieblich. *See* Lieblich, *Continuous and Concurrent*, *supra* note 9; *see also infra* notes 101–05 and accompanying text.

Moreover, current conflicts can often be long, with alternating periods of high intensity and relative quiet. Traditional scholarship tries to create a threshold, which is necessarily artificial, for when a conflict "ends," and requires a reevaluation of the *jus ad bellum* for when a conflict resumes, as opposed to cases seen as a single ongoing conflict.[46] This is a futile exercise, and once the conflict has begun, the parties will likely operate under the assumption they can use as much force as they want, and cause as much damage as they see fit, so long as they do not violate a specific rule of IHL.[47] Such situations undermine the notion that it is possible to agree on the identity of the aggressor and the victim, thus making it difficult to rely on principles attached to the resort to force in self-defense.[48]

The fact that so many modern conflicts involve non-State actors creates further challenges to the relevancy of the *jus ad bellum*.[49] Even if we accept that current international law recognizes the right of the State to use self-defense against a non-State actor, this is only usually seen as covering extraterritorial conflicts.[50] What if the State uses massive force against a non-State actor within its territory? Is there any meaning to proportionality in the *jus ad bellum* when a State is attacked by a non-State actor operating from within? Here too, IHL can regulate specific attacks, but our concern is with the overall use of force as opposed to individual incidents.

In sum, since the middle of the twentieth century, proportionality as a limit on the use of force has lost its original meaning, and in legal discus-

---

46. *See* Adil Ahmad Haque, *Necessity and Proportionality in the Law of War*, *in* THE CAMBRIDGE HANDBOOK OF THE JUST WAR 255, 257–58 (Larry May ed., 2016).

47. We do not address the question of the parallel application of IHL and international human rights law (IHRL), because we believe it leads essentially to the same conclusion. Further, since IHRL is mostly about individual violations, even if IHRL applies, it might prohibit specific acts, but it does not deal with the overall use of force.

48. Yael Ronen, *Israel, Hizbollah and the Second Lebanon War*, 9 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW, 362, 388–92 (2006). Ronen's attempt to apply the *jus ad bellum* test to the Second Lebanon War is telling. Israel and Hezbollah were in constant conflict, and the major claim by Israel was that unless full force was used, Hezbollah would simply go on threatening Israel. This meant that there was no sense in trying to locate the precise beginning of the conflict. The point holds for the situation between Israel and Hamas. Every two or three years the conflict erupts. Does it really make sense to try to apply the traditional *jus ad bellum* test to these situations?

49. The prohibition of the use of force and the right of self-defense both apply to U.N. member States according to the U.N. Charter. *See* U.N. Charter, art. 2, ¶ 4, art. 51; *see also infra* p. 178.

50. *See infra* Section III.A.2.

sions, it is almost obsolete.[51] This result stems from a number of factors, including the evolution of the modern law on the use of force and its focus on self-defense between States, as well the challenges in objectively determining and distinguishing between aggressors and defenders. Moreover, the conflation between necessity and proportionality has resulted in inadequate attention to the latter.

III. BRIDGING THE SPACE BETWEEN THE *JUS AD BELLUM* AND IHL

As will be demonstrated in this Part, there are numerous aspects of armed conflict which give rise to concerns that are neither easily resolved through traditional approaches to the *jus ad bellum* nor through IHL. Using these examples, we argue that there is a need for accepting a principle of strategic proportionality aimed at bridging the space between the current prevailing approaches. Such a principle would create a tool for balancing the aims and harms of conflict at the strategic and cumulative level throughout the duration of both international and non-international armed conflicts.

A. Strategic Goals versus Operational and Tactical Effects

Every military operation can be assessed on several levels. Legally, the tactical and operational effect falls under IHL. There, the military advantage of an operation should be assessed against the expected harm to civilians because of this specific attack (IHL proportionality).[52] However, every military operation is also a small piece of the overall conflict, which has its own larger strategic goals that are beyond the attack of the day. Equally, the harm to civilians from specific attacks is only a small piece of the destructive nature of war. By focusing on limiting damage at the level of specific operations, IHL is restricted in its ability to curtail the overall harm and destruction of the armed conflict.[53] Indeed, Beer goes so far as to argue that modern IHL has "tacitly accepted the in bello prototype of total war

51. There are notable exceptions and several scholars have kept the concept alive, including Christopher Greenwood, Judith Gardam, Rosalyn Higgins, and, more recently, David Kretzmer and Kenneth Watkin. *See infra* Part IV.

52. Here, attack refers to the context of an operation as a whole, but is still limited, and does not refer to war as a whole. *See* AP I, *supra* note 2, art. 51(5)(b).

53. YISHAI BEER, MILITARY PROFESSIONALISM AND HUMANITARIAN LAW: THE STRUGGLE TO REDUCE THE HAZARDS OF WAR 139–40 (2018).

between armies carried out in a bloody, industrial manner and aimed at the complete destruction of the adversary's armed forces."[54]

The IHL proportionality rule is under strain from both sides of the equation. On the civilian side, there are increased and well-argued calls for a wider interpretation of the types of harm that must be considered (partially as a result of attempting to overcome the above-mentioned perceived limitations).[55] For example, it is increasingly accepted that long-term harm, and what numerous commentators call reverberating effects,[56] are included in proportionality assessments, so long as the attacking force can reasonably expect these effects.[57] However, accepting this position may lead to even more searching questions, such as whether an attacking force must consider conflict-related disease,[58] and even mental harm,[59] in its proportionality assessments. An emerging view is that there is no reason to exclude these harms if they are foreseeable; but at present time, armed forces lack the tools to measure these harms in a way that lends itself to the calculations made during attack planning and proportionality assessments.[60]

We submit that the problem is more complex. For example, there is enough statistical data to show that mental harm is a likely result of exposure to armed conflict and can be expected.[61] The challenge is that while this harm can occur from one specific attack, it is often the result of prolonged exposure to war and not a single event.[62] In other words, it is not necessarily a harm resulting from a single attack or operation—which is what the IHL proportionality rule seeks to capture—but rather the resulting harm is often part of the overall and accumulated effect of the conflict.

---

54. *Id.* at 139.

55. *See, e.g.,* EMANUELA-CHIARA GILLARD, CHATHAM HOUSE, PROPORTIONALITY IN THE CONDUCT OF HOSTILITIES: THE INCIDENTAL HARM SIDE OF THE ASSESSMENT 27–42 (2018) (discussing what constitutes incidental harm to civilians).

56. INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 52 (2015); MICHAEL N. SCHMITT, ESSAYS ON LAW AND WAR AT THE FAULT LINES 156 (2011).

57. GILLARD, *supra* note 55, at 19, ¶ 57.

58. *Id.* at 14, ¶ 43, at 15, ¶ 47, at 18, ¶ 61, at 19, ¶¶ 66–65, at 31, ¶107.

59. Eliav Lieblich, *Beyond Life and Limb: Exploring Incidental Mental Harm under International Humanitarian Law*, *in* APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES: INTERNATIONAL AND DOMESTIC ASPECTS 185 (Derek Jinks, Jackson N. Maogoto & Solon Solomon eds., 2014).

60. *Id.*

61. *Id.* at 213.

62. *Id.* at 214.

Turning to the other side of the equation, the IHL proportionality rule is narrowly confined to the "concrete and direct military advantage anticipated."[63] Some commentators argue that this criterion is unfairly limiting. For example, states and various commentators have argued to include aims such as preventing the kidnapping of soldiers due to strategic and public morale implications.[64] But this aim appears to present a problematic widening of the notion of concrete and direct military advantage.[65] We thus see that the IHL proportionality rule is subjected to strain also by States wishing to consider aims that go beyond what it is understood to encapsulate.

1. Overall Harm and Benefit

The prevailing approaches to both the *jus ad bellum* and the *jus in bello* do not provide solutions for concerns on both sides of the benefit/harm proportionality formula. Perhaps nowhere is this shortcoming more obvious than in relation to overall casualty figures. As is well documented, past Israeli operations caused a significant number of civilian deaths in the Gaza strip.[66] Some scholars and international observers claim that the amount of civilian casualties demonstrates that Israel has failed the proportionality test in IHL.[67] However, the Israeli counter-claim that each individual operation satisfies the proportionality test might mean that Israel is complying with IHL. As long as Israel can justify civilian casualties in every specific operation, so goes the Israeli claim, there is no requirement in IHL to assess the

63. AP I, *supra* note 2, art. 51(5)(b).

64. *See generally* Ziv Bohrer & Mark J. Osiel, *Proportionality in War: Protecting Soldiers from Enemy Captivity, and Israel's Operation Cast Lead—"The Soldiers are Everyone's Children"*, 22 SOUTHERN CALIFORNIA INTERDISCIPLINARY LAW JOURNAL 637 (2013).

65. Amichai Cohen & Yuval Shany, *Contextualizing Proportionality Analysis*, JUST SECURITY (May 7, 2015), https://www.justsecurity.org/22786/contextualizing-proportionality-analysis-response-schmitt-merriam/.

66. *Gaza Crisis: Toll of Operations in Gaza*, BBC News (Sept. 1, 2014), https://www.bbc.com/news/world-middle-east-28439404 (reporting more than 2,100 Palestinian civilians were killed in the Gaza Strip during operation Protective Edge between July 8 and August 27, 2014).

67. *Compare* George E. Bisharat, *Israel's Invasion of Gaza in International Law*, 38 DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY 41, 66, 81–87 (2009), *with* Asa Kasher, *A Moral Evaluation of the Gaza War – Operation Cast Lead*, JERUSALEM CENTER FOR PUBLIC AFFAIRS, Feb. 4, 2010, http://jcpa.org/article/a-moral-evaluation-of-the-gaza-war-%E2% 80%93-operation-cast-lead/.

number of aggregate civilian casualties.[68] Unfortunately, neither does the *jus ad bellum* provide a solution.[69] If, as is often argued,[70] the *jus ad bellum* is an assessment that takes place at the start of the conflict, and if, as is also commonly agreed,[71] it is designed for inter-State wars, then the *jus ad bellum* cannot resolve the question of how to assess a situation with rising numbers of civilian casualties, especially in conflicts against non-State armed groups.

This is a troubling conclusion. The idea that the overall number of civilian deaths has no place in the required regulation of armed conflict seems not only morally dubious, but also out of kilter with the legal objectives of the U.N. Charter. The principle of strategic proportionality offers a way out of the hole that international law (or rather international lawyers) appears to have dug for itself.

A principle of proportionality focused on the overall harm and benefit of the conflict can assist with additional concerns that currently are not adequately addressed. Cumulative effects of harm other than direct casualties can also be factored into this framework. This is true of matters such as the aforementioned growing need to consider mental harm caused to the population,[72] as well as cumulative harmful effects on a State's infrastructure, economy, and other indirect but potentially devastating effects of war.[73]

As for the desire of parties to the conflict to consider aims that may fall outside the IHL notion of concrete and direct military advantage, we believe that this too requires a framework for assessment. One cannot ignore that parties to a conflict will be concerned with matters ranging from pub-

68. STATE OF ISRAEL, THE 2014 GAZA CONFLICT: 7 JULY – 26 AUGUST 2014: FACTUAL AND LEGAL ASPECTS 181–94 (2015).

69. As Gardam notes, "to some extent the existence of the IHL rule of proportionality, with its focus on collateral civilian damage, may deflect attention from this factor under *ius ad bellum*." GARDAM, *supra* note 23, at 162.

70. *See* Lieblich, *Continuous and Concurrent*, *supra* note 9 (manuscript at 4–5).

71. *See supra* note 40 and accompanying text.

72. *See* Lieblich, *supra* note 59 and accompanying text.

73. The deadly cholera outbreak in Yemen following the Saudi-led coalition's airstrikes and blockades provides one such example. *See, e.g.*, Matthew Ponsford, *Saudi-Led Coalition Responsible for 'Worst Cholera Outbreak in the World' in Yemen: Researchers*, REUTERS (Aug. 18, 2017), https://www.reuters.com/article/us-yemen-cholera-saudi/saudi-led-coalition-responsible-for-worst-cholera-outbreak-in-the-world-in-yemen-researchers-idUSKCN1AY2 JH (noting that economic collapse and mass hunger also followed these acts).

lic morale (which may be linked to mental health) of their own population stemming from, for example, living under constant fear of bombardment, to the wider economic costs and accumulated harm on their own side. If we expect a party to a conflict to consider such harm for the opposing civilians, surely it should be allowed to also take into account the same effect the conflict is having on its own population. There is a need to better articulate a strategic level of consideration that sits between the *jus ad bellum* requirement that war be prosecuted only for the aim of self-defense (or under Security Council authorization), and the aims of specific attacks. During armed conflicts, civilian and military leaders form strategy by "distributing and applying military means to fulfill the ends of policy."[74] This includes taking into account matters such as protection of troops, the defense and use of natural resources and armaments, economic effects, and the protection of specific geographic locations.[75] While some of these matters might not be accepted aims for assessing the legality of a specific attack under IHL,[76] one cannot deny that at some level they clearly enter the considerations of States in the decision-making process. There must be a space in which matters such as overall and cumulative harm of a conflict, together with the strategic aims guiding its prosecution, can be addressed. We believe that the proposed strategic proportionality principle can provide the appropriate framework and the space for such considerations.

