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Proportionality under *Jus ad Bellum* and *Jus in Bello*: Clarifying their Relationship

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Proportionality is a condition provided under both jus ad bellum *and* jus in bello*. Based on a particular interpretation of state practice and international case law, recent legal literature argues that the two notions of proportionality are interrelated in that proportionality under* jus in bello *is included in the assessment of proportionality under* jus ad bellum*. This article seeks to refute such a position and, more generally, to clarify the relationship between the two notions of proportionality.*

The main argument of the article is in line with the traditional position regarding the relationship between jus ad bellum *and* jus in bello*. It is argued that, although sharing common features and being somewhat interconnected, the notions of proportionality provided under these two separate branches of international law remain independent of each other, mainly because of what is referred to in this article as the 'general versus particular' dichotomy, which characterises their relations. Proportionality under* jus ad bellum *is to be measured against the military operation as a whole, whereas proportionality under* jus in bello *is to be assessed against individual military attacks launched in the framework of this operation.*

This article nonetheless emphasises the risk of overlap between the assessments of the two notions of proportionality when the use of force involves only one or a few military operations. Indeed, in such situations, the 'general versus particular' dichotomy, which normally enables one to make a distinct assessment between the two notions of proportionality, is no longer applicable since it becomes impossible to distinguish between the military operation as a whole and the individual military attacks undertaken during this operation.

Keywords: Proportionality, *jus ad bellum*, *jus in bello*, self-defence, protection of civilians

1. Introduction

It is now traditionally accepted that *jus ad bellum*, defining the conditions under which states are entitled to use force against each other, and *jus in bello*, defining the obligations of the belligerents once they are engaged in an armed conflict, are two separate branches of international law in the sense that the (extent of the) application of the latter is not dependent upon the respect of the former.[1] This position is one of the main achievements in the evolution of *jus in bello*. Indeed, under the just war theories, dating back to the Middle Ages, the emerging laws of war were generally considered to be applicable to each of the belligerents depending upon the justice of their

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[1] See nn 7 and 8.

resort to war.[2] This idea – whereby belligerents pursuing an unjust cause of war did not enjoy all the rights provided under *jus in bello* or belligerents fighting for a just cause were not bound by all the rules of *jus in bello* – remained debated even until the beginning of the second half of the twentieth century,[3] and it basically involved a clear subordination of *jus in bello* to *jus ad bellum*. This was firmly criticised as undermining the protection of persons under *jus in bello*[4] and, more generally, the development of this body of law.[5] The Preamble to the 1977 Additional Protocol I to the 1949 Geneva Conventions now unambiguously reflects the evolution towards the general acceptance of equal applicability of *jus in bello* to belligerents irrespective of the question of the legality of their use of force under *jus ad bellum*. The Protocol, indeed, reaffirms[6] that

> the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflicts.

This principle of equal application of *jus in bello* is now generally and firmly supported in legal literature[7] and international case law.[8] Although some scholars are reconsidering this cardinal principle, as they argue for a limited subordination of *jus in bello* to *jus ad bellum*,[9] such a

[2] See, for example, Robert Kolb, *Ius in bello: Le droit international des conflits armés* (2nd edn, Helbing Lichtenhahn 2009) 36–38.

[3] See, for example, Henri Meyrowitz, *Le principe de l'égalité des belligérants devant le droit de la guerre* (Pedone 1970) 77. See, in particular, the debates within the International Law Institute in 1963 on the question of equal application of the laws of war to parties to an armed conflict, (1963) 50 Annuaire de l'Institut de Droit International 306.

[4] See, for instance, Marco Sassòli, Antoine A Bouvier and Anne Quintin, *How Does Law Protect in War* (3rd edn, ICRC 2011) 115.

[5] See, for example, Kolb (n 2) 72.

[6] See the Preamble to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 3 ('Additional Protocol I'); see also art 96, para (3) of the same Protocol.

[7] See, for example, Meyrowitz (n 3); Sassòli, Bouvier and Quintin (n 4) 114–16; Marco Sassòli, '*Ius ad Bellum* and *Ius in Bello* – The Separation between the Legality of the Use of Force and Humanitarian Rules to be Respected in Warfare: Crucial or Outdated?' in Michael N Schmitt and Jelena Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines. Essays in Honour of Yoram Dinstein* (Martinus Nijhoff 2007) 242; Kolb (n 2) 17; Eric David, *Principes de droit des conflits armés* (4th edn, Bruylant 2008) 613; Adam Roberts, 'The Equal Application of the Laws of War: A Principle under Pressure' (2008) 90 International Review of the Red Cross 931; Rotem Giladi, 'The *Jus ad Bellum*/*Jus in Bello* Distinction and the Law of Occupation' (2008) 41 Israel Law Review 246; Jasmine Moussa, 'Can *Jus ad Bellum* Override *Jus in Bello*? Reaffirming the Separation of the Two Bodies of Law' (2008) 90 International Review of the Red Cross 963.

[8] See, for example, ICTY, *Prosecutor v Boškoski*, Judgment, IT-04-82-A, Appeals Chamber, 19 May 2010, [51]; see also Juan Carlos Abella, Argentina, Recommendations 11.137, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.98 doc 6 rev, 13 April 1998, paras 173–74, available at http://www.cidh.oas.org/annualrep/97eng/Argentina11137.htm. See, for instance, regarding national case law, *Danikovic and Others v State of the Netherlands* (2004) 35 Netherlands Yearbook of International Law 522, 524.

[9] See, for instance, Alexander Orakhelashvili, 'Overlap and Convergence: The Interaction between *Jus ad Bellum* and *Jus in Bello*' (2007) 12 Journal of Conflict and Security Law 157; Serena K Sharma, 'Reconsidering the *Jus ad Bellum*/*Jus in Bello* Distinction' in Carsten Stahn and Jann K Kleffner (eds), *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace* (TC Asser 2008) 9.

view remains isolated and most scholars often seem to take the position *de lege ferenda*.[10] More interestingly, some recent legal literature argues against the separate nature of the two bodies of law but in another way. *Jus in bello* should not be seen as subordinated to *jus ad bellum* but, on the contrary, the latter should be considered as subordinated to the former.[11] This position is notably based on the claim of a particular relationship between the notions of proportionality which are provided for under both *jus ad bellum* and *jus in bello*.

