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The Proportionality Principle in Operation: Methodological Limitations of Empirical Research and the Need for Transparency

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The principle of proportionality, notoriously obscure in application and subjective in interpretation, has been enforced so rarely as to call into question its potency as a meaningful international legal standard. Nonetheless, international criminal tribunals, academics, and the ICRC's monumental study on customary international humanitarian law all confidently proclaim the principle as embedded in the customary international law applicable to both international and non-international armed conflicts. To assess whether these claims are accurate, and to flesh out how states interpret the principle in practice, the author and a colleague have undertaken a long-term, multinational empirical study of state practice in interpreting and enforcing the proportionality principle. This article discusses the methodological options available and explains the one chosen for the proportionality study. The limitations of the study, in spite of its deliberate methodology, suggest that the debilities of the proportionality principle may not be conceptual as much as a byproduct of unnecessary military secrecy. This article concludes that greater transparency in state compliance with the rule of discrimination and the principle of proportionality would, at least, facilitate an understanding of how the hitherto obscure principle operates in practice and, at best, could create systemic effects that would decrease the dangers to civilians in armed conflicts.

Keywords: law of war, international humanitarian law, proportionality, transparency, empirical research

1. Introduction

The precipitant increase in civilian casualties from organised violence in the twentieth and twenty-first centuries can be traced to a variety of political, social, and technological factors. Among these is the increased prevalence of asymmetrical and non-international armed conflicts. It is a platitude that the laws of war in force today are not well adapted to such conflicts. Although the modern Hague Convention and Regulations,[1] Geneva Conventions and their protocols,[2] and

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[1] 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.

[2] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (entered into force 21 October 1950) 75 UNTS 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (entered into force 21 October 1950) 75 UNTS 85; Geneva Convention (III) relative to the Treatment of Prisoners of War (entered into force 21 October 1950) 75 UNTS 135; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (entered into force 7 December 1978) 1125 UNTS 3 ('Additional Protocol I' or 'AP I'); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims

other conventional sources of *jus in bello*[3] were adopted in the twentieth century, these treaties are essentially designed for the circumstances of late nineteenth century and early twentieth century warfare: two regular armies meeting on a battlefield far removed from civilian populations, or defending cities or towns from which civilians have either fled or are otherwise rarely in the direct line of fire. Only Additional Protocol I to the 1949 Geneva Conventions promulgates rules limiting combat techniques for the protection of civilians in substantial detail,[4] and its rules do not account adequately for the indirect effects of armed conflict on such facilities as transportation infrastructure, drinking water facilities,[5] power plants, telecommunications, and other civilian or dual-use property necessary for the survival and health of the resident population. Nor do they include especially practical guidance for asymmetrical warfare with an enemy that hides among, and indeed may disguise itself as, the civilian population – a scenario that has become disturbingly common.

More troubling still – with the notable exceptions of common Article 3 of the 1949 Geneva Conventions and Additional Protocol II to the same – most rules of *jus in bello* adopted for the protection of civilians do not clearly apply in non-international armed conflicts. The relevant provisions are framed in the vaguest manner and require merely that civilians be treated 'humanely' (common Article 3) and afforded 'general protection' from the effects of the hostilities (Additional Protocol II).[6] They superficially prohibit little more than direct targeting of civilians and indiscriminate attacks.

The tragic reality of civilian casualties in modern armed conflicts calls into question the effectiveness of two core legal protections for civilians: the principles of discrimination and proportionality. The lack of interpretive guidance and enforcement precedents with respect to the proportionality principle especially, combined with frequent accusations of its violation,[7] have fuelled pessimism as to whether it even has meaningful content beyond a general injunction not to ignore the consequences to civilians when making targeting decisions. The devotion of international and military lawyers to the concept of *lex lata*, far from reassuring critics of the

of Non-International Armed Conflicts (Protocol II) (entered into force 7 December 1978) 1125 UNTS 609 ('Additional Protocol II' or 'AP II').

[3] For example, 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 2 December 1983) 1342 UNTS 137 ('Convention on Conventional Weapons' or 'CCW'). The CCW currently has several protocols that prohibit the use of specific conventional weapons deemed to have excessively injurious or indiscriminate effects, such as certain landmines, incendiary weapons such as napalm, and blinding lasers.

[4] One other treaty – the Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques (entered into force 5 October 1978) 1108 UNTS 151 – does include some rules that prohibit certain acts during armed conflicts that might have severe and lasting effects on civilians.

[5] Attacks on water purification facilities are prohibited only if specifically intended to displace civilian populations: AP I (n 2) art 54(2)–(3). Unfortunately, the destruction of a dual-use drinking water facility that has the incidental but foreseeable effect of increasing civilian mortality does not violate the laws of war, although a cogent argument could be made that any foreseeable indirect civilian casualties should be included in the proportionality calculus.

[6] AP II (n 2) art 13(1).

[7] Of potentially innumerable examples, see Human Rights Watch, 'Iran/Iraq: Iranian Attacks Should Not Target Iraqi Civilians', 21 July 2010, available at http://www.hrw.org/en/news/2010/07/12/iraniraq-iranian-attacks-should-not-target-iraqi-civilians; Human Rights Watch, 'Why They Died: Civilian Casualties in Lebanon During the 2006 War', 5 September 2007, available at http://www.hrw.org/en/reports/2007/09/05/why-they-died/.

value of proportionality as a restraint on organised violence, merely highlights the dissonance between the prevailing international law of war doctrine and its operational code. Adhering to a conception of proportionality unsupported by state practice does not merely promote a delusive view of international law; it threatens to discredit the law of armed conflicts as a functional mediator between community values and state behaviour.

Consider the relatively bright-line rule of civilian immunity. Throughout the twentieth century, there was no reliable international system to threaten accountability for the ubiquitous dictators, commanders, and soldiers who intentionally targeted civilians. Following the formation of two ad hoc international criminal courts[8] and several hybrid national–international criminal tribunals,[9] civilian immunity received a boost in 2002 from the entry into force of the Rome Statute of the International Criminal Court (ICC).[10] A formal mechanism is now in place to (potentially) hold accountable individuals responsible for murdering civilians on a sufficient scale. While realistically there is little reason to expect courts of this kind to deter civilian devastation in many armed conflicts,[11] the clarity of the discrimination rule and the symbolic power of a permanent institution for prosecuting war crimes together proclaim the international community's commitment to the rule of law on this question.

Its commitment to the principle of proportionality is not quite so certain. The principle, first codified in Additional Protocol I of 1977 to the Geneva Conventions, prohibits attacks likely to cause 'incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'.[12] The principle is formulated in intentionally general terms to protect the discretion of military commanders to achieve legitimate strategic and tactical objectives.[13] The subjectivity of the principle, its vague formulation, and the incommensurability of the values (civilian lives and property versus military advantage) render the principle troublesome in its application.[14] The standard is so difficult to apply that there is no widely accepted metric for judging state compliance, and there are no well-known precedents in which a state, military commander or soldier was clearly sanctioned for a violation of the principle.[15] Further confusing the matter is the

[8] Specifically, the International Criminal Tribunal for Rwanda ('ICTR') and the International Criminal Tribunal for the Former Yugoslavia ('ICTY').

[9] For example, the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia.

[10] Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90 ('ICC Statute').

[11] See Mahnoush H Arsanjani and W Michael Reisman, 'The Law-in-Action of the International Criminal Court' (2005) 99 American Journal of International Law 385.

[12] AP I (n 2) arts 51(5)(b) and 57(2)(a)(iii), (b).

[13] See Aaron Xavier Fellmeth, 'Questioning Civilian Immunity' (2008) 43 Texas International Law Journal 454, 478–91.

[14] See generally Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2nd edn, CUP 2010) 132–3. Antonio Cassese, for example, has criticised the proportionality principle for its difficulty of application: see Antonio Cassese, 'The Prohibition of Indiscriminate Means of Warfare' in Robert J Akkerman, Peter J van Krieken and Charles O Pannenborg (eds), *Declarations on Principles: A Quest for Universal Peace* (AW Sijthoff 1977) 171, 184.