2. Non-International Armed Conflicts

In current legal scholarship, the applicability of the *jus ad bellum* to non-international armed conflict is debatable.[77] In relation to internal conflicts, it is generally assumed that States are not required to justify recourse to force against internal threats through the paradigm of the U.N. Charter's rules on force. Inherent to the notion of the State in the Westphalian order is its monopoly on the use force within its borders. While other bodies of

74. B.H. LIDDELL HART, STRATEGY 335 (1967).

75. *See generally* JOHN M. COLLINS, MILITARY STRATEGY: PRINCIPLES, PRACTICES, AND HISTORICAL PERSPECTIVES (2002).

76. *See infra* Part VI for further discussion.

77. François Bugnion, Jus ad Bellum, Jus in Bello, *and Non-International Armed Conflicts*, 6 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 167–98 (2006); Eliav Lieblich, *What Law Applies to the Resort to Force Against Non-State Actors? Filling the Void of "Internal Jus Ad Bellum"*, JUST SECURITY (Oct. 18, 2016), https://www.justsecurity.org/33664/law-applies-resort-force-non-state-actors-filling-void-internal-jus-ad-bellum/.

law can provide restrictions in relation to protection of human rights and the prohibition of genocide or crimes against humanity, States have not been expected to justify internal uses of force in the form of a self-defense exception to the Charter prohibition.[78]

The debates over the applicability of the self-defense regime raise different questions in the context of attacks by non-State actors from outside a State's borders. Here, while some opinions have proposed limiting the right of self-defense to attacks by other States,[79] there is growing acceptance that a State may claim the right of self-defense to protect itself from any attack emanating from the territory of another State, even if the originator of the attack was a non-State actor.[80]

Perhaps the most controversial notion of all would be the question of whether the non-State actors themselves are bound by the *jus ad bellum*. It seems clear from the wording of the U.N. Charter and the practice of States, that there was no intention to grant non-State actors a right of self-defense against States. To do so would undermine the State-centric international order and, subject to the debatable exception of self-determination,[81] it is a proposition with very little support.

All these issues of who has the right to respond with force against who are part of valuable discussions but do little to help address the actions taken in a conflict once it has already begun. We submit that notwithstanding the question over the *jus ad bellum* aspect of the right to use force, the separate principle of strategic proportionality is a useful tool for the regulation of non-international armed conflicts, and that its introduction can be

78. *See* Eliav Lieblich, *Internal* Jus Ad Bellum, 67 HASTINGS LAW JOURNAL 687 (2016). On the evaluation of the Westphalian international order in modern time, see Simona Ţuţuianu, *Redefining Sovereignty: From Post-Cold War to Post-Westphalia*, *in* TOWARDS GLOBAL JUSTICE: SOVEREIGNTY IN AN INTERDEPENDENT WORLD 43 (2012).

79. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 139 (July 9).

80. *See, e.g.*, ILA REPORT, *supra* note 29, at 14–17 (Section B.2.c. Self-Defence against Non-State Actors); *see also* Jeremy Wright, U.K. Attorney General, The Modern Law of Self-Defence, Speech before the International Institute of Strategic Studies (Jan. 11, 2017), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/583171/170111_Imminence_Speech_.pdf; S.C. Res. 1373 (Sept. 28, 2001) (regarding the Sept. 11, 2001 attacks against the United States); S.C. Res. 2249 (Nov. 20, 2015) (regarding ISIS).

81. There are numerous debates concerning claims of self-determination. *Compare* G.A. Res. 2625 (XXV) (Oct. 24, 1970), *with* Reference re Secession of Quebec, [1998] 2 S.C.R. 217, ¶¶ 2, 110–119, 122–128, 130–36.

achieved without upsetting the delicate balance of international order that is the concern of the above questions. Indeed, these other debates over *jus ad bellum* and non-State actors center around questions such as which entities may have a legitimate claim to resort to force in self-defense, and whether the nature or location of the entity behind the armed attack has any bearing on this claim.[82] Our focus is different. Regardless of the answers to these debates, we note that there remains a concern as to the regulation of the overall force at the strategic level after the conflict has commenced. In non-international armed conflicts, as with international ones, IHL plays a crucial role in providing a framework of rules applicable to all parties—State and non-State actor—that includes the IHL rule of proportionality. But, as in the case of international armed conflicts, this rule is focused on the decisions of commanders and soldiers in relation to specific attacks and operations, rather than the "bigger picture."[83]

The suffering and devastation of war is no lesser—indeed, by some measures it has been even greater in recent decades—in non-international armed conflicts. If the U.N. Charter is to be taken at its word, then its opening aim to "save succeeding generations from the scourge of war"[84] must be considered applicable to non-international armed conflicts. As we demonstrate, a strategic proportionality principle can provide the primary foundation for requiring the leadership of parties to a conflict to assess the harm of war against the strategic objectives being gained. The Charter's goal of minimizing the harm of conflict should not be reduced to a formalistic reading of Article 2(4) and its exceptions.[85] There is no moral, political, or in our view legal basis to exempt non-international armed conflicts from such a requirement to assess the overall human cost of war. We submit, therefore, that our proposition of a strategic proportionality principle that applies throughout an armed conflict to ensure that the overall harm does not outweigh the strategic advantage should be equally applicable to the conduct of all parties in non-international armed conflicts.

---

82. *See* NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 25–82 (2010).

83. *See supra* p. 173–75.

84. U.N. Charter, pmbl.

85. *Id.* arts. 2, ¶ 7, 24, 25, 39–51.

3. Means and Methods

Means and methods are usually examined under the IHL framework,[86] with numerous rules and prohibitions established in this context.[87] State practice and exhaustive interpretations provide States with guidance regarding the application of this part of IHL. However, certain aspects of weapon use raise concerns that IHL cannot easily address. Take, for example, the debates surrounding the use of cluster munitions. Their use is prohibited under the Cluster Munitions Convention,[88] but significant military powers are not party to this instrument.[89] For these non-signatory States, the use of cluster munitions is generally allowed so long as specific uses do not violate other rules of IHL. The principle of distinction may prohibit the use of cluster bombs in the vicinity of civilians,[90] but that does not mean that there would be no cases in which cluster munitions might be used by non-parties in an IHL compliant manner that nevertheless leads to some civilian casualties. In fact, much of the concern over cluster munitions stemmed from their long-term cumulative effect. While some long-term effects, if they are to be expected, can be considered within the IHL proportionality rule, this is not always the case for aggregate cumulative effects of conflict. Accordingly, while it may be the case in certain circumstances that cluster munitions use might not be prohibited under IHL (for States not party to the relevant convention), the cumulative and well-documented long-term effect for the civilian population[91] could enter the strategic proportionality analysis and lead to a decision to refrain from their use.