It is true that proportionality is a common concept to these two branches of international law. Under *jus ad bellum*, it is claimed that proportionality is applicable to any use of force, be it legally controversial, such as humanitarian intervention,[12] or classically admitted, like resort to force authorised by the UN Security Council (UNSC).[13] Although there is room for arguing in this sense, especially regarding the UNSC military enforcement measures,[14] it is only with respect to self-defence that the applicability of proportionality is incontestably and clearly established in light of state practice[15] and international case law.[16] Under *jus in bello*, legal literature is also divided regarding the precise matter to which proportionality is applicable. It could be argued on the basis of Article 8(2)(b)(iv) of the ICC Statute[17] that proportionality applies to attacks on the natural environment in humanitarian law. This Article indeed mentions, among the list of war crimes committed in international armed conflicts, the attacks causing 'long-term and severe damage to the natural environment which would be clearly *excessive* in relation to the concrete and direct overall military advantage anticipated'.[18] However, proportionality is not traditionally conceived as relating to the natural environment. Neither Additional Protocol I to the Geneva Conventions nor any other international convention provides a rule that prohibits excessive damage to the natural environment. Article 8(2)(b)(iv) of the ICC Statute must rather be seen

[10] Sharma, ibid.
[11] See nn 25, 30, 32 and 33.
[12] See, for example, Christine M Chinkin, 'Kosovo: A "Good" or "Bad" War?' (1999) 93 American Journal of International Law 841, 841–42; Jonathan I Charney, 'Anticipatory Humanitarian Intervention in Kosovo' (1999) 93 American Journal of International Law 834, 839. In this case, proportionality would be measured between the humanitarian intervention and the purpose of protecting the civilian populations.
[13] See, for example, Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (OUP 1994) 631. In this case, proportionality would be measured between the UNSC military action and the general objective that this action is authorised to pursue according to the relevant UNSC resolution (see, for state practice in this sense, n 14).
[14] In some instances, states have criticised the military action undertaken on the basis of an express UNSC authorisation by emphasising the disproportionate nature of such action; see, in this respect, some state reactions to the military action conducted by the allies in Iraq on the basis of UNSC Resolution 678 (29 November 1990), *Keesing's Contemporary Archives* (1991) 37989; see also the recent Russian declarations considering the 2011 NATO military action in Libya to be disproportionate because it exceeded the mandate provided under UNSC Res 1973(2011), UN Doc S/RES/1973 (2011), 17 March 2011; declaration available at http://www.dailymotion.com/video/xjo1k6_russia-condemns-nato-air-strikes-on-libya_news. Nonetheless, state practice is still limited and not entirely consistent in that regard.
[15] There are so many references in state practice to the condition of proportionality as a specific requirement under the law of self-defence that it is impossible to mention all of these references here; see nn 26–28, 41 for references in particular cases.
[16] See n 42.
[17] Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90 ('ICC Statute').
[18] Emphasis added.

as establishing a special regime in this respect, which is only applicable before the International Criminal Court (ICC) and cannot be considered as being part of customary international humanitarian law (yet).[19] Some scholars also support the idea that the rule prohibiting the use of means that cause superfluous injuries or unnecessary suffering to combatants[20] – which is provided for in several *jus in bello* conventions[21] – entails a proportionality requirement. However, this is far from being a common agreed position. Proportionality is most generally referred to in legal literature[22] as well as in international case law,[23] in relation to civilians and civilian objects, as requiring that attacks do not cause excessive damage to the latter in comparison with the direct and concrete military advantage anticipated from the attacks.[24]

In short, it is only with respect to self-defence and attacks on civilians and civilian objects that proportionality is commonly and incontestably referred to under *jus ad bellum* and *jus in bello*, respectively. It is precisely between these two notions of proportionality that some debatable interrelations are claimed to exist. The Israeli intervention in Lebanon in 2006 is mentioned as a typical precedent evidencing such interrelations, since – as argued by scholars[25] – many states considered that the Israeli intervention was disproportionate in light of the law of self-defence – and, therefore, not justified – because of the excessive damage caused to civilians and civilian

[19] This may be supported by the fact that such a rule is not listed among the customary rules in the study on customary international humanitarian law sponsored by the International Committee of the Red Cross: Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Vol I: Rules* (ICRC, CUP 2005) ('ICRC Study').

[20] See, for instance, Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (CUP 2004) 15 (the author nonetheless concedes that '[t]echnically, it is more accurate today to talk in terms of superfluous injury or unnecessary suffering in the context of combatants, rather than proportionality'); see also David (n 7) 268; Christopher Greenwood, 'Historical Developments and Legal Basis' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (OUP 2008) 35.

[21] For example, the Preamble to the Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight (opened for signature 29 November 1868, entered into force 11 December 1868) ('St Petersburg Declaration') in Dietrich Schindler and Jiří Toman (eds), *The Laws of Armed Conflicts* (3rd revised and completed edn, Martinus Nijhoff 1988) 102; Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (entered into force 26 January 1910) Martens Nouveau Recueil (ser 3) 461, art 23; Additional Protocol I (n 6) art 35(2).

[22] For example, Henri Meyrowitz, 'The Principle of Superfluous Injury or Unnecessary Suffering' (1994) 34 International Review of the Red Cross 98, 109–10; Hamutal Esther Shamash, 'How Much Is Too Much? An Examination of the Principle of *Jus in Bello* Proportionality' (2005–6) 2 Israel Defense Forces Law Review 103; Bernard L Brown, 'The Proportionality Principle in the Humanitarian Law of Warfare: Recent Efforts at Codification' (1976–7) 10 Cornell International Law Journal 134; ICRC Study (n 19) 46.

[23] See, for example, ICTY, *Prosecutor v Gotovina and Others*, Judgment, IT-06-90-T, Trial Chamber I, 15 April 2011, [1171]–[1172], [1183], [1191]; ICTY, *Prosecutor v Galić*, Judgment, IT-98-29-A, Appeals Chamber, 30 November 2006, [190].

[24] See Additional Protocol I (n 6) arts 51(5)(b) and 57(2)(a)(iii); see also art 3(8)(c) of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects (entered into force 3 December 1998) UN CCW/CONF. I/ 1. It is now commonly agreed that this proportionality requirement has gained the status of a customary norm and that it is applicable in both international and non-international armed conflicts; on this subject see, for example, ICRC Study (n 19) 46–50.