[15] cf Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (2000) 39 International Legal Materials 1257, 1271 ('It is much easier

disjunction between Additional Protocol I and the ICC Statute. Although an attack causing 'excessive' anticipated collateral damage violates Additional Protocol I, it may be prosecuted as a war crime before the ICC only if it is 'clearly excessive'.[16]

Two examples of criminal prosecutions for disproportionate attack that are commonly cited by commentators – the *Blaškić* case and the *Galić* case – do not, in fact, relate to Article 51 (5)(b) of Additional Protocol I at all. *Blaškić* concerned three artillery attacks on Vitez and Stari Vitez that resulted in the killing of some one hundred civilians and a smaller number of combatants. The ICTY Trial Chamber found that this ratio of civilian casualties to military advantage was excessive.[17] Dinstein and others characterise this case as an application of the proportionality principle,[18] and the tribunal did discuss proportionality at some length in obiter dicta. However, the ruling of the case deals solely with the related but distinguishable rule of discrimination.[19] The Trial Chamber held that the attack proceeded 'without distinction' among adults and children; that the attackers had not targeted combatants specifically with their artillery fire; that the attacks 'targeted the Muslim civilian population'; and that Vitez and Stari Vitez lacked any 'strategic or military' value.[20] In other words, the attack went beyond disproportionality and violated the principles of necessity and discrimination.[21]

The Appeals Chamber, while accepting that a majority of victims of the attacks were civilians, specifically rejected the conclusion that the civilian casualty figures could be 'relied on in determining the nature of that attack'[22] and accordingly exonerated the commander from ordering an illegal attack.[23] Indeed, the Appeals Chamber's analysis seems to imply the position that an attack targeting civilians would constitute a war crime, but that a wilful attack resulting in more than 50 per cent civilian casualties and 'lacking sound military judgment' would not.[24] If the *Blaškić* case tells us anything about proportionality, it is to call into question whether a disproportionate attack can ever rise to the level of a war crime unless the attack qualifies as wholly indiscriminate.

In the second example sometimes cited, the *Galić* case, the ICTY found a series of attacks on random locations in a populated town which resulted in 50 per cent civilian and 50 per cent combatant deaths to be disproportionate or 'indiscriminate'.[25] One commentator described this case as

to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances'). The Proportionality Study, discussed in Section 2.3, has already uncovered a few more examples, albeit among dozens of cases of disproportionate attacks committed with impunity.

[16] ICC Statute (n 10) art 8(2)(b)(iv).

[17] ICTY, *Prosecutor v Blaškić*, Trial Judgment, IT-95-14-T, Trial Chamber, 3 March 2000, [507]–[510].

[18] Dinstein (n 14) 131–32; Amichai Cohen, 'The Principle of Proportionality in the Context of Operation Cast Lead: Institutional Perspectives' (2009) 35 Rutgers Law Record 23.

[19] An indiscriminate attack is one made without any attempt to (or ability to) target a legitimate military objective and that consequently may result in civilian casualties or property damage: AP I (n 2) art 51(4). Disproportionate attacks, in contrast, are always directed toward a legitimate military objective.

[20] *Blaškić* (n 17) [507]–[510].

[21] See AP I (n 2) arts 48 and 51(4).

[22] ICTY, *Prosecutor v Blaškić*, Appeal Judgment, IT-95-14-A, Appeals Chamber, 29 July 2004, [441].

[23] ibid [444], [463].

[24] ibid [463].

[25] ICTY, *Prosecutor v Galić*, Judgment, IT-98-29-T, Trial Chamber, 5 December 2003, [372]–[387].

a 'successful proportionality prosecution'.[26] This, too, is a false positive identification. As the Appeals Chamber observed, the Trial Chamber found the disproportionate effects of the attacks to merely constitute evidence that the defendant was intentionally targeting civilians: 'No mention is made of indiscriminate or disproportionate attacks as the basis for conviction.'[27]

At the level of treaty obligations, some functional guidance is available. First, there are blanket prohibitions on the manufacture and use of certain highly indiscriminate weapons.[28] Additional Protocol I also includes some specific operational rules to deter indiscriminate and highly disproportionate attacks. Article 51 prohibits attacks that treat 'as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects'.[29] Such attacks are 'considered indiscriminate', which, again, differs from proportionality analysis while achieving a similar objective. Article 57 requires military commanders to choose 'means and methods of attack' that minimise civilian casualties and dictates that, when confronting multiple military objectives conferring a 'similar military advantage', commanders must choose the objective posing the least danger to civilian lives and property.[30] Attacks otherwise violate the proportionality principle, although Article 57 does not explicitly relate these concepts to 'excessive' collateral damage.

These rules are intended to guide military judgments to protect civilians from the worst effects of armed attacks. Unfortunately, they do not apply equally in non-international armed conflicts; instead, Additional Protocol II merely provides: 'The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations.'[31] This amounts to only the slightest enhancement of the principle of discrimination.

In the absence of conventional sources of more detailed guidance for the interpretation of the proportionality principle, and of any guidance whatsoever on the question of whether and how the proportionality norm applies in non-international armed conflicts, scholars,[32] international

[26] Abraham Bell, 'Critique of the Goldstone Report and Its Treatment of International Humanitarian Law' (2010) 104 American Society of International Law Proceedings (forthcoming), available at http://ssrn.com/abstract=1581533

[27] ICTY, *Prosecutor v Galić*, Appeal Judgment, IT-98-29-A, Appeals Chamber, 30 November 2006, [134].

[28] See, for example, the Convention on Cluster Munitions (entered into force 1 August 2010), available at http://www.clusterconvention.org/downloadablefiles/ccm77_english.pdf. See also AP I (n 2) art 54(4) (prohibiting parties from employing indiscriminate methods of attack, including by implication using weapons that are by their nature indiscriminate); *Case Concerning the Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, [95] (implying that the use of inherently indiscriminate weapons violates customary *jus in bello* by its statement that the use of nuclear weapons seems 'scarcely reconcilable' with the requirement that methods and means of warfare discriminate between military and civilian targets).

[29] AP I (n 2) art 51(5)(a).

[30] ibid art 57(3).

[31] AP II (n 2) art 13(1).

[32] See, for example, Michael Bothe, Karl Josef Partsch and Waldemar A Solf, *New Rules for Victims of Armed Conflicts* (Martinus Nijhoff 1982) 299; Yoram Dinstein, 'Collateral Damage and the Principle of Proportionality' in David Wippman and Matthew Evangelista (eds), *New Wars, New Laws?* (Transnational 2005) 211; W Hays Parks, 'Air War and the Law of War' (1990) 32 Air Force Law Review 1, 168; LR Penna, 'Customary International Law and Protocol I: An Analysis of Some Provisions' in Christophe Swinarski (ed) *Studies and Essays on International Humanitarian Law and Red Cross Principles* (Kluwer Law International 1976) 201, 220; Mark David Maxwell and Richard V Meyer, 'The Principle of Distinction:

tribunals,[33] the International Committee of the Red Cross (ICRC),[34] and even some states[35] have turned to customary international law. Customary international law embodies the long-standing, widespread, and consistent practice of states undertaken from an expectation of legally binding obligation (*opinio juris sive necessitatis*). Those looking for guidance on the application of the principle of proportionality must study state practice with a view to identifying consistent patterns of behaviour, characterised by those marks of respect for the expectations of the international community that are sufficiently unambiguous to establish recognition of a legal rule. Producing decisive evidence of a customary rule of international law is notoriously tricky and laborious, and all the more so in the study of the customary law of armed conflict. Studies of international custom have so far proven impervious not only to all attempts to identify the content of the rule of proportionality in any detail, but to assess the status of the principle itself as a binding custom in both international and non-international armed conflicts.

If proportionality is to play a role as a standard of behaviour rather than an abstract ideal then international lawyers, military commanders, and other relevant actors need better metrics of how states interpret the rule of proportionality to accurately assess the content of custom as well as the incidence and methods of state compliance. The purpose of this article is to analyse the challenges in developing a methodology to study these questions, and to describe one methodology designed to study empirically state practice of proportionality. In the course of the analysis, the limitations of any private research methodology will become clear, and ideas for making proportionality analysis more approachable will be explored.

In Section 2 of this article, the practical obstacles to understanding how (and whether) states interpret and apply the proportionality principle in practice are discussed. I then analyse the strengths and weaknesses of some potential methods for conducting empirical research on proportionality, followed by a description of the method settled upon by the author and colleagues for conducting a long-term, multinational empirical study of state practice of proportionality.

Probing the Limits of its Customariness', The Army Lawyer, March 2007, Pamphlet 27-50-406, 1, 10, available at http://www.loc.gov/rr/frd/Military_Law/pdf/03-2007.pdf.

[33] See, for example, ICTY, *Prosecutor v Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, Appeals Chamber, 2 October 1995, [127] ('[I]t cannot be denied that customary rules have developed to govern internal strife. These rules … cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks … as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.'); ICTY, *Prosecutor v Kupreskić*, Judgment, IT-95-16-T, Trial Chamber II, 14 January 2000, [524] (concluding that the principle of proportionality is a 'general principle of international law').