---

86. The general principle under IHL limiting the right of parties to an armed conflict to choose means and methods of warfare can be found in AP I, *supra* note 2, art. 35(1).

87. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 67 (2004).

88. Convention on Cluster Munitions, May 30, 2008, 2688 U.N.T.S. 39.

89. For a review on the signatories, non-signatories, and specific reservations, see UNITED NATIONS TREATY COLLECTION, CONVENTION ON CLUSTER MUNITIONS, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-6&chapter=26&lang=en (last visited June 12, 2020).

90. AP I, *supra* note 2, art. 48; *see also* HCJ 8990/02 Physicians for Human Rights v. Doron Almog—O.C. Southern Command 193(4) PD (2003) (Isr.) (discussing this issue before the Supreme Court of Israel).

91. John Borrie & Rosy Cave, *The Humanitarian Effects of Cluster Munitions: Why Should We Worry?*, 4 DISARMAMENT FORUM 5 (2006).

Revisiting the International Court of Justice (ICJ) *Nuclear Weapons Advisory Opinion* may also lead toward such a principle. The Court's explanation was seen as peculiar, as its reasoning included reference to a State being under existential threat.[92] This reasoning is heavily criticized as a mixing of IHL and the *jus ad bellum*.[93] Indeed, traditional analysis of proportionality does not allow for considering the general goals of the war within IHL. This is further compounded by the fact that a decision to deploy such weapons would not necessarily occur on the first day of conflict, and yet a common perception of the *jus ad bellum*, as described earlier, would mean that by the time the nuclear decision came about, we would be in the sole realm of IHL. Regardless of one's view as to the legality of nuclear weapons, there was an element of the Court's reasoning that resonates with the concern raised in this article. Nuclear weapons are strategic weapons, and their legality should therefore be discussed at the strategic level, where such considerations can be taken into account. In other words, the Court was articulating—albeit not in the clearest manner—the notion that there is another level of proportionality regulation which must be applied throughout the conflict and which does not quite fit within the IHL proportionality rule nor the *jus ad bellum* as commonly understood. It does align, however, with the proposed principle of strategic proportionality.

We want to be very clear on what we suggest here. We do not advise that for each weapon used by parties to the conflict at any moment, the level of analysis should be the strategic one. On the contrary, for most uses of weapons we believe that the IHL proportionality analysis is appropriate. Moreover, the IHL rules will also apply to the use of cluster munitions or nuclear weapons in specific attacks. Nonetheless, we believe that the very deployment of such weapons requires an additional and separate assessment at a higher level of decision-making, and that the proposed notion of strategic proportionality can provide such a space.

4. The Problem of Externalities

Armed conflicts create externalities; that is, they also affect third parties. If the main determinant of the legality of self-defense under the *jus ad bellum* is its necessity, and if the decision is taken only at the beginning of the armed

92. *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. Rep. 226, at ¶¶ 41–43.
93. DINSTEIN, *supra* note 87, at 78.

conflict when the length and the effects of the conflict are opaque, then the effects on third parties are unlikely to be taken into account. Yet, in modern armed conflicts, especially lengthy ones, the negative effects of an ongoing conflict on neighboring States are often recognized. Several conflicts in Africa and the Middle East endangered the internal stability of third-party States by refugees fleeing violence (for example, eastern DRC refugees entering Rwanda and Syrian refugees entering Jordan).[94] In an influential 2005 article, Judith Gardam suggested that the *jus ad bellum* should also take into account the effects on third States.[95] In fact, it seems to us that in modern armed conflicts the case for taking into account the harms created for third States is even stronger. Moreover, this approach has specific bearings in the context of conflicts such as those involving al-Qaeda, the Islamic State, and other transnational non-State armed groups.

One of the most controversial issues of the "global war on terrorism" is the ability of States to consider the entire world as the battlefield. Some views hold that it is within the self-defense powers of States to attack terrorists wherever they are located, and even when there is no specific "battlefield" that may be identified.[96] When considering the transnational characteristics of recent non-State actors, this approach does not seem entirely groundless even if elements of it are highly debatable and its manifestation has raised numerous legitimate concerns.[97] Without falling into the "unwilling or unable" debate,[98] one can envision circumstances in which States are faced with deadly attacks against their civilians emanating from non-State actors located in a number of other States—which are not responsible for the non-State actor's attacks—who are either unwilling or unable to pre-

94. *See* Satvinder S. Juss, *The Decline and Decay of European Refugee Policy*, 25 OXFORD JOURNAL OF LEGAL STUDIES 749, 761 (2005).

95. GARDAM, *supra* note 23, at 160–79.

96. *See, e.g.*, Laurie Blank, *Self-Defense Against Terrorists: How Long and How Far?*, JURIST (Mar. 11, 2017), http://jurist.org/forum/2017/03/Laurie-Blank-self-defense.php.

97. See the sources cited in *infra* note 98.

98. Of course, there is a wide range of views on this topic. *See, e.g.*, Ashley Deeks, *"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VIRGINIA JOURNAL OF INTERNATIONAL LAW 483 (2012); Kimberly N. Trapp, *Actor-Pluralism, the "Turn to Responsibility" and the* Jus Ad Bellum*: "Unwilling or Unable" in Context*, 2 JOURNAL ON THE USE OF FORCE AND INTERNATIONAL LAW 199 (2015); Olivier Corten, *The 'Unwilling or Unable' Test: Has it Been, and Could It Be, Accepted?*, 29 LEIDEN JOURNAL OF INTERNATIONAL LAW 777 (2016); Noam Lubell, *Fragmented Wars: Multi-Territorial Military Operations against Armed Groups*, 93 INTERNATIONAL LAW STUDIES 214 (2017).

vent these attacks. In such circumstances, one should be able to recognize the challenge this situation poses, and the reason why some States would wish to use force on the territory of the host State.[99] Equally, it should be clear that such actions open up a new front of conflict and bring the risk of severe harm and casualties to civilians in the host State who might be affected.