[25] See, for instance, Enzo Cannizzaro, 'Contextualizing Proportionality: *Jus ad Bellum* and *Jus in Bello* in the Lebanese War' (2006) 88 International Review of the Red Cross 779, 780.

infrastructure.[26] In addition, reasons given by states in order to justify the evaluation as disproportionate of the Israeli intervention under *jus ad bellum* were similar to those advanced by the same or other states in order to explain the evaluation as disproportionate of the intervention under *jus in bello*.[27] In fact, practice shows that states have frequently criticised the disproportionate nature of the self-defence action by emphasising the excessive damage caused by this action to the civilian population.[28] International case law and – to a lesser extent – the work of the International Law Commission (ILC) have also been interpreted as evidencing the existence of particular interrelations between proportionality under *jus ad bellum* and *jus in bello*. In the *Nuclear Weapons* Advisory Opinion, the International Court of Justice (ICJ) stated that 'a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which [encompasses the principle of proportionality]'.[29] Some scholars have argued that this statement meant that '*in order for self-defence to be proportionate*, it must respect international humanitarian law [including the principle of proportionality]'.[30] It has been asserted in the same way that the term 'lawful', which qualifies the measure of self-defence that precludes the wrongfulness of an act of a state under Article 21 of the ILC's Articles on State Responsibility,[31] makes the proportionate nature of an action in self-defence dependent upon the respect of the *jus in bello* rules on the conduct of hostilities, including the principle of proportionality provided by those rules.[32]

[26] See, for instance, statements of Russia (UN Doc S/PV.5489, 14 July 2006, 7); Qatar (ibid 10 and UN Doc S/PV.5493, 21 July 2006, 14); China (UN Doc S/PV.5489, 14 July 2006, 11); Japan (ibid 12); United Kingdom (ibid 13); Congo (ibid); Tanzania (ibid); France (ibid 17 and UN Doc S/PV.5493 (Resumption 1), 21 July 2006, 11); Slovakia (UN Doc S/PV.5493, 21 July 2006, 19); Finland (UN Doc S/PV.5493 (Resumption 1), 21 July 2006, 16); Algeria (ibid 22); Australia (ibid 27); Djibouti (ibid 32); New Zealand (ibid 33); India (ibid 34); Chile (ibid 35); Canada (ibid 39); Guatemala (ibid 41).

[27] See, for instance, statements of Greece (UN Doc S/PV.5489, 14 July 2006, 17 and UN Doc S/PV.5493 (Resumption 1), 21 July 2006, 3); Russia (ibid 2); Switzerland (ibid 18); Norway (ibid 23); Indonesia (ibid 25); Morocco (ibid 29); South Africa (ibid 43–44).

[28] See, for instance, state reactions to military actions conducted by Israel in the past and, in particular, statements in relation to the 1966 Israeli intervention in Jordan of the United Kingdom (UN Doc S/PV.1320, 16 November 1966, 19), United States (ibid 20–21); the Netherlands (UN Doc S/PV.1323, 18 November 1966, 3) and Uganda (UN Doc S/PV.1327, 24 November 1966, 4); statements in relation to the Israeli intervention in Lebanon in February 1972 of France (UN Doc S/PV.1643, 26 February 1972, 12), Italy (ibid 13–14), Argentina (UN Doc S/PV.1644, 27–28 February 1972, 3) and Somalia (ibid 18); statements in relation to the Israeli intervention in Lebanon in June 1972 of Sudan (UN Doc S/PV.1648, 23 June 1972, 11); France (UN Doc S/PV.1650, 26 June 1972, 2) and Italy (ibid 11). See also statements in relation to the intervention of the United Kingdom in Yemen in 1964 of Iraq (UN Doc S/PV.1106, 2 April 1964, 14–15); the Ivory Coast (UN Doc S/PV.1108, 6 April 1964, 10) and Czechoslovakia (UN Doc S/PV.1110, 8 April 1964, 5).

[29] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 226, 245 [42] ('*Nuclear Weapons'*).

[30] See Moussa (n 7) 974–75 (emphasis added) who stresses that such interpretation (which she does not share) has been advanced in legal literature in support of the proposition that 'any act [which] contravenes *jus in bello* cannot be considered a proportionate and reasonable measure of self-defence under *jus ad bellum*'; see, in this respect, Jérome de Hemptinne and Jean d'Aspremont, *Droit International Humanitaire* (Pedone 2012).

[31] Annex to UNGA Res 56/83, 12 December 2001, 6: this Article provides that '[t]he wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations'.

[32] See, for instance, de Hemptinne and d'Aspremont (n 30). Such interpretation is founded upon the ILC commentary on the aforementioned Article 21, which provides that 'the term "lawful" implies that the action taken [in

According to those interpretations of state practice, international case law and the ILC's work on state responsibility, proportionality under *jus ad bellum* and proportionality under *jus in bello* are to be seen as interrelated in such a way that the latter must be considered as part of the assessment of the former. Basically, this means that *jus ad bellum* would be subordinated to *jus in bello* to the extent that any action taken under the law of self-defence could only be judged as proportionate under this law if it also conforms to proportionality under *jus in bello*. This position is allegedly motivated by the increasing concern regarding the protection of civilian populations during war – protection that would be better ensured if the requirement of proportionality under *jus in bello* was considered as being part of proportionality under *jus ad bellum*.[33]

This article seeks to analyse such a position and, more generally, to clarify the relationship between the two notions of proportionality, those notions being understood here as those commonly and indisputably used in legal literature and international case law – that is, as referring to proportionality under the law of self-defence and proportionality in relation to attacks on civilians and civilian objects, respectively. The article is divided into two parts. The first part (Section 2) develops the main argument, which is in line with the traditional position regarding the relationship between *jus ad bellum* and *jus in bello*. It is argued that, although sharing common features and being somewhat interconnected, the notions of proportionality provided under these two separate branches of international law remain separate and independent of each other, mainly because of the existence of what it is referred to in the article as a 'general versus particular' dichotomy. This means that, under the law of self-defence, proportionality is concerned with the armed operation as a whole, whereas, under *jus in bello*, proportionality regulates individual attacks launched in the framework of this operation.

The second part of the article (Section 3) addresses the particular situations in which the application of the above-mentioned dichotomy, upon which the independent nature of the two notions of proportionality is founded, may be problematic. Such situations are those which involve only one or a few military operations – that is, situations in which it is logically no longer possible to distinguish between the individual military attacks and the military operation as a whole. It is acknowledged that such situations may increase the risk of conflating the assessments of the two independent notions of proportionality.

2. TWO INDEPENDENT NOTIONS

Although they share basic common features, proportionality under *jus ad bellum* and proportionality under *jus in bello* remain two independent notions, this independent nature ultimately deriving from their different rationales.

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self-defence] respects those obligations of total restraint applicable in international armed conflicts, as well as compliance with the requirements of proportionality and of necessity inherent in the notion of self-defence': Report of the International Law Commission on the Work of its 53rd Session, UN Doc A/56/10, 2001, 75 para 6.

[33] See, for instance, Inger Österdahl, 'Dangerous Liaison? The Disappearing Dichotomy between *Jus ad Bellum* and *Jus in Bello*' (2010) 78 Nordic Journal of International Law 553, 565; Cannizzaro (n 25) 791–92.