[34] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Vol I: Rules* (ICRC, CUP 2005) 48–49, 58–59. The ICRC, although a non-governmental organisation, plays a dominant role in the negotiation and interpretation of international humanitarian law. Its guidance is influential and regarded seriously by both national and international political elites.

[35] See, for example, Michael J Matheson, 'Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions' (1987) 2 American University Journal of International Law and Policy 419, 426 (stating official US policy as recognising the rule of proportionality and most other provisions of AP I as customary international law). But see Hays Parks (n 32) 173 (stating that, in reviewing a draft of AP I during negotiations, the US Department of Defense concluded that the concept of proportionality was not a customary rule of law as presented in the draft).

In Section 3, the limitations of empirical research will be discussed, and some proposals for overcoming the obstacles to understanding how states implement proportionality will be explored. Specifically, in Section 3, I discuss the merits of adopting a transparency norm with respect to state implementation of proportionality obligations, including training, monitoring and enforcement measures. In Section 3, I then propose a new legal duty for the gathering and dissemination of information on post-engagement civilian and combatant casualties and property damage, and discuss the kinds of disclosure obligation most likely to be acceptable to states and their military organisations.

2. EMPIRICALLY ASSESSING PROPORTIONALITY IN OPERATION

2.1 OBSTACLES TO RECOGNITION OF THE PROPORTIONALITY PRINCIPLE AS INTERNATIONAL CUSTOM AND TO ASSESSMENT OF ITS CONTENT

Inferring the existence and content of the principle of proportionality in customary international law is obstructed by several factors. First, until relatively recently, states did not consider themselves legally bound to afford significant protection to the civilian population under international law. The unnecessary civilian deaths caused by carpet bombing, firebombing, and the use of indiscriminate weapons such as toxic gases, landmines, drifting contact sea mines, unguided rockets, and atomic bombs in the Second World War[36] – not to mention the intentional murder of millions of civilians – demonstrated a general ruthlessness and disregard for the safety of civilians during that period. The establishment of a long-standing, widespread, and consistent custom of taking special precautions to protect civilians from the effects of hostilities, if it has arisen, must have done so in the last 60 years or so.[37] Yet, as already noted,[38] the ratio of civilian to combatant casualties does not seem to have abated since the Second World War. Civilian casualties continue to overshadow military casualties in most armed conflicts globally. The facts do not seem to support, at least superficially, the many assertions[39] that the principle of proportionality has yet crystallised into customary international law.

Second, military planning and operations are generally opaque. The planning processes in which decisions are made about targeting and attack methods, in particular, are highly secretive. To expose the decision process to public view could enable current or future adversaries to

[36] See, for example, Alan J Levine, *The Strategic Bombing of Germany: 1940–1945* (Praeger 1992); John W Mountcastle, *Flame On! US Incendiary Weapons, 1918–1945* (White Maine Books 1999) 68–85, 103–19; Kenneth P Werrell, *Blankets of Fire: U.S. Bombers over Japan during World War II* (Smithsonian Institution Press 1996), 150–68; AC Grayling, *Among the Dead Cities: The History and Moral Legacy of the WWII Bombing of Civilians in Germany and Japan* (Walker 2006) 76–78.

[37] cf Stefan Oeter, 'Methods and Means of Combat' in Dieter Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (2nd edn, OUP 2008), 119, 198; Anthony PV Rogers, 'The Principle of Proportionality' in Howard M Hensel (ed), *The Legitimate Use of Military Force: The Just War Tradition and the Customary Law of Armed Conflict* (Ashgate 2008) 189, 190, 202.

[38] See Fellmeth (n 13) 454–55.

[39] See nn 29–32 and sources cited therein.

predict the military organisation's strategy and tactics, undermining its effectiveness and exposing its personnel to danger. For similar reasons, military discipline enforced against the organisation's own commanders and soldiers is rarely conducted with total transparency (although several military organisations do conduct public trials[40] or at least publish the judgments). Nor are military organisations usually eager to allow the media free access to their battlefield operations. As a consequence, experienced students of the laws of armed conflict are quick to acknowledge the nearly insuperable difficulty of assessing state practice and *opinio juris* based on actual battlefield events.[41] The ICTY itself observed in the *Tadić* case:[42]

> When attempting to ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour.

Given the chaos typically governing armed hostilities, even military commanders themselves may not always be able to ascertain with certainty *ex post facto* whether any specific attack complied with the applicable rules of engagement, much less the principle of proportionality.

Third, it is possible for a sufficiently serious violation of the principle of proportionality to be considered a war crime,[43] and few states are eager to publicise crimes committed by their own military organisations. Even those that privately recognise that an attack violated the *jus in bello* will rarely concede the fact openly. Admission of such violations brings disrepute to the military organisation and, by extension, the government. It also may invite intrusive scrutiny into military planning and operations by civilian political authorities or the international community. As a result, breaches of the laws of war may be denied, intentionally overlooked or, at best, handled privately and informally with no public acknowledgement of the violation. Often, official information about a breach of the *jus in bello* becomes available only after the rare international outcry or investigation by an international human rights authority.

Finally, most of the armed conflicts since 1945 have been, or at least started out as, non-international. There are several reasons why states have shown special reluctance to treat the targeting rules applicable in international armed conflicts as equally binding in non-international conflicts. Traditionally, a state's treatment of its own civilians was considered a matter of

[40] The US, for example, is exceptionally open. The general rule is that courts martial are open to the public, although they may be closed at the discretion of the military judge. See Joint Service Committee on Military Justice, *Manual for Courts-Martial United States* (2008 edn), II–79.

[41] For example, Michael N Schmitt, 'The Law of Targeting' in Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (CUP 2007) 131, 135, 156.

[42] *Tadić* (n 33) [99].

[43] Art 8(2)(b)(iv) of the ICC Statute gives the court jurisdiction over an attack made 'in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment, which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated'.

sovereign internal control, beyond the purview of international law.[44] This attitude has since become more enlightened, but the Geneva Conventions and their additional protocols do not reflect the full extent of change. As noted, Additional Protocol II omits any reference to a proportionality principle in non-international conflicts. While some authorities have asserted or implied that the principle of proportionality applies equally in non-international armed conflicts under customary international law or otherwise,[45] the accuracy of the claim is difficult to test. The opacity of military decision-making is, if anything, redoubled in armed conflicts confined to a single state. There, the international media and non-governmental organisations may have less interest and be excluded more easily. Moreover, when the opposition group must remain clandestine in order to survive, there is limited access to viewpoints opposing the government's official line. When anti-government forces can manage to communicate, the secrecy of the organisation may cast doubt on its veracity; it seems psychologically difficult to attribute honesty and candour to a violent group that lurks in the shadows. A single state government firmly in control of the ostensibly credible information about traumatic events in a dangerous and often remote location multiplies the already substantial obstacles to acquiring objective information.[46]

2.2 METHODOLOGICAL APPROACH TO THE STUDY OF THE CUSTOMARY LAW OF WAR

The most thorough analysis of the state practice of proportionality currently available is the monumental study, *Customary International Humanitarian Law* ('ICRC Study'), conducted under the auspices of the ICRC by Jean-Marie Henckaerts and Louise Doswald-Beck.[47] The ICRC Study assembles valuable guidance on how states have interpreted their obligations through treaty negotiations, national legislation, military manuals, and public statements. Through this guidance, the ICRC Study identifies proportionality as a principle of customary international law.

The ICRC Study's methodology and the content of the rules it identifies as customary have not, however, achieved universal acceptance. The legal advisers to the US Department of State and Department of Defense, for example, characterised the study as excessively reliant on documentary sources and lacking verification by actual state practice on the battlefield.[48] They further

[44] See Jean Pictet (general ed), Oscar M Uhler and Henri Coursier (eds), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War: Commentary* (ICRC 1958) 46 (observing that the reason for excluding a belligerent's own nationals from the category of 'protected persons' was concern to avoid interfering with a sovereign state's relationship with its own nationals); Maxwell & Meyer (n 32) 10.

[45] For example, *Tadić* (n 33) [119]. 'What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife': Henckaerts and Doswald-Beck (n 34) 58–59.

[46] The news media has become more effective at publicising military operations and war crimes since the spread of satellite news transmission and resource-rich global media organisations. However, information reported by the media is frequently unverified, anecdotal, or derived from the self-interested military organisations themselves.

[47] Henckaerts and Doswald-Beck (n 34).