Our suggestion seeks to provide the correct balance between these competing claims. Arguably, in a limited set of circumstances, States may be allowed to use force in self-defense against non-State actors in the territory of another State, absent attribution to that State and subject to the existence of an armed attack and the requirements of necessity.[100] However, the strategic proportionality principle requires an assessment as to whether the gains would outweigh the costs of involving another country in armed activities, and the harm that may be caused to this other State and its inhabitants. In practice, this may raise the barrier for extending such conflicts into new territories.

IV. STRATEGIC PROPORTIONALITY

We suggest a reevaluation of how proportionality has come to be understood in modern conflict. Thus, it is time to return to the original meaning of proportionality as a rule limiting the use of force, both before and during the conflict, and regardless of the identity of the parties to the conflict or the question of which party initiated the hostilities. In order to differentiate between our suggestion and current positions in international law, we call this proposal the principle of strategic proportionality.

Strategic proportionality would serve as a guiding principle that applies in all armed conflicts and throughout the duration of each conflict. It would require that the overall harm anticipated must not outweigh the expected legitimate strategic aims. This principle would provide a framework for addressing the challenges described in the previous Part, which are not currently resolved through the *jus ad bellum* or IHL. Of course, this simple formula requires explication, and we attempt to provide some clarification below. Before we do that, we first discuss the aims and address some of the intuitive objections to our proposal.

---

99. ILA REPORT, *supra* note 29, at 14–17 (Section B.2.c. Self-Defence against Non-State Actors).

100. *Id.*

A. Aims

Notwithstanding the lack of clarity surrounding proportionality demonstrated earlier in this article, a small number of authors including Greenwood, Gardam, Higgins and, more recently, Kretzmer and Watkin, have made significant contributions to a refined understanding of the concept as a crucial principle of the *jus ad bellum* that goes beyond the separate question of necessity and can apply to modern conflicts.[101] Greenwood and Higgins, for example, have written of the proportionality principle affecting decisions to expand the zone of conflict,[102] while Gardam has written similarly in relation to the temporal scope of self-defense.[103] Kretzmer points to "narrow proportionality," which, "refers to the *actual* damage caused by the means used to pursue the legitimate ends of military force."[104] This version of proportionality is, in our view, at the heart of the required understanding of the principle. Finally, Watkin, in his expansive treatment of the issue, notes, "It is the strategic impact of large-scale civilian casualties and damage that appears to influence what might constitute a disproportionate exercise of the right to self-defense by a State."[105] Hence, in some respects, our suggestion is not a break with past scholarship, but rather a continued development and clarification of this key legal issue.

In other critical points, however, we go beyond what has been suggested in contemporary scholarship, introducing the principle of strategic proportionality in a manner that not only accurately reflects the conceptual aim of the proportionality principle, but also in a manner that can be operationalized consistent with how States conduct war-time decisions.[106] Similar to Gardam and Watkin, our aim is to identify and elucidate a proportionality principle capable of providing a framework for assessing matters such as accumulated overall casualties during the conflict. Unlike them, we believe

---

101. Christopher Greenwood, *The Relationship Between Ius ad Bellum and Ius in Bello*, 9 REVIEW OF INTERNATIONAL STUDIES 221 (1983); GARDAM, *supra* note 23; ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT (1995); Kretzmer, *supra* note 29; KENNETH WATKIN, FIGHTING AT THE LEGAL BOUNDARIES: CONTROLLING THE USE OF FORCE IN CONTEMPORARY CONFLICT (2016). For a discussion of the various views on this point, see Lieblich, *Continuous and Concurrent*, *supra* note 9.

102. Greenwood, *supra* note 101, at 223; HIGGINS, *supra* note 101, at 229–32, 241.

103. GARDAM, *supra* note 23, at 167–68.

104. Kretzmer, *supra* note 29, at 278.

105. WATKIN, *supra* note 101, at 62.

106. *See infra* Part IV.

that this principle needs to be considered outside of the scope of the *jus ad bellum* as traditionally defined, and is one which requires all parties to all types of armed conflicts to engage in a continuous balancing between the overall harm and benefit of the conflict.

The introduction of a new term emerges from the need to differentiate this concept not only from the IHL proportionality rule, but also from the *jus ad bellum*. The roots of this principle, as well as its scope and aims, go beyond the law on the resort to force, at least as it has been traditionally understood. This is particularly true if the *jus ad bellum* is seen as applying primarily at the start of conflicts and only to inter-State wars. Our position is that the principle of proportionality must reclaim its original meaning as a limitation on the use of force, applied *throughout* the conflict, and to all participants, regardless of their status, or the question of the legitimacy of the use of force. It thus departs from the *jus ad bellum* focus on self-defense actions of one State against another, and instead casts a far wider net.

As for the normative claim, the desire for international peace and security is not simply a policy for global stability; importantly, it is also an aim in and of itself. The principal basis for this claim finds its roots in the very notion of humanity.[107] Further, its essence is perhaps best captured in the opening words of the preamble to the U.N. Charter, stating, "We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind."[108]

The principle of strategic proportionality finds strong historical support as well. Since at least 1899, States have realized that war causes immense suffering, and have tried to prohibit the use of force in international relations.[109] The prohibition is part of the universal attempt to reduce the suffering from war. While the necessity requirement of self-defense may limit the occasions in which recourse to force is warranted, it will do little to diminish the harm to those suffering in the wars it does allow, in conflicts

107. The basic principle of humanity can be seen as expressed in the preamble of the Hague Convention, which is also known as the "Martens Clause." *See* Convention No. II with Respect to the Laws and Customs of War on Land pmbl., July 29, 1899, 32 Stat. 1803, T.S. No. 403.

108. U.N. Charter, pmbl.

109. For the history of the attempts to outlaw war, see generally HATHAWAY & SHAPIRO *supra* note 17.

that have broken out in violation of the prohibition, or in non-international armed conflicts not covered by the same rules.

The principle of strategic proportionality can play a key role in reducing the harm and suffering attendant to all wars. To do so, it must not be limited to a narrow set of conflicts. Moreover, given that IHL and its associated proportionality rule cannot encompass the overall casualties and accumulated devastation of war, the strategic proportionality principle must continue to apply throughout the armed conflict. It can be seen as complementing and bridging the *jus ad bellum* and IHL, applied alongside them and without contradiction.

B. Is it Law?

The practical application of strategic proportionality raises questions as to its place in the rulebooks of international law as *lex lata, lex ferenda,* or as a recommended policy standard. Our claim is that based on the historical evolution of the laws regarding the use of force, the actual practice of States, and the development of principles of international law, strategic proportionality should be considered at least as *lex ferenda*.