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2.1 BASIC COMMON FEATURES

It is undoubtedly the case that proportionality under *jus ad bellum* and proportionality under *jus in bello* share common features. The most obvious of these is that their field of application is similar. They simultaneously govern the conduct of hostilities while also serving as a restraint upon such activity. This role is particularly clear with respect to proportionality under *jus in bello*. The latter forms part of the rules regulating the conduct of hostilities, and it is well known that the general principle behind those rules is that the means and methods of warfare are not unlimited.[34] Yet, proportionality under *jus ad bellum* also has a role to play 'as a restraint upon the conduct, as opposed to the initiation, of hostilities'.[35] Damage caused to the aggressor state (or even third states and the environment[36]) by the defensive action (including the targets of this action[37]), as well as the means used by the state acting in self-defence[38] and the duration of the whole military operation,[39] are all factors which are included in the assessment of proportionality under the law of self-defence.

Another fundamental feature that the two notions of proportionality have in common is the nature of the balance exercise that they both entail as well as the general factors that take part in such an exercise. Indeed, the two notions of proportionality do not actually require striking a balance between two similar quantities, as any proportionate balance normally does. They rather require putting an action in relation to its aim: this action, which includes the damage that it causes, is required not to exceed what is necessary to achieve the intended aim. Basically, this is a teleological balance exercise, which results from the application of a necessity test. In this sense, the two notions of proportionality have a close relationship with necessity. The relation between this test and the notion of proportionality under *jus in bello* is more obvious.

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[34] This principle is explicitly mentioned in Additional Protocol I (n 6) art 35(1).

[35] Christopher Greenwood, 'Self-Defence and the Conduct of International Armed Conflict' in Yoram Dinstein (ed) and Mala Tabory (associate ed), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Martinus Nijhoff 1989) 273.

[36] See, concerning such a limit, *Nuclear Weapons* (n 29) 242, [30]. The considerations held by the Court in that respect are nevertheless confusing. Indeed, while discussing the question of the relationships between the right of self-defence and the obligation to protect the natural environment, the Court asserted that '[s]tates must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of *legitimate military objectives*' (emphasis added). It continued by saying that '[r]espect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of *necessity* and *proportionality*' (emphasis added). By previously using the notion of 'military objectives', the Court seems to have referred to *jus in bello*. Moreover, in order to support its view, the Court further mentioned a series of legal texts which were only concerned with international humanitarian law. Although the Court did not elaborate on the principles of proportionality and necessity that it mentioned and did not expressly link those principles to *jus ad bellum* rather than *jus in bello*, it remains that proportionality under *jus in bello* was only recognised at that time in relation to civilians and civilian objects and not in relation to the natural environment as such. For the proportionality requirement with respect to the natural environment, see Section 1, 'Introduction'.

[37] For example, *Oil Platforms* (*Iran v US*), Merits, Judgment, 6 November 2003 [2003] ICJ Rep 161 ('*Oil Platforms*'), [74].

[38] ibid [77].

[39] For example, *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v US*), Merits, Judgment, 27 June 1986 [1986] ICJ Rep 14 (*'Nicaragua'*), [237].

According to scholars,[40] it may be argued that the notion of proportionality under *jus in bello* is misleading as it requires less equilibrium between two similar quantities than a teleological balance exercise consisting of assessing whether the attack launched by the belligerent, including the effect of such attack on civilians and civilian objects, does not exceed what is *necessary* for achieving the military advantage anticipated.

The link between necessity and proportionality under *jus ad bellum* is more complex. Proportionality under the law of self-defence has usually been conceived by states[41] and the ICJ[42] as requiring a quantitative equilibrium between the action in self-defence and the armed attack and, more particularly, a balance between the damage caused and the military means used by the attacker and the damage caused and the military means used by the state acting in self-defence. However, the vast majority of scholars disagree with such a conception. They consider that a state defending itself against an armed attack may require the use of broader means than those resorted to by the aggressor state. As a result, they argue that proportionality implies a teleological balance exercise requiring that the action in self-defence does not exceed what is necessary for the state to defend itself against an armed attack.[43] This latter approach entirely conflates proportionality with necessity. The most convincing answer to this debate seems to consider the quantitative proportionality test as a means for assessing *prima facie* the necessity of the action in self-defence.[44] As rightly emphasised by one author, '[p]roportionality thus seems to be one way to evaluate whether a measure is necessary…. The disproportionality seems here to be the mark that the State supposedly acting in self-defence was pursuing some other end than merely riposting to an attack'.[45] In short, proportionality under *jus ad bellum* is intrinsically linked to necessity as it is an easy tool for assessing whether the action in self-defence is *necessary*.

[40] For example, Robert Kolb, *Réflexions de philosophie du droit international. Problèmes fondamentaux du droit international public: Théorie et philosophie du droit international* (Bruylant 2003) 322.

[41] Apart from Israel (see, for example, UN Doc SP/V.1461, 30 December 1968, 11), states usually adopt a quantitative conception of proportionality. State reactions to the 2006 Israeli intervention in Lebanon are a clear example thereof: see, for example, in this respect, statements of Russia (UN Doc S/PV.5489, 14 July 2006, 7); Argentina (ibid 9); Qatar (ibid 10); China (ibid 11); Japan (ibid 12); Congo (ibid 13); Tanzania (ibid 13); Denmark (ibid 15); Greece (ibid 17); France (ibid); Ghana (UN Doc S/PV.5493 (Resumption 1)), 21 July 2006, 8); Brazil (ibid 19); New Zealand (ibid 33).

[42] See *Nicaragua* (n 39) [237]; *Oil Platforms* (n 37) [76]–[77]; *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Uganda*), Merits, Judgment, 19 December 2005 [2005] ICJ Rep 168, [147].

[43] Most of the scholars who support such an understanding refer to the considerations held on this subject by the former ILC Special Rapporteur: Roberto Ago, Addendum – Eighth Report on State Responsibility by Mr Roberto Ago, Special Rapporteur – the Internationally Wrongful Act of the State, Source of International Responsibility (Part 1), UN Doc A/CN.4/318/Add.5–7 (1980), 69, para 121.

[44] See, for a more detailed view on this issue, Raphaël van Steenberghe, 'Self-Defence in Response to Attacks by Non-State Actors in the Light of Recent State Practice: A Step Forward?' (2010) 23 Leiden Journal of International Law 183, 205–06.

[45] Olivier Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart 2010) 489.