[48] John B Bellinger III and William J Haynes II, 'A US Government Response to the International Committee of the Red Cross Study *Customary International Humanitarian Law*' (2007) 89 International Review of the Red Cross 443.

claimed that the study failed to adduce specific evidence of *opinio juris*.[49] Academic commentators have echoed these concerns.[50]

The criticisms of the approach by Henckaerts and Doswald-Beck to *opinio juris* take issue with the inference that states adopting legal constraints on attack modalities do so from a sense of international legal obligation. Technically, this is indeed a mere inference and not indisputable proof of *opinio juris*. Yet the relevance of the ICRC Study's sources to the assessment of customary international law is beyond doubt. States do not promulgate limitations on attack methods in their military manuals, or create criminal liability in national legislation, for the satisfaction of arbitrarily hampering the effectiveness of their military commanders. When states voluntarily limit their own military capabilities as a general rule applicable in all future conflicts it is because they consider such tactics to be either generally ineffective (for example, wasteful of firepower), immoral, or prohibited by international law.[51] It may be difficult to separate pragmatic motivations for adopting a rule of proportionality from the *opinio juris* motivation, but practical and humanitarian concerns need not be mutually exclusive.

In any case, it would be impossible to present the irrefutable proof of widespread, long-standing, and consistent state practice of proportionality accompanied by *opinio juris* desired by the ICRC Study's critics, unless states were to adopt the habit, which they have very rarely done,[52] of publicly and formally acknowledging customary rules of international law that they consider to be legally binding. Given that *opinio juris* can be inferred only indirectly in almost every case, the chief methodological difficulty is to gather evidence of battlefield behaviour during the confusion of combat and, afterwards, subject it to intentional obfuscation by the relevant actors. In adversarial legal practice, this problem may be overcome through the allocation of burdens of proof, ethical rules, and rules requiring cooperative evidentiary discovery. In international law, the door to such evidence is closed. Given the real-world constraints on evidence gathering, the value of the ICRC Study for assessing *opinio juris* is beyond doubt, even if its conclusions are presented with greater confidence than the evidence presented in the study can justify.

The ICRC Study is, in fact, more useful to that end than it is for assessing state practice. The main limitation on its assessment of state practice is its failure to reflect the potential gulf between two concepts described by Pound as 'law on the books' and 'law in action'.[53] Battlefield behaviour does not always comply with the ideals set forth in military manuals or national legislation.

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[49] ibid.

[50] See, for example, Schmitt (n 41) 134; Yoram Dinstein, 'The ICRC Customary International Humanitarian Law Study' (2006) 36 Israel Yearbook on Human Rights 1.

[51] When states wish to constrain military commanders in a specific armed conflict, they issue rules of engagement, and these may include tighter constraints on attack modalities motivated by concerns specific to the conflict at issue, such as a desire to win goodwill or avoid opprobrium among the civilian population.

[52] At the conclusion of the Geneva Conferences of 1977, the Legal Adviser to the US Department of State publicly specified which provisions of the Additional Protocols the State Department considers to be reflective of customary international law, and which it does not: Matheson (n 35). It is possible that the US critics of the ICRC Study have erroneously assumed that this practice is a usual one. In fact, very few state governments take public positions on the customary status of a rule or principle except in the course of an international dispute directly on point.

[53] Roscoe Pound, 'Law in Books and Law in Action' (1910) 44 American Law Review 12.

It is true that the ICRC Study omitted any serious evaluation of actual state military practice. The question remains open whether states in fact observe a proportionality principle with any consistency and, if so, how they implement the principle in battlefield situations. The ICRC Study establishes that the principle of proportionality in its general formulation has achieved significant influence in state attitudes towards the conduct of hostilities. The next step – a method for assessing how states interpret and operationalise the proportionality principle – is sorely needed.

2.2.1 JOURNALISTIC METHODOLOGY

None of the critics of the ICRC Study has thus far offered any concrete suggestion as to how it might supplement the Study with a more accurate and complete study of practice. The four factors discussed earlier in Section 2.1 serve to deter the deeper investigation of state practice. While they do not pose insuperable obstacles to supplementing the ICRC Study with an alternative methodology, they offer challenges that no study has yet answered.

One option would be to supplement the ICRC Study's sources using a journalistic methodology. This approach involves four general steps:

(1) defining the scope of the research and identifying sources of information, including legislation, media reports, reports and press releases of non-governmental organisations, public announcements of national and international elites, witness statements, and acts and reports of intergovernmental organisations;
(2) gathering the available information through documentary research and interviews;
(3) evaluating the validity of each source by confirming it against independent sources of evidence; and
(4) combining the facts into a narrative – with appropriate qualification for, or discounting of data falling towards, the less reliable end of the spectrum.[54]

From this narrative, it may be possible to draw tentative conclusions about elite expectations for the actors involved in the incident under study, or at least their public positions on these expectations.

The strengths of this method include its openness to a variety of non-documentary data sources and its ability to cast doubt on some unreliable facts by seeking independent confirmation. On the other hand, journalistic methods for the evaluation of the reliability of evidence are less refined than legal evidentiary principles. For example, they do not necessarily account for the unreliability of second-hand evidence or the self-interest of the information source. The result is usually a neutral report of the statements of relevant actors or the journalist's own anecdotal observations rather than a thorough and objective analysis of the events. Moreover, the journalistic method is typically used for gathering and evaluating facts based on an incident limited both temporally and in subject matter (Step 1). Journalistic methodology is not adapted to the open-ended study of long-standing, consistent, and widespread international custom.

[54] See generally William E Bundell, *The Art and Craft of Feature Writing* (Plume 1988).

2.2.2 HISTORIOGRAPHICAL METHODOLOGY

Historians, in contrast, are accustomed to using such methods to survey developments occurring through a large number of incidents over a long span of time. From a thorough study of state practices through all available and reliable resources, historiography may generalise with appropriate nuance. Such a study will inevitably involve the use of numerous secondary sources dealing with specific incidents or trends in incidents. The resulting research is highly resource-intensive, involving the winnowing of large quantities of information in memoirs, biographies, or government records to isolate a few legally relevant details in the mass of data.[55] Because an accurate depiction of historical trends requires both a long view of the subject and a firm grasp of important details, a thorough study typically takes many years to complete. Such a study of international practice in the application and interpretation of the proportionality principle would be theoretically possible with sufficient resources, but the researcher then faces the obstacles discussed earlier in Section 2.1. Moreover, historians rarely gather information personally from direct sources except in distant retrospective interviews, and secondary sources relating to armed conflicts are usually written by journalists and historians with no training in international law. They rarely include the kind of detail about targeting decisions that are necessary to draw reliable legal conclusions about how states apply and interpret the proportionality principle, even if such information were available to researchers.

2.3 THE PROPORTIONALITY MULTINATIONAL STUDY

The present author and a colleague, Professor Douglas Sylvester of the Arizona State University College of Law, have designed, and are in the process of conducting, a long-term, multinational study of state practice in observing and interpreting the proportionality principle ('the Proportionality Study'). This project aggregates data gathered through individual 'incident studies'. The incident study is a method of identifying and evaluating a specific event or connected series of events as a legal precedent. The methodology has been fully described in the writings of Andrew Willard and W Michael Reisman[56] and combines legal, journalistic, and historiographical research techniques. In the evaluation of each source of data, the observational standpoint of the source must be weighed to assess the reliability and bias of the source, and whenever possible such data is corroborated independently. The claims of all politically relevant actors are evaluated in light of the facts to ascertain how the operative legal norms affect the outcome of the dispute or the international community's appraisal of the event. Incident studies use the journalistic and historiographical methods described above, but supplement them with the

[55] See generally Martha C Howell and Walter Prevenier, *From Reliable Sources: An Introduction to Historical Methods* (Cornell University Press 2001).

[56] See Andrew R Willard, 'Incidents: An Essay in Method' (1984) 10 Yale Journal of International Law 21; W Michael Reisman, 'International Incidents: Introduction to a New Genre in the Study of International Law' in Michael Reisman and Andrew R Willard (eds), *International Incidents: The Law that Counts in World Politics* (Princeton University Press 1988) 3.

international lawyer's understanding of the political relevance and viewpoints of actors in the international community and of legal principles of evidence. The Proportionality Study departs from the incident study methodology in some ways to be described in this section, but the most important departure is that the Proportionality Study is not limited to a single incident, but rather aggregates data from numerous incident studies. Specifically, our purpose in organising the Proportionality Study was to gain a more factually accurate and complete understanding of state practice of proportionality by cumulating incident studies in a wide range of major conflicts, both international and non-international, since 1945. The Study's key goal is to move beyond formal, documentary evidence of customary law and to analyse real battlefield practice.