At the outset, it is worth recalling that while the principles of necessity and proportionality are regularly reaffirmed as fundamental conditions for the exercise of force in self-defense, they are not explicitly formulated in the U.N. Charter, and have been read into the law through a succession of ICJ decisions and State practice.[110] In fact, it could generally be said that much of the law in the area of the legality of the use of force, and especially the legality of the resort to force in self-defense, suffers from inherent (and possibly deliberate) ambiguity, and is uniquely complex. This a result of the lack of detailed written treaty rules, accompanied by inconsistent case law, continuous disagreement and debate over key issues such as anticipatory self-defense, and an often confusing mixture of law and policy. In matters of the use of force and self-defense, States avoid general statements of law so that they are not bound by these statements in the future. Even when States do make declarations, these are usually directed at other States, and are a means to achieve a political end, rather than to provide a statement of

110. *Military and Paramilitary Activities in and Against Nicaragua*, 1986 I.C.J. Rep. 14, at ¶ 176; *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. Rep. 226, at ¶ 41.

law.[111] Accordingly, for our purposes of identifying existing support for strategic proportionality, we rely on a combination of law and policy interpreted in light of the aims and unfolding of modern conflicts.

These challenges notwithstanding, we believe that the practice of States can be read to support the underlying requirements of strategic proportionality as presented in this work. The first point to note is that in asymmetric armed conflicts, States and non-State actors will often terminate the conflict even when there is no clear winner.[112] Although modern armed conflicts are sometimes long, the parties to the conflict recognize that there are limits, and at some point, they end these conflicts even when there is no clear winner or victory. Naturally, States may claim to do so because some agreement has been reached. But this conclusion or agreement usually could have been reached at a much earlier stage. Among the many available examples is the U.S. war in Vietnam, where the combination of U.S. and Vietnamese casualties caused the United States finally to retreat from Vietnam in 1973.[113]

The same is true of Israel's presence in Lebanon between 1982 and 2000. In 1982, Israel invaded Lebanon under the pretext of halting the firing of mortar shells by the PLO into northern Israeli towns, but probably with the actual aim of putting Israeli allies in control of the Lebanese government.[114] Even during Israel's eighteen years in Lebanon, Israeli forces and Lebanese fighters resisting Israel's presence arrived at several understandings and agreements that limited the harm to civilians and damage to

111. The U.S., U.K., and French missile strikes against Syria, after the Syrian government's use of chemical weapons, provides a good example. The United States and France did not explicitly state their legal positions on the legality of the strike. The U.K. did provide a legal position. *See Syrian Action – UK Government Legal Position*, PRIME MINISTER'S OFFICE (Apr. 14, 2018) https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position. Pro-Syrian countries did not hesitate to base their reaction on their interpretation of international law. *See, e.g.*, Sewell Chan, *U.N. Security Council Rejects Russian Resolution Condemning Syrian Strikes*, N.Y. TIMES (Apr. 14, 2018). We do not think that it is accurate to conclude that the United States and France agreed that their actions violated international law, even if they did not explicitly justify it.

112. Blum, *supra* note 39, at 407.

113. *See* HENRY KISSINGER, DIPLOMACY 674–703 (1994); *see generally* MAX HASTINGS, VIETNAM: AN EPIC TRAGEDY, 1945–1975 (2018).

114. ZE'EV SCHIFF & EHUD YA'ARI, ISRAEL'S LEBANON WAR 41 (1984).

civilian property.[115] Israeli military casualties together with the suffering and growing opposition of Lebanese civilians caused Israel to retreat to its international border in 2000, even though it was clear Israel did not achieve almost any of its declared goals.[116]

The decision to limit the use of force and its effect during armed conflict is not unique. As Gabriella Blum has convincingly shown, States arrived at similar arrangements based on the specifics of protracted conflicts. Blum uses the example of the India-Pakistan conflict, in which these two States are locked in a long-term conflict. Nonetheless, the conflict remains limited, and the two States cooperate on several levels.[117]

Modern armed conflicts, conducted under the light of media coverage and international attention from civil society and other States, cause each party to the conflict, especially the stronger one, to consider the costs and harm caused to the opposing side. This plays out most clearly in the form of a common strategic goal in modern asymmetric armed conflicts, to win the "hearts and minds" of the enemy population.[118] Achieving this objective requires applying limited force, rather than deploying all possible power. In fact, counterinsurgency strategy builds on the idea that force should be applied only on a limited basis.[119] This is true also of the non-State actors. Armed groups often act from within the civilian population and are dependent on its support. At minimum, the above already lends strong

115. GABRIELLA BLUM, ISLANDS OF AGREEMENT: MANAGING ENDURING ARMED RIVALRIES 190–241 (2007).

116. William A. Orme Jr., *RETREAT FROM LEBANON: THE ISRAELIS; Barak Declares End to 'Tragedy' as Last Troops Leave Lebanon*, NEW YORK TIMES, May 24, 2000, https://www.nytimes.com/2000/05/24/world/retreat-lebanon-israelis-barak-declares-end-tragedy-last-troops-leave-lebanon.html; *see also* Dalia Dassa Kaye, *The Israeli Decision to Withdraw from Southern Lebanon: Political Leadership and Security Policy*, 117 POLITICAL SCIENCE QUARTERLY 561 (2002–03).

117. Blum writes:

> [O]ne cannot avoid the surprising observation that although the parties are engaged in one of the gravest of enduring armed conflicts, they somehow also manage to maintain a semi-normal relationship in most important sphere of their interstate relations. Trapped between the perceived need to invest in the conflict and the very real resource constraint, the two throughout their history have found mutual interest in limiting the scope of their hostility and creating regimes of active and ongoing cooperation.

BLUM, *supra* note 115, at 113.

118. RUPERT SMITH, UTILITY OF FORCE: THE ART OF WAR IN THE MODERN WORLD 279 (2008).

119. *See* BEER, *supra* note 53, at 134–38 (discussing counterinsurgency strategy and limited war).

support to the strategic proportionality principle as a combined legal and policy tool designed to show external observers that the party to the conflict is not applying excessive force.