2.2 RELATIONS

The two above-mentioned features – the same field of application and a similar teleological balance exercise – could suggest that proportionality under *jus ad bellum* and proportionality under *jus in bello* actually merge. Yet, there is a fundamental distinction between the two notions of proportionality which makes them separate and independent notions. This key distinction is referred to as the 'general versus particular' dichotomy. Indeed, according to the position generally upheld in the scarce literature on the subject,[46] proportionality under *jus ad bellum* only regulates the conduct of hostilities in a general perspective, since it is concerned with the military operation in self-defence as a whole, whereas proportionality under *jus in bello* only regulates the conduct of hostilities from a more particular view, as it is concerned with individual military attacks launched in the framework of this operation. This dichotomy must be clearly understood. It does not imply that proportionality under *jus ad bellum*, envisaged as more general, encompasses proportionality under *jus in bello* and that, contrary to what is argued in this article, the relationship between the two notions of proportionality would be that of inclusion of the latter in the former. It rather means that, although they share a similar field of application, as they both apply to a similar reality – the conduct of hostilities – proportionality under *jus ad bellum* and proportionality under *jus in bello* have a distinct scope of application: the former applies to the hostilities as a whole, whereas the latter applies to the specific incidents of targeting which occur in the framework of those hostilities. Basically, the above-mentioned dichotomy reveals the existence of a clear-cut separation and relation of independence, rather than of inclusion, between the two notions of proportionality.

Admittedly, this does not have an impact on the fact that these two notions have a close relationship with the necessity test and that they both entail a similar teleological balance exercise between an action and its aim. Yet, this radically changes the nature of the general factors which take part in the proportionality equations. As correctly stated by one author, 'in current times, the dual proportionality [tests] incorporate a consideration of the same general factors but with a different emphasis'.[47] First, the aim against which the action is to be assessed is entirely different. As far as proportionality under *jus ad bellum* is concerned, the military operation will be assessed in balance with a general objective, the ultimate goal of the operation – that is, defending itself against an armed attack or, if one admits the right to anticipatory self-defence,[48] averting an (imminent) threat of armed attack. As a result, proportionality under *jus ad bellum* can be considered as determining the form of the whole military operation which is necessary for achieving

[46] See, for example, Elizabeth Wilmshurst, 'The Chatham House Principles of International Law on the Use of Force in Self-Defence' (2006) 55 International and Comparative Law Quarterly 963, 969 para E; Dapo Akande, 'Nuclear Weapons, Unclear Law? Deciphering the *Nuclear Weapons* Advisory Opinion of the International Court' (1997) 68 British Yearbook of International Law 165, 191; Moussa (n 7) 978; Cannizzaro (n 25) 786.

[47] Gardam (n 20) 19.

[48] See, for instance, on the subject Raphaël van Steenberghe, *La légitime défense en droit international public: Statut, contenu et preuve* (forthcoming, Larcier 2012) 273–343.

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a general objective: repelling (or preventing) an armed attack. By contrast, as far as proportionality under *jus in bello* is concerned, the objective in relation to which each individual military attack is to be balanced is more specific. Indeed, according to the clear wording of the proportionality requirement under *jus in bello*,[49] the proportionate nature of the individual attacks cannot be measured against the defensive military objective of the operation as a whole, but only against the *concrete* and *direct* military advantage anticipated from these attacks.[50] In this sense, proportionality under *jus in bello* can be considered as determining the form of individual military actions undertaken within the context of the whole operation, which are necessary for the realisation of the corresponding specific military objectives.

It is true, in this respect, that some interconnection may be claimed to exist between the two notions of proportionality given the objectives against which these two notions are to be assessed. Indeed, since proportionality under *jus ad bellum* determines, as stated above, the form of the military operation as a whole, which is necessary for a state to defend itself against an armed attack, it plays a role in identifying all the specific military objectives that such defensive operation may legally pursue and against which proportionality under *jus in bello* is to be evaluated. In other words, the definition of the specific military objectives, against which such proportionality is to be tested, must theoretically not exceed what is necessary for the state to defend itself against the armed attack, according to proportionality under *jus ad bellum*. This evidences a link between the two notions of proportionality, which mainly results from the unavoidable 'subordination' of all the particular military objectives to the general defensive goal of the entire military action. That having been said, this link only entails that proportionality under the law of self-defence will be violated not if the rule of proportionality under *jus in bello* is infringed but if the particular military objectives are not correctly determined. In this sense, such a link merely evidences some overlapping between criteria taking part in the assessment of the two conditions of proportionality and does not make one of these conditions dependent upon the other.

The second general term against which the two notions of proportionality are to be assessed is the forcible action which has been launched. In accordance with the 'general versus particular' dichotomy argued above, all the general aspects of this action must be considered as relevant factors when assessing proportionality under *jus ad bellum*. Those factors include, as already

[49] See n 24.

[50] Emphasis added. The currently debated question of whether the term 'military advantage' refers to the advantage anticipated from the attack as a whole or only from the isolated or specific elements thereof is a distinct issue (see, for instance, in this respect, ICRC Study (n 19) 49–50 and the state declarations mentioned by these authors). In any event, the notion of 'attack as a whole' is not used as meaning the whole military campaign that may be conducted in self-defence but rather as referring at best to a series of military actions which are part of the individual attack launched in the framework of such a campaign. See, in this respect, fn 36 in the ICC Elements of Crimes (entered into force 9 September 2002) ICC-ASP/1/3 (Part II-B): although the term 'overall' was added before the notion of 'military advantage', in art 8(2)(b)(iv) of the ICC Statute, the explanatory footnote states that '[t]he expression "concrete and direct overall military advantage" refers to a military advantage that is foreseeable by the perpetrator at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack. (…) It does not address justifications for war or other rules related to *jus ad bellum*. It reflects the proportionality requirement inherent in determining the legality of any military activity undertaken in the context of an armed conflict'.

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indicated above, damage caused by the action in self-defence to the aggressor state, including its civilian population and armies, the targets and duration of this action as well as the means used on that occasion. Under *jus in bello*, factors are more limited. Proportionality is assessed mainly in light of the means used for the attack and the damage that this attack caused to civilians and civilian objects.

Again, it is true in this respect that some factors, mainly the damage caused to the civilian population, appear to be common to the two notions of proportionality. This may explain why some authors, such as those commenting on the 2006 Israeli intervention in Lebanon,[51] have interpreted declarations in which states have criticised the disproportionate nature of the action in self-defence because of the excessive damage caused to the civilian population as also evidencing the violation of proportionality under *jus in bello*. It is precisely such an interpretation which has led those authors to argue for the position that the *jus in bello* proportionality is included in the assessment of the *jus ad bellum* one. Admittedly, it may be argued that the violation of proportionality under *jus in bello* can be used as an *indication* that proportionality has also been violated under *jus ad bellum*. Yet, this does not imply that the violation of one condition of proportionality necessarily entails the violation of the other. This only means that a prima facie assessment may be made with respect to such violation, especially because of similar factors being taken into consideration in the evaluation of the two conditions. Such prima facie assessment must, nonetheless, be conducted in greater depth in order to establish whether it is founded. An in-depth scrutiny will have to assess each notion of proportionality by measuring it against the relevant – general versus particular – action and objective, and this may provide a different assessment result. In short, contrary to the interpretation supported by some authors with regard to state reactions to the 2006 Israeli intervention in Lebanon, emphasis put by states on the excessive damage caused to civilians by the self-defence action as a basis for asserting the violation of proportionality under *jus ad bellum* does not necessarily imply that proportionality under *jus in bello* has also been (considered to be) violated.