The first step in each incident study is to identify and circumscribe the incident to be examined. We began with a set of armed conflicts, the selection of which was based on intensity, geographic and temporal diversity, and relative geopolitical importance. In the selection process, we have tried to obtain a representative sample of both international and non-international conflicts. With the parties to the conflict identified, we search through conventional sources of information on each party's general military legal training, law compliance monitoring, and enforcement techniques, through military manuals, public documents, and internet resources. This includes training techniques, deployment and the accessibility of legal personnel,[57] target selection and approval procedures, procedures for investigating and punishing commanders allegedly responsible for disproportionate attacks, and procedures for deterring or correcting dysfunctional attack methods. This general information will later be supplemented through interviews with military personnel.

With a relevant conflict identified, we select incidents of potentially disproportionate attack based on news reports, NGO reports, or allegations by opposing military forces or civilian populations. Given the Study's goals, at no stage do we judge whether such allegations are accurate. However, to determine the credibility of allegations that significant civilian casualties or property damage resulted from an attack, we perform documentary research relying primarily on reports of NGOs, the news media, or intergovernmental organisations such as the UN, Human Rights Committee, Inter-American Commission on Human Rights, or European Court of Human Rights. Based on this data, we determine whether a credible question of disproportionate attack has been raised. This research always requires assistants who are fluent in the languages spoken by the participants in the conflict.

Once we have identified a potentially precedential incident, our next step is to gather as much information as possible about the circumstances and consequences of the engagement. We attempt to overcome the difficulties described in Section 2.1 by examining each incident of allegedly disproportionate attack to determine:

- the actors involved, including their characteristics and relative advantages;
- the strategic goals of the participants;
- the immediate goal of the attack;

[57] The Study accordingly has the incidental benefit of gathering data on compliance with AP I, art 82, which requires that legal advisers be made available to military commanders.

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- the weapons used;
- the forces, threats, and defences faced by the attacker;
- the environment and context in which the engagement took place (for example, geographic, temporal, institutional);
- the political and logistical circumstances of the attack (for example, crisis, terrorism, war of attrition);
- the nature and strategic value of the military targets chosen in light of the range of targets reasonably available for attack;
- what method of attack was used of those reasonably available (for example, in terms of timing, approach, or distance);
- the military advantage expected from the attack;
- the expected consequences for civilian lives and property at the planning stage; and
- the claims and strategies of the relevant actors as to the legality of their actions, including their strategies for defending their actions.

Any clearly intentional killings of civilians, such as execution-style killings or attacks distant from any military objective, are factored out as being irrelevant to the question of proportionality.[58]

If the facts are insufficiently developed to determine with confidence whether significant civilian casualties or property damage resulted from the engagement, we discontinue study of the incident and move on to the next. With sufficient facts, we then seek further information on the consequences of the incident from representatives of the armed forces involved. Our general interview protocol, which must be translated into each relevant foreign language, is set out below as an Appendix, although it is subject to customisation depending on the facts of the conflict and the information already publicly available. In addition, the research assistants are instructed to follow up with detailed questions about any vague or ambiguous practice. We also attempt to interview any available witnesses, field reporters, NGO and IGO personnel, and government sources to corroborate facts and supplement the record with unpublished information about the course of events and ultimate consequences for the actors.

In those cases in which, after extensive investigation, we are unable to identify any remedial or punitive consequences that were at least arguably connected to the allegedly disproportionate attack, we note the apparent absence of enforcement action. In the event that disciplinary or corrective action was taken, or a formal investigation was undertaken, we record the manner of investigation, the corrective measure, or the punishment and its result. Finally, we survey the reaction of the international community to the incident and its outcome (if any) through public

[58] The challenge here is in separating, from disproportionate attacks, those killings that were allegedly intentional but for which the evidence was inconclusive. Some actors almost always claim that an attack resulting in significant civilian deaths was indiscriminate or intentional rather than disproportionate. Whenever any significant doubt existed regarding the substantiation of such allegations, we resolved them in favour of the assumption that the killings were accidental. This brought a larger number of incidents within the scope of the study while excluding cases in which civilians were clearly targeted in violation of the principle of discrimination.

statements of the government and international community, actions by intergovernmental organisations, national and international lawsuits, and NGO reports or press releases.

When a representative sample of countries and incidents have been studied, we will synthesise the findings and present an analysis of state practice in terms of general practices for ensuring compliance with the proportionality principle and specific corrective or enforcement measures in cases of credible allegations of violation. From our study of specific incidents, we will be able to describe the circumstances that provoked an investigative or other response, the range and incidence of responses (such as compensation to victims, implementation of new procedural protections, and punishment of individual combatants), and the expressed views of the international community on what kinds of measures are expected to satisfy proportionality obligations.

To conduct a sufficient quantity of incident studies to permit a competent analysis of the existence and content of a general customary norm of proportionality requires the evaluation of numerous military conflicts in diverse geographic locations over an unusually long time span. Each incident represents a single data point; it tells us about one event in one conflict only. To extrapolate a general rule or trend from such incidents requires a representative sample of incidents in a representative sample of armed conflicts. A systematic study of state practice in this manner demands patience, extensive resources, and assistants knowledgeable in over a dozen languages.

Our findings based on this methodology are subject to several important limitations. The first and most consequential is the absence of direct access to the tactical planning process of the military commanders involved. As noted above, military planning is by nature secretive, and decisions not to attack, or to change mode of attack, to reduce civilian casualties are not susceptible to discovery through conventional fact gathering techniques. The influence of the rule of proportionality, though sometimes invisible, nonetheless may have important consequences in practice. Not all legal rules operate by threat of sanction – indeed, very few do. Many legal rules become integrated into cultural expectations of rectitude and so operate psychologically with greater effect and universality than would be possible through threatened coercion.[59] But the difficulty of demonstrating empirically the operation of such influences in those countries with closed military cultures leaves them vulnerable to underestimation. Because there is often no real possibility of gaining access to this data, our findings should be qualified by the understanding that they may understate the role of the proportionality principle in protecting civilian populations. The main value of the incidents – as opposed to our more general research on military training, target planning and approval processes – is in assessing whether and how states investigate allegations of disproportionate attack and respond to discovered violations.

[59] The US furnishes an excellent example; there, military units in the field include an officer from the Judge Advocate General (JAG) Corps on staff. Because both JAG Corps officers and US Army commanders are trained in the laws of war, including the principle of proportionality, the laws may be expected to exert at least some influence on targeting decisions: Richard Jackson, Special Assistant on Law of War Matters, Army Judge Advocate General Corps, participating in 'Empirical Approaches to the International Law of War' (2008) 16 Willamette Journal of International Law and Dispute Resolution 386, 393–94.

Gathering information about the consequences (or absence thereof) of an alleged violation of *jus in bello* is especially difficult. It is possible that, in some instances, disciplinary action was taken against a commander who directed a disproportionate attack without the action becoming publicly known. There are sanctions that fall short of court martial or criminal prosecution that could nonetheless punish and deter effectively. Corrective measures could result from disproportionate attacks without the military organisation publicly drawing a connection between the two. Whenever possible, we question our informants about whether any given incident could have resulted in corrective measures or informal sanctions,[60] but the frequent lack of direct access to military officers who would know best impedes their discovery.

The distortive effect of secrecy should not be overstated, however. A military organisation that refrains from publicising the consequences of a violation of *jus in bello* mutes the deterrent effect on its military commanders. This is not to say that an unpublicised sanction is equivalent to no sanction at all, but silent sanctions are much less conducive to the development of a military culture respectful of the laws of war. A military organisation's commitment to observing international law, to be effective, should be a public one.

In addition, in each case, whether a given attack was disproportionate in the first place is a question that can never be finally settled by our Study. No information dragged kicking and screaming from the din and mayhem of war will ever be totally beyond impeachment. Many military organisations do not even collect data on civilian or enemy military casualties. This is especially true of irregular armed forces, but even describes the practices of highly professional military organisations. Reliance on NGO and witness reports should be qualified by the understanding that, between the fog of war, the danger and difficulty of surveying a battlefield during or immediately after an armed engagement, and the traumatic effects of witnessing human devastation, the data will inevitably be partial and subject to some uncertainty. The news media and NGOs may fail to verify allegations of disproportionate attacks, may misreport accidental deaths as intentional killings of civilians (or vice versa), or may misstate the number of civilian or military casualties. The headline-grabbing effect of intentional executions of civilians also tends to overshadow reports of accidental, even if disproportionate, civilian casualties. Consequently, an investigation by the self-interested military organisation that ultimately exonerates the commander concerned cannot be disbelieved out of hand. At the same time, the organisation's failure to seriously investigate credible allegations of disproportionate attack, or consistent exonerations following credible reports of disproportionality, speaks forcefully about the regard in which the organisation holds the *jus in bello*.