One might also see proportionality in this context as a "facilitator" in Weberian terms.[120] Here, the principle applies within a body of norms that allows parties to interact with each other and with third parties over what is a legitimate use of force. For example, organizations like Hamas in the Gaza strip or Hezbollah in Lebanon not only fight against Israel, but also control the lives of many civilians, and so have a responsibility toward preserving their welfare. This responsibility causes these organizations to limit their recourse to armed conflict and to try to end conflicts relatively quickly, even without a clear winner.[121] Indeed, in the current Israel-Hamas conflict, in which the parties alternate between short periods of relatively intense armed activity, and longer periods of relative calm, there are constant attempts at limited arrangements.[122]

Moreover, it may also be said that proportionality is a general principle of law that must be considered in wider circumstances than the examples of it in specific rules of particular legal frameworks. Indeed, proportionality is a legal principle of extreme importance in constitutional and administrative law and in the jurisprudence of many countries.[123] Based on this principle, which attempts to balance the rights of the individual and the aggregate interests of society, various legal regimes put important limitations on the powers of governments.[124] There is however little uniformity on the actual meaning. German jurisprudence, for example, includes a wide understanding of proportionality which can be broken down further to include

120. *See* Carl Levy, *Max Weber and European Integration*, *in* MAX WEBER, DEMOCRACY AND MODERNIZATION 113, 118 (Ralph Schroeder ed., 1998).

121. AMICHAY AYALON & IDIT SHAFRAN GITTLEMAN, DEMOCRACY'S STRUGGLE AGAINST TERROR: A VIEW FROM ISRAEL 22–27 (2018).

122. Daniel Byman, *Why Israel is Stuck with the Hamas*, LAWFARE (Mar. 19, 2018), https://www.lawfareblog.com/why-israel-stuck-hamas.

123. Alec Stone Sweet & Jud Mathews, *Proportionality, Balancing and Global Constitutionalism*, 47 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 73, 74–75 (2008); *see also* PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING (Grant Huscroft, Bradley W. Miller & Grégoire Webber eds., 2014).

124. הבינלאומי במשפט המדתיות בעקרון השימוש [YUVAL SHANY, THE PRINCIPLE OF PROPORTIONALITY UNDER INTERNATIONAL LAW] 11 (2009) (Isr.).

necessity as a sub-question, and a narrower proportionality *stricto sensu*.[125] While a comparative analysis of proportionality is outside the scope of this article, we believe that evidence abounds in most legal systems of the recognition of a general principle requiring a balancing between the harm and benefit of an action. We do not claim this as evidence for the specific principle of strategic proportionality, but merely offer this observation in support of the need to find a tool that can assess the balance of overall harm and strategic benefit during armed conflicts.

A more problematic aspect of this discussion is *opinio juris*: Is there compelling evidence of official State positions that support the existence, or at least the desirability, of the principle of strategic proportionality as a limit to the overall use of force? We believe that there is. Granted, States do not necessarily use the term strategic proportionality. However, there are numerous official State and international organization declarations that declare resort to force to be "disproportionate," even when there is not always a clear-cut justification of this term in either IHL or in the traditional understanding of *jus ad bellum*.[126] As we have demonstrated in the examples in Part II above, we suggest that in many of these cases, what States mean can only be coherently understood if utilizing an approach along the lines of the proposed principle of strategic proportionality.

V. HOW DOES STRATEGIC PROPORTIONALITY WORK

A. Level of Decision Making

The responsibility for decision making regarding the *jus ad bellum* has always resided at the highest level of government. Commanders in the field are not supposed to make such decisions, nor are they held responsible for

125. Moshe Cohen-Eliya & Iddo Porat, *American Balancing and German Proportionality: The Historical Origins*, 8 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 263, 267–69 (2010).

126. *See, e.g.*, *EU: Israel Uses "Disproportionate Force" in Lebanon*, DEUTSCHE WELLE (July 14, 2006), https://www.dw.com/en/eu-israel-uses-disproportionate-force-in-lebanon/a-2095871; *Israel Used Disproportionate Force in Gaza, Says UN Humanitarian Chief*, U.N. News (July 25, 2006), https://news.un.org/en/story/2006/07/186852-israel-used-disproportionate-force-gaza-says-un-humanitarian-chief.

them.[127] This does not mean that soldiers must follow all orders. On the contrary, it is well-settled law that soldiers must disobey orders that are manifestly unlawful under IHL.[128] And yet, most commentators perceive the lawfulness of the resort to force outside the considerations that soldiers and field commanders must take into account.[129] This doctrinal approach seems to us to be correct in the moral, political, and practical sense. Other than the requirement to disobey orders that are manifestly unlawful in the immediate IHL sense (such as the execution of civilians), soldiers are not expected to take responsibility for the actions of their superiors in relation to the strategic elements and overall decisions to wage war. Although the general decision to use force at the State level is prohibited in most circumstances, the exceptions allowing resort to force are best evaluated by the executive branch and military high command, not the soldiers on the ground. Politically, there is no other way to conduct the affairs of the State, and practically, a soldier cannot be expected to know all the facts or the law regarding the legality of the resort to force.

This division also seems justified when strategic proportionality is evaluated during the armed conflict. The issues which we suggest should be discussed under this heading are not ones in which the regular personnel of armed forces should be involved. We do not think that responsibility for these actions should lie with soldiers or field commanders. Rather, these acts are the responsibility of the high command and their political superiors.

Our approach clarifies that the primary responsibility for the large-scale effects of war rests with the high-level command and the executive branch, and must be subject to ongoing assessment throughout the conflict. Absent such an understanding, and by remaining tied to the oft-cited approach limiting *jus ad bellum* proportionality to the opening of the conflict, there is

---

127. ROBERT CRYER, HÅKAN FRIMAN, DARRYL ROBINSON, ELIZABETH WILMSHURST, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 313 (3d ed. 2014).

128. On the customary nature of this rule, see *Rule 154. Obedience to Superior Orders*, INTERNATIONAL COMMITTEE OF THE RED CROSS, IHL DATABASE: CUSTOMARY IHL, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter43_rule154 (last visited June 12, 2020).

129. *See, e.g.*, YORAM DINSTEIN, WAR, AGGRESSION AND SELF DEFENCE 133–34 (4th ed. 2005). The Rome Statute states that responsibility for the crime of aggression is for "a person in a position effectively to exercise control over or to direct the political or military action of a State." Rome Statute of the International Criminal Court, art. 8(bis)(1), July 17, 1998, 2187 U.N.T.S. 90. *But see* JEFF MCMAHAN, KILLING IN WAR 133 (2009).

a risk of creating a situation in which there is no legal requirement for oversight or responsibility for the overall cost of conflict. It would mean that once the initial decision is taken by the executive branch and high-level command, the war would proceed with nothing but lower-level cost-benefit regulation of individual operations. This not only represents a political and moral distortion in the shape of a vacuum of responsibility for the oversight of the armed conflict, it is also out of step with the reality of wartime decision making by States.