All of this indicates that the two notions remain independent of one another. This involves two main consequences regarding the assessment of the legality of any use of force. First, it is perfectly possible that a use of force is legal under *jus ad bellum* but illegal under *jus in bello* because it is disproportionate according to this law, and vice versa.[52] Secondly, the two conditions of proportionality must be separately but cumulatively complied with for any resort to force to be legal.[53] It is in this sense that the aforementioned ICJ conclusions in the *Nuclear Weapons* Advisory Opinion, as well as the ILC commentary on Article 21 of the Articles on

[51] See n 25.

[52] As one author, commenting on the Israeli intervention in Lebanon in 2006, has validly argued, 'a defensive military campaign might not be out of proportion to the attack defended against (a *jus ad bellum* issue), but some of the tactics used in the campaign might contravene the *jus in bello* if the risk to civilians or to civilian objects is disproportionate to the military advantage to be gained by using those tactics': Frederic L Kirgis, 'Some Proportionality Issues Raised by Israel's Use of Armed Force in Lebanon', 17 August 2006, available at http://www.asil.org/insights060817.cfm.

[53] See Orakhelashvili (n 9) 163, who asserts that '*jus in bello* and *jus ad bellum* contain separate but cumulative requirements'.

State Responsibility, must be interpreted – that is, as meaning that 'in order for any use of force to be legal, it must respect both the *jus ad bellum* limit of proportionality and the principles of *jus in bello*'.[54] As a result, there is no fear, contrary to what is voiced by authors who support the inclusion of the *jus in bello* proportionality in the assessment of proportionality under *jus ad bellum*,[55] that the particular protection afforded by *jus in bello* would not be taken into account, since respect for proportionality under *jus in bello* will necessarily take part in the general assessment of the forcible action.

2.3 Different Rationales

The fundamental distinction between the two notions of proportionality and the independent nature which derives from such distinction may be explained by the different rationales that underlie those notions. Although both notions serve as a limitation to any resort to force, the logic behind this limitation is radically different. Proportionality under *jus ad bellum* is fundamentally linked to the maintenance of international peace and security.[56] It is true that its immediate purpose is to prevent the state acting in self-defence from using a measure of force beyond that which is necessary to repel (or avert) an armed attack. However, by doing so, proportionality precludes this state from acting unilaterally in order to achieve an objective which normally falls within the exclusive competence of the UN Security Council and requires a collective decision in accordance with the UN Charter provisions concerning the maintenance of international peace and security. More concretely, its aim is to avoid any escalation of violence at the international level and any expansion of the already occurring disturbance of the international social order. In other words, although resorting to self-defence is allowed as an acceptable provisional disruption of international peace and security, the requirement of proportionality ensures that such a level of disturbance remains at the level authorised by the UN Charter. This has been validly summarised by one author, who stated that, '[while] assigning priority to the defensive needs of the attacker, proportionality [under *jus ad bellum*] remains an instrument for social control of unilateral resort to force'.[57] It is therefore logical that the major criteria for assessing it relate to the general aspects of the military operation as a whole, including 'the level of destruction of enemy territory and the infrastructure of the State; overall collateral civilian damage and combatant casualties; and the impact of the use of force on third States'.[58]

It is only incidentally that humanitarian considerations – namely the suffering caused to civilians and combatants – are taken into consideration in the proportionality equation under *jus ad bellum*, since they are merely part of the requirement not to cause excessive damage to the aggressor state. It is only in this sense that one may consider, as some authors do, that

[54] Moussa (n 7) 975.
[55] Österdahl (n 33) 565.
[56] See, for example, Greenwood (n 35) 278.
[57] Cannizzaro (n 25) 785.
[58] Gardam (n 20) 17.

proportionality under *jus ad bellum* 'could limit [the] territorial and temporal dimensions [of war so as to] reduce suffering for both civilians and combatants'.[59]

The logic behind proportionality under *jus in bello* is entirely different. Its primary concern is not the maintenance of international peace and security but rather the protection of humanitarian values,[60] in particular the limitation of the suffering of non-combatants in situations of armed conflict. More precisely, its purpose is to conciliate such a limitation with the military necessities that may be legally pursued by each belligerent, by prohibiting that such necessities could justify the launching of an attack causing excessive damage to civilians or civilian objects. Although such damage, as emphasised above, is also a factor for assessing proportionality under *jus ad bellum*, it is viewed from a different perspective under *jus in bello*. It is not assessed as part of the damage caused to any particular state, but as damage caused to individuals as such. The suffering of non-combatants is an inherent part of the proportionality equation under *jus in bello*. As rightly emphasised by one author, whereas the self-defence conditions 'focus on damage to the enemy state as an abstract entity apart from its individual inhabitants, by taking into account such factors as … the general destruction caused to the state and its population … in [*jus in bello*], it is the effect of a weapon on civilians … as individuals that requires assessment'.[61]

3. BLURRED SITUATIONS?

The independent nature of the two notions of proportionality is founded mainly upon the 'general versus particular' dichotomy referred to above. Yet, there are situations in which this dichotomy does not seem applicable, such as those which involve only one or a few military measures, including a limited self-defence response to sporadic attacks. In such situations, the teleological balance exercise which characterises the two notions of proportionality is likely to be based on similar elements. Indeed, when there is only one or just a few military actions, it logically becomes impossible to distinguish between the individual attacks and their particular military objectives, against which proportionality under *jus in bello* is to be assessed (if it applies),[62]

[59] Theodor Meron, 'The Humanization of Humanitarian Law' (2000) 94 American Journal of International Law 239, 241.

[60] See, for example, Friedhelm Krüger-Sprengel, 'Le concept de proportionnalité dans le droit de la guerre' (Rapport présenté au Comité Pour la Protection de la Vie Humaine dans les Conflits Armés, VIIIe Congrès de la Société Internationale de Droit Pénal Militaire et de Droit de la Guerre), (1980) 19 Revue de Droit Pénal Militaire et de Droit de la Guerre 177, 181.

[61] Judith Gardam, 'Proportionality as a Restraint on the Use of Force' (1999) 20 Australian Yearbook of International Law 161, 168.