The Proportionality Study has already begun to uncover empirical evidence of how states react to allegedly disproportionate attacks. Although we consider the Study to be an important advance over currently available information on international custom, our methodology does not touch the ideal. Because we perceive no readily available remedy for the deficiencies of

[60] The Study has already begun to uncover evidence that at least some military organisations rely on informal sanctions in preference to criminal investigations in cases of disproportionate attack. This is also sometimes true, although to a lesser extent, in response to allegations of the intentional murder of civilians.

this methodology at the present time, empirical researchers face the alternatives of a flawed study or none at all. To prevent the best from becoming the enemy of the better, we prefer the former to the extent that it produces at least some useful and reliable data, if regarded with sufficient caution.

3. THE NEED FOR PROCEDURAL REFORM: TOWARDS GREATER PROTECTION OF CIVILIANS IN PRACTICE

3.1 THE BENEFITS OF A BASIC TRANSPARENCY OBLIGATION

The obstacles to a more reliable and complete picture of international custom draw attention to a critical gap in the *jus in bello* that, if filled, could increase our understanding of how the proportionality principle operates and, if the principle offers insufficient protection to civilians in practice, to improve compliance or develop alternatives. Given our findings in the five conflicts we have studied to date, it seems very unlikely that the Proportionality Study will be able to conclude that the principle is consistently implemented with great deference to the protection of civilians in most international armed conflicts. It clearly receives still less deference in non-international conflicts. It would be surprising indeed if the sanguinary civilian casualty statistics in modern wars could support a sanguine conclusion.

Without prejudging the effectiveness of the proportionality principle, one might hypothesise that the perceived failure of a generally phrased legal principle to achieve its policy objective should prompt proposals for the adoption of treaties, regulations, or other guidance with clearer or stricter obligations. The intuitive cure for vague law is more precise or detailed law. There are, no doubt, improvements to the phrasing of the proportionality principle that could render it more effective in protecting civilians, or at least make it easier to judge compliance with the principle.[61] In general, however, stricter rules are a double-edged sword. If not sufficiently restrained, they could upset the balance between military flexibility and humanitarian concerns struck in the framing of Additional Protocol I. The proportionality principle was intended specifically to provide a certain degree of flexibility to military commanders. An interpretation of the principle that hamstrings a state's ability to achieve its critical military objectives would not attract a general consensus or serve the international community's interests. The reforms that I propose here – not exclusive of other proposals for the improved protection of civilians – do not involve upsetting that balance.

Additional Protocol I mandates that the proportionality principle should be implemented through an *ex ante* assessment of the consequences of an attack on civilians. Both the

[61] Two such reforms that, if properly implemented, could enhance the role of proportionality in protecting civilians are: (1) Hampson's suggestion of dynamically redefining proportionality to account for the relative military superiority of the state in specific conflict: Françoise J Hampson, 'Proportionality and Necessity in the Gulf Conflict' (1992) 86 Proceedings of the American Society of International Law 45, 45–50 and (2) Michael Reisman's proposal to require two-level compensation to civilians and their survivors harmed either by lawful or by disproportionate attacks: W Michael Reisman, 'The Lessons of Qana' (1997) 22 Yale Journal of International Law 381, 398.

Inter-American Court of Human Rights and European Court of Human Rights have also held that the human right against arbitrary deprivation of life requires an effective, public investigation of alleged killings of civilians during an armed conflict.[62] Amichai Cohen has argued that such *ex post* review by the military organisation or national government of commander decisions resulting in civilian deaths should also be implied as a requirement of the proportionality principle.[63] That a legal norm only becomes operative with institutional detection of violations and enforcement against violators is definitional, and Cohen's observation that investigations may yield useful information about the consequences of reckless or negligent targeting decisions is an insightful one.

Ex post investigation should be facilitated and supplemented, however, with other measures. As an enforcement technique, any investigation requires a standard of sufficient clarity and precision by which to appraise the commander's targeting decisions. It is impossible to evaluate a state's compliance with the proportionality principle, much less to understand how military commanders engage in the proportionality calculus in battlefield situations, without access to information about training in the law of war, tactical planning procedures, and enforcement practices. A few states have been forthcoming with some information about training, procedural safeguards, and enforcement of *jus in bello*. The US Army, for example, has publicly released summaries of its standing rules of engagement that address proportionality[64] and has even adopted a general methodology for estimating collateral damage prior to attack.[65] Excerpts or summaries of both have been declassified and can be accessed by the interested public. On the level of enforcement, the US Army conducts public criminal trials of officers and soldiers accused of violating the *jus in bello*. However, few military organisations have shown comparable candour.

What I propose is that the first step toward the greater protection of civilians should be the adoption of regulations for the gathering and dissemination of information about the military organisation's compliance procedures and the consequences of its operations on civilians. This could be accomplished through the adoption of a new information-sharing treaty for the protection of civilians in armed conflicts or by the creation of an intergovernmental agency charged with monitoring compliance with existing laws of war, or both.

Although the words 'transparency' and 'military' are rarely found as neighbours, a greater if limited degree of transparency promises a significant increase in civilian protection. As noted,

[62] *Isayeva v Russia* (2005) 41 EHRR 39, [208]–[213]; *Moiwana Village v Suriname* (2005) Inter-Am Ct HR, Judgment, 15 June 2005 (Ser C) No 124, 2, 10; *Las Palmeras v Colombia* (2001) Inter-Am Ct HR, Judgment, 6 December 2001 (Merits), (Ser C) No 90, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_90_ing.pdf.

[63] Cohen (n 18) 35–36.

[64] US Chairman of the Joint Chiefs of Staff, Instruction 3121.01B, Standing Rules of Engagement (13 June 2005), unclassified portions reprinted in US Dept of the Army, Judge Advocate Generals Legal Center & School, *Operational Law Handbook* (International & Operational Law Dept 2009) 82–96.

[65] US Dept of Defense, Joint Publication 3–60, Joint Targeting, ann E, app G. The classified version is US Chairman of the Joint Chiefs of Staff, Manual 3160.01A, *Joint Methodology for Estimating Collateral Damage for Conventional Weapons, Precision, Unguided, and Cluster*.

most military organisations do not keep track of civilian deaths or property damage.[66] Some do not even keep an accurate account of enemy combatants killed. National legislation and most military manuals are a matter of public record, but many states have extremely secretive and closed military cultures that inhibit the gathering of information about their methods for ensuring compliance with the laws of war. This is especially so if, when the proportionality rule has been violated, the practical consequences take the form of informal or *sub rosa* sanctions or corrective measures, such as demotion, unpaid leave, reforms to classified procedures, or simply a private reprimand.

My proposed approach – which would apply in the case of any significant use of force whether international or non-international – would not impose any new limitations on the ability of states to use military force. Its sole purpose would be the promotion of a limited kind of transparency. Specifically, what I propose are commitments by states, either directly or through a neutral clearinghouse:

(1) to track all direct and indirect civilian and combatant casualties on all sides of the conflict to the extent possible without endangering combatant lives or important military objectives, and to make this information publicly available;[67]
(2) to make publicly available the military organisation's training methods for compliance with the laws of war;
(3) to make publicly available the methods adopted for ensuring compliance with the laws of war by units in the field (for example, through the appointment of legal advisers, detailed rules of engagement, no-strike lists, limitations on the use of relatively indiscriminate weapons, a collateral damage estimate methodology, or clearance by commanders of targeting decisions that potentially endanger civilians);
(4) as suggested by Cohen and in the decisions of the regional human rights courts,[68] to require investigation of all credible allegations of disproportionate attacks and to publish the findings, with redactions if necessary for national security purposes; and
(5) to make publicly available the results of any formal charges brought against a military commander for indiscriminate or disproportionate attacks resulting in civilian casualties or extensive property damage.

[66] Even the unusually transparent US government does not track civilian casualties: see, for example, Hannah Fischer, 'Iraqi Civilian Deaths Estimates,' CRS Report for Congress, 27 August 2008, 1, available at http://www.fas.org/sgp/crs/mideast/RS22537.pdf.

[67] For this purpose, a methodology for judging indirect casualties would need to be established by agreement. To avoid underestimating casualty statistics, for example, increased civilian mortality caused by blockades or attacks on power plants or water purification facilities should be included, as Roscini suggests: Marco Roscini, 'Targeting and Contemporary Aerial Bombardment' (2005) 54 International and Comparative Law Quarterly 411, 441. The standard for excluding more remote causes of casualties could reference the International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts ('ILC Draft Articles'), Supp No 10, UN Doc A/56/10, November 2001.