B. Timeframe for Decisions

One of the earlier identified challenges with the traditional approach to the *jus ad bellum* is the notion that it only covers decisions made at the time of the decision to resort to force. This is compounded in conflicts with a stop-start nature punctuated by periods of calm.[130] Still, even if this were understood as requiring evaluations at the start of every new round of hostilities, what about the time during the hostilities within each such period? Is there a duty to impose a requirement on the high command to continuously review the conduct of the conflict for the purposes of strategic proportionality?

We suggest three contexts in which it would be useful to examine the overall amount of force. One is the traditional test: at the beginning of a conflict and the initial resort to force, when the high command is required to approve it, it must take into account proportionality considerations. A second context, as suggested by Gardam, is that means and methods are not outside the realm of the analysis.[131] As discussed above, this forms part of the strategic proportionality principle.[132] Equally, it is often at the strategic level where the discussion and decisions take place in relation to "target banks" and general targeting policies.[133] Accordingly, the times in which a decision is made during a conflict to authorize the use of weapons systems that significantly change the landscape of potential harm, nuclear weapons and cluster munitions being prime examples, or the approval of new targeting policies and "target banks," will require an assessment in the context of

130. *See supra* pp. 171–72.

131. Judith Gardam, *A Role for Proportionality in the War on Terror*, 74 NORDIC JOURNAL OF INTERNATIONAL LAW 3, 13–14 (2005).

132. *See supra* Section III.A.3.

133. BEER, *supra* note 53, at 149.

the harm and benefit at the strategic level rather than just IHL compliance for specific attacks.

In addition to these specific contexts, we submit that the overall effects of the conflict measured in relation to the strategic objectives gained must be reevaluated continuously throughout the armed conflict. While some may question the practicability of such a requirement, it is in fact not only reasonable and practical, but also accords with common practice.[134] We do not proscribe specific intervals or required daily assessments of strategic proportionality. The reality is that appropriate moments for reevaluation already occur naturally. For example, the political and military high command will hold discussions at regular times throughout a conflict, and it is in these moments in which they must consider the above. Strategic decisions do not end on day one, and national security decisions continue throughout the war at the political level. Of course, the executive branch does not spend its wartime meetings discussing the finer details of tactical and operational IHL assessments of specific attacks, but instead focuses on the large questions of strategic aims and the overall cost of the war. We submit that this should be viewed not just as common practice, but rather, as stemming from the legal requirement to ensure that the overall use of force is proportionate.

VI. CONCLUSION

There exist significant challenges in the regulation of armed conflict, which neither traditional approaches to the *jus ad bellum*, nor the detailed rules of the *jus in bello,* are able to solve. Nowhere is this shortcoming more obvious than in the question of how to assess civilian casualties throughout the lifetime of a conflict. There are, as discussed, historical reasons for why both the legal frameworks concerned with armed conflict have developed as they did, but it is regrettable that certain aspects of proportionality appear

134. For example, during the NATO intervention in Kosovo there were intensive discussions of whether to "step up" the bombing campaign, due to the likelihood of more civilian casualties. *See* Carl Ceulemans, *The NATO Intervention in the Kosovo Crisis*, *in* MORAL CONSTRAINTS ON WAR: PRINCIPLES AND CASES 205, 222 (Bruno Coppieters & Nick Fotion eds., 2003). Similarly, Iraqi leader Saddam Hussein, and especially U.S. President George H.W. Bush, shifted their positions and objectives during the First Gulf War, taking account both the realities on the ground and, for the United States, the possibility of inflicting a high level of civilian casualties. *See* ALEX WEISIGER, LOGICS OF WAR: EXPLANATIONS FOR LIMITED AND UNLIMITED CONFLICTS 166–68 (2013).

to have been neglected as a result. Nonetheless, and despite the noted deficiencies in the prevailing legal paradigms, we have deliberately avoided describing this as a legal lacuna since we believe an appropriate framework does exist in what we have called the principle of strategic proportionality. Our desire is not to lay claim to a new concept, nor "invent" a new rule. Indeed, it may be that future interpretations and new approaches may emerge with a view to resolving the problems highlighted in this article. It is, however, evident that the situation as it currently stands leaves too much unanswered, most notably with regard to measuring overall and cumulative harm caused by armed conflict, and doubly so with regard to non-international armed conflicts. The suggested principle of strategic proportionality offers one possible avenue toward a solution by requiring the balancing of the overall, strategic level benefit and harm of the force being used, not only at the opening stage, but also throughout the armed conflict, and by applying it to all forms of armed conflict and to all parties involved.

In order to avoid any misunderstanding, it must be stressed that the proposed interpretation of strategic proportionality should in no way be seen as weakening or replacing the rules of IHL. The two regimes operate side by side in a complimentary manner. The *jus in bello* proportionality test measures the expected collateral harm from an attack against the concrete and direct military advantage anticipated from this specific operation, whereas strategic proportionality covers the overall wider effects of the conflict, measured against the strategic aim of use of force. While the strategic proportionality principle may therefore be seen as having a wider scope on both sides of the equation, it is imperative that it is not used to undermine the *jus in bello*. Although the strategic objectives may allow, for example, to expand the scope of the conflict to new geographical zones, each individual attack within these zones must still comply with the strict *jus in bello* rules and their narrower notion of military advantage.

While presenting the strategic proportionality principle as stemming from general principles of law and in line with the aim of the U.N. Charter, we have also acknowledged the challenge in determining whether, and on what basis, this principle can be articulated as binding law. Even if it can, there will remain further questions as to how it will be applied and whether it is objectively justiciable. On this account, it may be useful to compare it to the IHL proportionality rule, and to note that there is no escaping its inherent subjectivity in relation to many circumstances. Still, one cannot deny that it is a vital rule and must be applied if we are to avoid extreme and obvious cases of disproportionate attacks. At the very least, the princi-

ple of strategic proportionality can serve the same function with regard to the overall assessment of force being used during an armed conflict.

Accepting such a principle will require further study into matters such as how it affects calculations of force protection and harm to enemy soldiers. It also raises intriguing questions with regard to what role the law might play in ending conflicts that have no chance of victory. Indeed, we are aware that the concept of strategic proportionality creates as many questions as it answers and, yet, we believe it is a crucial step in advancing the role that international law was intended to play in the regulation of the use of force and armed conflict. To this end, we hope that this article provides the beginning of an informed debate and useful exchange, and ultimately, that it brings greater clarity to how we assess the strategic aims of war in light of its destructive cumulative effects.