[62] The fact that the military operation entails only one or a few forcible measures does not necessarily imply that *jus in bello* is not applicable in that case. It is indeed well supported in legal literature that violence must not reach any particular level of intensity in order for humanitarian law to be applicable when this violence breaks out between two states (see, for instance, Jean Pictet, *Commentary on the Geneva Convention I* (ICRC 1952) 34; Kolb (n 2) 158). Although such a level of intensity may be required in case of a conflict occurring in the territory of a state between the military forces of another state and non-state actors such as terrorists (see the US Supreme Court which qualifies the conflict between the US Army and Al Qaeda in Afghanistan as a non-international armed conflict (*Hamdan v Rumsfeld* (2006) 45 International Legal Materials 1154)), the possible limited action by the

from the military operation as a whole and its general objective, against which proportionality under *jus ad bellum* is to be measured. In addition, the aspects of the action to be taken into account in the assessment of the two notions of proportionality – namely the means used and the damage that it causes – may entirely overlap. In short, as based on similar elements, the teleological balance exercise that the two notions of proportionality entail could provide a similar assessment result. This does not challenge the theoretical position that the two notions of proportionality remain independent from one another. Yet, this emphasises that making a distinctive assessment between the two notions of proportionality may be very difficult in practice, especially in situations involving one or a few military actions.[63]

It is indicative – although admittedly not entirely conclusive – to observe that considerations regarding proportionality under *jus ad bellum* and *jus in bello* have always been confusing or at least problematic in cases in which the ICJ has been called upon to rule on an action allegedly undertaken in self-defence and limited to one or just a few military operations. One may first mention in that respect the *Oil Platforms* case,[64] in which the question of the legality of only two military operations under the law of self-defence was put before the Court. It is interesting to note that the United States justified the proportionate nature of its action in self-defence by referring to considerations pertaining, as emphasised by Iran itself,[65] to *jus in bello* – namely that the choice of the military target of its action (the oil platforms) was motivated notably by the desirability to limit to the greatest possible extent the number of civilian casualties[66] – as required by proportionality under *jus in bello*.

One may also mention the *Wall* case and the considerations held in that case by some judges of the Court as well as by some states. The Court asserted that Israel had invoked the law of self-defence in order to justify the building of the wall – that is, to justify the legality of what could be viewed as one particular military operation.[67] The Court dismissed this argument mainly because Israel did not prove that the alleged armed attacks came from outside the territory that it controlled.[68] Some judges and states have nevertheless considered the argument. Observations held in that respect evidence some confusion between the two classically separated branches of international law. Indeed, the reasons for which Judge Kooijmans qualified the building of the wall as disproportionate under *jus in bello*[69] were largely identical to those referred to by

state acting in self-defence abroad could be a response to a series of attacks by the non-state actors, which, taken cumulatively, evidence a high level of violence. This would make *jus in bello* applicable.

[63] See, for examples of such situations in addition to those mentioned below, the US military bombings in Afghanistan in 1998: Letter from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc S/1998/780, 20 August 1998.

[64] n 37.

[65] See the oral pleadings by Iran, public sitting in the case concerning *Oil Platforms*, 19 February 2003, CR 2003/7, para 63.

[66] See the oral pleadings by the United States, public sitting in the case concerning *Oil Platforms*, 26 February 2003, CR 2003/12, para 18.32.

[67] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136 ('*Wall Advisory Opinion*'), [138].

[68] ibid [139].

[69] ibid, Separate Opinion of Judge Kooijmans, [34].

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Judge Higgins in order to support the disproportionate and non-necessary nature of this building under *jus ad bellum*.[70] More generally, after having recalled that the law of self-defence was regulated by the conditions of necessity and proportionality, some states seem to have argued that these conditions had not been respected by referring to humanitarian law considerations,[71] including the absence of any distinction between civilians and combatants, the excessive damage caused to the civilian Palestinian population,[72] and (other) specific violations of humanitarian law.[73]

Finally, one must refer again to the *Nuclear Weapons* Advisory Opinion. Indeed, the conclusions reached by the Court in that case have certainly given rise to the liveliest debates on the distinction between *jus ad bellum* and *jus in bello*. It is well known that, after having stated that nuclear weapons were 'generally contrary to humanitarian law',[74] the Court concluded in a very ambiguous statement[75] that

> in view of the current state of international law, and of the elements of fact at its disposal, [it] cannot [however] conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.

The Court, therefore, did not exclude that, in such circumstances, the threat or use of nuclear weapons could be lawful. The Court's reasoning and, more particularly, the relationships between its first *jus in bello* conclusion and its following *jus ad bellum* statement have given rise to different interpretations. It has been argued that the Court (possibly) meant that nuclear weapons could be used in some extreme self-defence situations even if violating *jus in bello*.[76] According to this interpretation, the Court has asserted that a state which would lawfully resort to self-defence in order to protect its survival would not be obliged to respect humanitarian law rules regulating the conduct of hostilities, including the principle of proportionality provided by those rules. Basically, the Court would have endorsed the idea that *jus ad bellum* could override *jus in bello* in some cases. This interpretation is not an isolated one. It has been considered by several judges of the Court as the correct,[77] or at least a possible,[78] interpretation of the

[70] ibid, Separate Opinion of Judge Higgins, [35].
[71] See, for example, written statements of France, paras 57–58, available at http://www.icj-cij.org/docket/files/131/1591.pdf, and South Africa, para 36, available at http://www.icj-cij.org/docket/files/131/1597.pdf.
[72] See, for example, written statement of Saudi Arabia, para 34, available at http://www.icj-cij.org/docket/files/131/1543.pdf.
[73] See, for example, written statements of Indonesia, para 7, available at http://www.icj-cij.org/docket/files/131/1587.pdf, and Malaysia, para 151, available at http://www.icj-cij.org/docket/files/131/1625.pdf.
[74] *Nuclear Weapons* (n 29) 266, dispositive, E.
[75] ibid.
[76] See, for example, Marie-Pierre Lanfranchi and Théodore Christakis, *La licéité de l'emploi d'armes nucléaires devant la Cour Internationale de Justice* (Economica 1997) 108.
[77] See, for example, *Nuclear Weapons* (n 29), Separate Opinion of Judge Koroma, 559–60; Separate Opinion of Judge Fleischhauer, ibid 308 [5].
[78] See, for instance, Dissenting Opinion of Judge Ranjeva (ibid 301); Dissenting Opinion of Judge Higgins (ibid 590 [29]); Dissenting Opinion of Judge Shahabuddeen (ibid 426).

Opinion. Judge Koroma has argued in this sense that the Court 'create[d] … a new category called the "survival of the State", seen as constituting an exception to … the principles and rules of humanitarian law'.[79] Similarly, Judge Fleischhauer asserted[80] that the Court's findings meant that,

> although recourse to nuclear weapons [was] scarcely reconcilable with humanitarian law applicable in armed conflict as well as the principle of neutrality, recourse to such weapons could remain a justified legal option in an extreme situation of individual or collective self-defence in which the threat or use of nuclear weapons is the last resort against an attack with nuclear, chemical or bacteriological weapons or otherwise threatening the very existence of the victimized State.