[68] See nn 62–63 and accompanying text.

3.2 Limitations and Objections to a Transparency Obligation: Beyond Criminalisation of Disproportionate Attacks

The reason for the inclusion of combatant casualties in the first obligation may not be obvious, considering the emphasis of humanitarian law – and the proportionality principle especially – on civilian protection. Aside from honouring the intrinsic value of combatant lives, tracking combatant as well as civilian casualties serves a dual function that would indirectly support the goal of protecting civilians. With regard to a state's own combatant casualties, the proposal would encourage states to exercise greater candour about the human consequences of their military operations. The international community and NGOs show special solicitude for civilian lives (and especially the lives of women and children[69]), implicitly if unintentionally minimising the fact that combatant lives have moral weight as well. More to the present point, knowledge of the number of combatant casualties may facilitate an assessment of compliance with and interpretation of the proportionality principle by emphasising the importance of post-engagement information gathering.[70]

With regard to enemy combatant casualties, in the era of classical warfare such a reporting obligation would usually have been superfluous because the enemy belligerent could be expected to assess its own military casualties. Today, when asymmetric and non-international armed conflicts predominate, enemy belligerents are often either failed states or are not states at all but rather insurgent groups. The organisation and the information gathering and disseminating capabilities of such groups are typically greatly inferior to those of opposing state military organisations. Unless the latter attempts to track enemy combatant casualties, the consequences of armed conflicts for enemy combatants may remain unknown in asymmetrical engagements. Enemy combatant casualties are not decisive in proportionality analysis because prior expectations matter, not *post hoc* consequences, and enemy casualties cannot be equated with military advantage by any means. Nonetheless, such statistics may partially inform the military advantage expected from the attack during the planning stage.

The first obligation listed above also raises the inevitable question of which deaths and injuries should be included in the calculus. Military organisations reporting on civilian deaths will naturally tend to count civilian deaths resulting from direct attack only. Marco Roscini has proposed to include indirect casualties in any assessment of proportionality.[71] Depending on how 'indirect' casualties are defined,[72] this practice could greatly increase the number of civilian

[69] See generally R Charli Carpenter, *Innocent Women and Children: Gender, Norms and the Protection of Civilians* (Ashgate 2006).

[70] That said, knowing the number of enemy combatant casualties can assist only indirectly for two reasons. First, the relevant consideration is military advantage rather than enemy combatants killed or wounded. These two variables are far from coextensive. Second, the principle obligates commanders to weigh the military advantage *anticipated* against the risk of collateral damage. In any given attack, the advantage anticipated may have little relationship with the advantage acquired.

[71] Roscini (n 67).

[72] The Articles on Responsibility of States for Internationally Wrongful Acts are curiously agnostic on the question of how to determine causation: see ILC, Draft Articles (n 67) art 2(a). However, the standard of proximate cause, which is based on the reasonable foreseeability of the casualties to the attacker, is well established in customary international law and would seem to offer the best candidate: see, for example, *Trail Smelter (US v Canada)* (1938,

casualties reported in protracted – where the diversion of resources from civilian to military uses on a significant scale tends over time to reduce civilian essential services and ultimately their life expectancy – or intense armed conflicts near urban areas, where damage to civilian infrastructure may endanger resources necessary for the survival of concentrated populations. The necessity for including such indirect but foreseeable civilian casualties in a reporting obligation may deter unnecessary attacks on important civilian or dual-use infrastructure.

The first and last listed obligations could be objectionable if construed to require military organisations to disclose sensitive national security information. No state would consent to be bound by a transparency obligation that compromised national security. The transparency commitments would necessarily stop short of obligating states to reveal sensitive military information, such as specific procedures for selecting targets for attack. As noted, the United States has revealed declassified versions of its training, collateral damage estimates, and targeting rules of engagement without suffering any noticeable military disadvantage.

Of course, allowing secrecy creates the potential moral hazard of exempting states from the consequences of disproportionate attack by overclassifying conflict information as being necessary for national security. However, there are some kinds of relevant and important data that can be uniformly qualified as non-sensitive. This includes the number of enemy combatant deaths, the number of civilian casualties, and the civilian property damage following an armed attack. Such information cannot reasonably be categorised as militarily sensitive. In addition, the identity and general nature of the military target being attacked, and the general method of attack and weapons used, will generally not be militarily sensitive information after the attack is completed. In those presumably rare cases in which such information can be used to predict future methods of attack, the disclosure obligation can wait until the engagement has terminated. While an immediate disclosure obligation might be ideal, even a more realistic duty of delayed disclosure would improve accountability. Moreover, outside sources of information such as NGOs and opposing parties will help to correct or at least moderate distortions, as currently occurs for human rights obligations through the UN Human Rights Council's Universal Periodic Review.[73] Furthermore, states that repeatedly fail to comply with their reporting obligations by claiming security privilege with respect to violations of the *jus in bello* or distorting information will be subjected to reputational pressures to reform, including possible sanctions or expulsion from the transparency regime.

Given the widespread acknowledgement of the subjectivity and indeed potential arbitrariness of proportionality judgments, a criminal conviction in the case of a borderline disproportionate attack may be viewed as inequitable. Articles 51 and 57 of Additional Protocol I are designed to restrain violations of the law of war prospectively rather than to create a framework for criminal punishment. Neither the Fourth Geneva Convention nor Additional Protocol I defines a

1941) 3 RIAA 1905, 1931; *Portuguese Colonies* (*Naulilaa Incident*) (1928) 2 RIAA 1011, 1031; US-German Mixed Claims Commission, Administrative Decision No II (1923) 7 RIAA 23, 30.

[73] See UN Office of the High Commissioner for Human Rights, 'Non-governmental Organisations and National Human Rights Institutions', available at http://www.ohchr.org/EN/HRBodies/UPR/Pages/NgosNhris.aspx.

disproportionate attack as a grave breach. The principle as stated in Additional Protocol I includes no detailed enumeration of elements of the crime, it does not clearly specify a *mens rea* requirement, and it proposes no specific punishment for individual violators. Nor does it specify whether individual combatants can be found liable for violating the principle, or whether the principle applies only to commanders who plan attacks.

The language of the principle is, in short, more characteristic of a general legal obligation incumbent upon the state than a specific criminal prohibition applicable to individuals. Perhaps some attacks, falling short of indiscriminate, may be so evidently disproportionate that no reasonable person could disagree as to their character as prohibited, but many others will inevitably fall within the twilight zone between sufficiently restrained and wildly reckless. The ICC Statute is consistent with this reasoning in authorising international criminal prosecutions for 'clearly excessive' attacks only.[74] However, for attacks not so 'clearly' disproportionate, an ordinary military commander cannot be expected to understand what the principle prohibits with great confidence and precision. Such uncertainty opens the door to arbitrary or discriminatory enforcement. Overly vague criminal laws are inherently unfair, a point international law reflects through the principle *nullum crimen sine lege*. Wherever there is uncertainty as to whether a military commander's conduct falls within the scope of a criminal prohibition, all doubt should be resolved in favour of exoneration.[75] The inappropriateness of a criminal penalty for most violations of the proportionality principle does not, however, doom it to irrelevance. A more nuanced approach could preserve the principle while fostering transparency and observing the basic human rights of military commanders to due process of law.

Additional Protocol I directly binds state parties, not individuals. It does not specify that its provisions must be enforced by criminal prosecution; it simply prohibits specified acts and leaves the means of ensuring compliance to state parties. At least in its manifestation in Additional Protocol I, then, the proportionality principle imposes an obligation on states to deter and punish any kind of excessive attack, but not necessarily through criminal penalties. This approach is both appropriate and consistent with the policy goals of international humanitarian law. Criminal prosecution is a fortiori less appropriate for attacks other than those that threaten civilian lives or property in a manner clearly in excess of the direct and concrete military advantage anticipated. In such cases, the state satisfies its international legal obligation through measures sufficient to deter future disproportionate attacks accompanied by compensation to the civilian victims and their families.[76] With criminal penalties off the table for all but the most plainly disproportionate attacks, no serious obstacle to the adoption of a basic transparency obligation should remain.

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[74] ICC Statute (n 10) art 8(2)(b)(iv).

[75] In the US, the prohibition on overly vague criminal laws is a constitutional requirement: *Kolender v Lawson*, 461 US 352, 357 (1983). The rule of lenity further requires exoneration in case of doubt about whether a criminal statute covers the conduct in question: *McNally v US*, 483 US 350, 359–60 (1987).

[76] AP I (n 2) art 91; John F Murphy, 'Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution' (1999) 12 Harvard Human Rights Journal 1; Reisman (n 11) 398.

4. CONCLUSION

Widespread adoption of the proposed commitment to the collection and disclosure of information on compliance with the rules of discrimination and proportionality would have two salutary consequences for the protection of civilians. First, the publicising of casualties caused by the armed conflict would place reputational and other political pressures on states to minimise such casualties whenever possible and, by motivating domestic and international opposition to the irresponsible use of armed force, potentially increase the threshold of provocation before a state will resort to armed coercion. Opacity and secrecy promote irresponsibility and unaccountability.[77] As US Supreme Court Justice Louis Brandeis once wrote, 'sunlight is the best disinfectant'.[78] In the context of proportionality, where assessing compliance is complicated by the obstacles discussed earlier, transparency would promote the necessary accountability now lacking.

Transparency would also lead to a better understanding of how proportionality operates in practice. The proposal would make possible a more reliable evaluation of state compliance with the *jus in bello* most affecting civilians. At present, an accurate assessment of the operation of the proportionality principle is hobbled by an information vacuum that, when completed, the Proportionality Study will only partially fill. The systematic collection of more comprehensive information will require cooperation by states in sharing relevant compliance data. To the extent that the proportionality principle could be refined, supplemented, or replaced to achieve more effectively the objectives of civilian protection consistent with legitimate military operations, transparency would facilitate the analysis greatly.

Some states may prove reluctant to agree to these requirements. Publicity about civilian and combatant deaths is likely in many cases to stimulate public opposition to the armed conflict at issue. This is one reason why states often avoid gathering casualty statistics in the first place. Moreover, because it will not be possible to enforce comparable requirements in asymmetrical conflicts on terrorist organisations or irregular armed opposition groups, some states may object to reporting burdens that do not encumber their opponents (who may already disregard the most fundamental laws of war).

These are legitimate concerns, but they are also reasons for building into the transparency regime effective institutional deterrents to non-compliance with the transparency obligations, not for adhering to the status quo. The measures proposed here are far from drastic. It is possible to define them in such a way so as not to require an extensive allocation of resources by states, nor to put any state's critical defence needs at risk. Further development of a transparency regime would require more extensive discussion than is possible here. The point of raising it is to

[77] In his 2010 report on targeted killings, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions similarly observed that states failing to share information about individuals they have killed summarily on the basis of alleged terrorist identity are operating in an 'accountability vacuum' that can be remedied only with greater transparency: Human Rights Council, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, Study on Targeted Killings, UN Doc A/HRC/14/24/Add.6, 28 May 2010, para 92.

[78] Louis D Brandeis, *Other People's Money and How the Bankers Use it* (Frederick A Stokes Co 1914) 92.

emphasise the limitations of empirical research in state interpretation of, and compliance with, the proportionality principle, and to suggest the aptitude of transparency for improving our understanding of, and potentially the very operation of, this aspect of the law of armed conflict.

In the meantime, the Proportionality Study continues to plod along. Whatever the outcome of that research, the utility of our methodology is not limited to studying the proportionality principle itself or even *jus in bello* more generally. It is adapted to the exigencies of research on secretive military organisations, but it is easily customisable. The investment of resources required for thorough empirical research is substantial, and the payoff uncertain and glacially slow. But for those international lawyers not content to rely for their understanding of customary international law on the *ex cathedra* pronouncements of international tribunals or each other's *ipse dixit*, there are few good substitutes.

APPENDIX

INTERVIEW PROTOCOL FOR FOREIGN MILITARY REPRESENTATIVES

If we send our questions in writing, or pre-send them in preparation for an oral interview, we begin with the following introductory comments:

> Dear Sir/Madam:
>
> I am writing to request your advice and assistance with a long-term, multinational study on the international law of war, specifically on the concept of 'proportionality' as defined in Protocol I Additional to the 1949 Geneva Conventions, Article 51. I am a graduate law student working with the authors of the study, Professors Aaron Fellmeth and Douglas Sylvester of the Arizona State University College of Law.
>
> The purpose of the study is to document state practice in interpreting and enforcing the proportionality principle in battlefield practice, in both international and non-international armed conflicts. To that end, the study will describe in detail some twenty armed conflicts in which allegations of disproportionate attack were made. The purpose of the study is not to accuse any state, military organisation, or person of violating international law, but instead to deepen our understanding of how the proportionality principle works. This includes information about how military organisations such as your own generally train commanders and combatants to respect the proportionality principle; the role of military lawyers in battlefield practice; any interpretive guidance given to commanders and combatants; and monitoring and enforcement mechanisms and practices. We are also studying specific military engagements involving civilian casualties in which disproportionate attack was alleged, and how any investigation and enforcement was handled.
>
> To be clear, we guarantee that we will not use any person's name without explicit permission. We will not purport to arrive at any conclusions about the criminality of any action or omission by any state or person. The purpose of our project is solely educational.
>
> Thank you in advance for your kind assistance.

GENERAL QUESTIONS

1. Do military units in the field always or generally include a legal adviser trained in the laws of armed conflict?

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(a) If so, is the legal adviser a military officer? Of what rank?
(b) What is the minimum size of the military unit for which a legal adviser is required or responsible?
(c) Is the adviser automatically involved in targeting decisions, or only when requested by a military commander? If the latter, are there published guidelines on when military commanders should consult legal counsel during active military operations?
(d) Does the legal adviser have power to block targeting decisions, or is his advice optional?

2. How are military commanders, soldiers, and pilots trained in the laws of war?
(a) Does initial training involve instruction in the laws of war?
(b) Are soldiers or commanders issued a military manual describing their rights and obligations under the Hague and Geneva Conventions and Additional Protocols?
(c) If commanders have questions about their obligations under international law, are there clear channels through which they can question legal advisers?

3. What is the protocol for commanders to assess the probability and number of civilian casualties involved in an attack?
(a) Before commencing military operations, does the organisation always or usually create a no-strike list?
(b) Must targeting decisions and attack methods be approved by a high-level officer? If so, what level?
(c) Does the military organisation have standing rules of engagement in addition to general rules on laws of war and proportionality in particular?
(i) If so, are they classified or public?
(ii) If so and they are public, where can we find them?
(d) Does the organisation have an established methodology for estimating collateral damage?
(i) If so, is it classified or public?
(ii) If so and it is public, where can we find it?
(iii) If so and it is classified, is there a summary available? Where can we find it?

4. Does your military organisation keep track of civilian deaths and property damage caused by its operations? If so, how?
(a) What are the usual consequences of a military commander making a tactical decision that results in excessive civilian deaths?
(b) Does your military organisation include an ombudsman, military lawyer, or other independent person to evaluate the legality of battlefield behaviour?

5. Does your military organisation have its own system of courts and judge advocates general?
(a) If so, are its proceedings open to the public in criminal cases?
(i) Are its judgments published and publicly available?
(ii) If not, are summaries or outcomes of the judgments made public?
(b) If not, how does the organisation handle violations of the laws of war? By civilian criminal courts or through some other means?

6. To whom do you recommend we talk to get more information about your training, monitoring, and enforcement practices? How can we get in touch with that person?

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QUESTIONS SPECIFIC TO THE INCIDENT UNDER STUDY

1. How did the military organisation respond to allegations of disproportionate attack in the incident under study?
   (a) If there was an investigation, who conducted it?
      (i) What was the procedure followed?
      (ii) Were the results of the investigation made public? If so, how?
   (b) Was the commander found to have followed the protocol for assessing danger to civilians?
   (c) What was the judgment of liability?
      (i) If someone was found liable, at what rank?
      (ii) What were the consequences for that individual?
2. Were there some other, non-criminal consequences? For example:
   (a) Was anyone demoted as a result of the investigation?
   (b) Was anyone dishonorably discharged or fired?
   (c) Was anyone put on mandatory leave? If so, for how long? Paid or unpaid?
   (d) Was the unit responsible reorganised? If so, when and how?
   (e) Was any military commander transferred to another unit? For what official reason? What are the consequences of the transfer for that commander?
   (f) Was anyone given a letter of reprimand or otherwise informally cautioned or sanctioned?
   (g) Were any of the above consequences made public? If so, how?
3. Regardless of the outcome, did the incident prompt any change to your methods of training or supervising commanders or soldiers for compliance with the principle of proportionality? Any change to your target selection, weapon selection, precautionary measures, or collateral damage estimation methods?
4. To whom do you recommend that we talk for more information or other perspectives on this incident? How can we get in touch with that person?

Follow up on all answers as appropriate, with special attention to vague or ambiguous responses.

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