Yet, this interpretation does not seem founded for several reasons. First, it implies that the Court has adopted a solution which is contrary to the now undisputable principle of equal application of the laws of war between belligerents, something which would dramatically undermine the whole application of humanitarian law. Secondly, it is contrary to the statement that the Court itself had made in this case and according to which, as interpreted above, any use of force must respect both *jus ad bellum* and *jus in bello* in order to be lawful.[81] Thirdly, it would go beyond what the nuclear states themselves requested of the Court – that is, merely not to rule that the use of nuclear weapons is unlawful in any circumstance. Finally, in this interpretation it is forgotten that the Court has not considered nuclear weapons to be always prohibited under humanitarian law but only as generally contrary to this law.

Those considerations are actually crucial in interpreting the Court's reasoning. Indeed, it means that nuclear weapons could be used lawfully under humanitarian law. Read together with the subsequent *jus ad bellum* statement of the Court and the principle that any use of force must comply with both *jus ad bellum* and *jus in bello*, the Court's statement arguably implies that the only case in which the threat or use of nuclear weapons by a state could possibly be lawful under *both* the law of self-defence and humanitarian law is when the survival of this state is at stake. Why is it the most likely case? Certainly, as far as *jus ad bellum* is concerned, it is because this circumstance threatens the most important purpose for which the right of self-defence has been designed – the continued existence of its beneficiary – and could, therefore, legitimise the use of the most powerful and damaging defensive means, including atomic bombs. In other words, the objective to defend itself against an armed attack that threatens its survival is the only potential case in which the use of any means (including nuclear weapons) which is likely to cause severe damage, may be seen as not exceeding that which is necessary to achieve that objective according to the condition of proportionality. Basically, the use of exceptional defensive means would be justified, in this case, by the very significant threat to the state.

[79] n 77.
[80] ibid.
[81] *Nuclear Weapons* (n 29).

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But how could it also be consistent with *jus in bello*? Although, admittedly, it is difficult to answer this question comprehensively, an answer may at least be given when the use of nuclear weapons, in the circumstances mentioned by the Court, consists of only one or a few military operations. Indeed, it is precisely in such a situation that the distinction between the assessments of the two notions of proportionality may fade away. The respective factors for assessing these two notions, including the distinct – general versus particular – objectives of the use of nuclear weapons, are likely to overlap entirely. In other words, if the use of nuclear weapons is judged as being proportionate under *jus ad bellum* in such a situation, it is likely also to be judged as proportionate under *jus in bello*, and vice versa. It is in light of these considerations that the position upheld by some judges of the Court can be understood. In her dissenting opinion Judge Higgins interestingly did not exclude the possibility that the use of nuclear weapons in compliance with *jus ad bellum* in a situation of extreme self-defence 'might *of itself* exceptionally make such a use compatible with the humanitarian law'.[82] This comes after she argues[83] that

> in order to meet the legal requirement that a military target may not be attacked if collateral civilian casualties would be excessive in relation to the military advantage [that is, in order to meet the requirement of proportionality under *jus in bello*], the 'military advantage' must … be one related to the very survival of a State [which is part of the assessment of proportionality under *jus ad bellum*].

Those considerations conflate the factors for assessing the two notions of proportionality, in particular, the respective objectives pursued by the use of nuclear weapons under *jus ad bellum* and *jus in bello*; this is logically conceivable if the use of nuclear weapons involves only one or a relatively small number of attacks.

4. CONCLUSION

Proportionality is a concept which is provided under both *jus ad bellum* and *jus in bello*. Although traditionally these two branches of international law are considered to be entirely separate bodies of law, some scholars argue that proportionality under *jus ad bellum* is dependent upon the respect for proportionality under *jus in bello*, the latter being envisaged as an element of the assessment of the former. This position is ultimately motivated by the aim of strengthening the protection of persons in armed conflicts and is mainly based upon recent state practice, including reactions to the 2006 Israeli intervention in Lebanon.

This article does not share such a position. The two notions of proportionality are clearly distinct. Although applying to a similar reality, they regulate this reality with different emphases: proportionality under *jus ad bellum* focuses on the military operation as a whole, which must be assessed in relation to a general objective – that is, defending against an armed attack; proportionality under *jus in bello* is concerned with individual military attacks launched during this

[82] ibid, Dissenting Opinion of Judge Higgins, [25].
[83] ibid [21].

operation, which must be measured in relation to the concrete and direct military advantage anticipated from the attack. Accordingly, they operate independently of each other but both must be fulfilled in order for any use of force to be considered lawful under international law. In this respect, there is no reason to argue for the inclusion of the *jus in bello* proportionality in the requirement of proportionality under *jus ad bellum* as the most 'likely development given the current focus on the law in war and on the suffering of the civilian population during war'.[84] Such specific protection will indeed always be taken into account when assessing the legality of any use of force.

The fundamental distinction between proportionality under *jus ad bellum* and *jus in bello* also implies that, although some of the factors for assessing these two notions are similar – which involves mainly damage caused to civilians and civilian infrastructure – those factors are taken into account in a different way. First, they are measured against the general objective of the military operation as a whole under *jus ad bellum*, and against the particular military advantage of the individual attack under *jus in bello*. Secondly, they are only taken into consideration as part of the overall damage caused to the aggressor state as far as the assessment of the *jus ad bellum* proportionality is concerned, whereas they are the primary focus in the proportionality equation under *jus in bello*. All of this indicates that when states criticise the disproportionate nature of an action in self-defence by emphasising the excessive damage caused by this action to the civilian population – as states often do and did so especially regarding the 2006 Israeli intervention in Lebanon – one must not necessarily interpret that proportionality under *jus in bello* has also been (considered as) violated. Those state reactions are, therefore, not conclusive for the position that proportionality under *jus in bello* is part of the assessment of proportionality under *jus ad bellum*.

The fundamental distinction between the two notions of proportionality actually derives from the distinct rationale underlying each of them: the principal aim of proportionality under *jus ad bellum* being to minimise the disturbance of the international social order, while proportionality under *jus in bello* directly pursues humanitarian ends, in particular to limit the suffering of non-combatants in armed conflicts. Such a distinction is clear in theory. Yet, it proves to be far from easy to make distinct assessments between the two conditions of proportionality in practice, especially when the use of force to be assessed involves only one or a few military actions. In such situations, one can hardly distinguish between the general versus particular aspects of the actions and, therefore, the respective factors for assessing the two conditions, which basically increases the risk of complete overlap between the evaluations of these conditions.

[84] Österdahl (n 33) 565.

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