

LEGAL ISSUES JOURNAL

Volume 6, Issue 2

July 2018

EXECUTIVE PUBLISHER

Fatos Selita

EDITOR-IN-CHIEF

Markus McDowell

REVIEWERS AND EDITORS

David Felipe Alvarez, Marco Bocchi, Matthew Channon, Janet Furness, Richard Glover, M. Sanjeeb Hossain, Riyao Liu, Alex Matheson, Tony Meacham, Darell Pang, Nataly Papadopoulou, Daniel Schoeni, Nazia Shaikh, Andre Sinanan, Meixian Song

COPY EDITORS

Konstantinos Georgiadis, Leanne Gray, Mohammed Subhan Hussain

Legal Issues is an interdisciplinary journal publishing original research on all legal issues affecting society, including: law and genetics/biosciences; law and justice; law and philosophy; law and medicine; law and business; and law and equality.

ISSN 2516-1210 (Print)

ISSN 2515-9887 (Online)

© 2018 United Kingdom Law & Society Association. All rights reserved.

The Jurisdiction of the International Criminal Court in War Crime Trials and the Use of Force

Paul Dale¹

In December 2017, it was decided that the International Criminal Court is to activate its jurisdiction over the crime of aggression on the 17th July 2018, which is directed towards the leadership of a state who plan an aggressive war. Lower level military commanders on the ground, will not be able to be tried for the crime. Further, the 'equality of belligerents' principle protects soldiers on the battleground from decisions of their leaders. Meaning that lower-level military commanders cannot be held accountable for taking part in an illegal war.

This preserves the distinction between *jus ad bellum* (justifications for going to war) to the *jus in bello* (law regulating conduct in war). However, preserving this distinction and bringing the crime of aggression under its jurisdiction, means that the ICC can now rule the same civilian deaths as being lawful and unlawful, in the same time and place.

This article addresses this concern, arguing that by means of proportionality rules contained within Article 8(2)(b)(iv) of the Rome Statute, that the ICC has the ability to prosecute military commanders who participate in an aggressive war. It will show that the rules of proportionality has developed to a point where there exists an overlap in *jus ad bellum* and the *jus in bello*; the former now defines the perimeter of the latter. When examined in this new light, the ICC can prosecute a lower level military commander who takes part in an aggressive war.

¹ PhD Candidate in the Jurisprudence of International Law at the University of Birmingham; Associate Lecturer in Law at Aston University and The Open University.

Introduction

This article evaluates the relationship of differing rules governing proportionality in the use of force, in *jus ad bellum* (law regulating justifications for resort to war) and the *jus in bello* (law regulating conduct in war). It contends that there is an overlap in the substance of the factual elements, as such the International Criminal Court (ICC) has jurisdiction to consider the prohibition on the use of force when considering the guilt of a military commander for a disproportionate attack under Article 8(2)(b)(iv) of the Rome Statute.

At its conception, the ICC did not have jurisdiction over the crime of aggression, because states have had difficulty in providing a workable definition. The matter (as settled by the Kampala agreement in 2010), had been placed on hold until January 2017. It is aimed at high level officials, in particular heads of state, or those closely associated with them, who implemented the decision for an aggressive use of force.² In December 2017, at the sixteenth session of The Assembly of States Parties, it was decided that the International Criminal Court is to activate its jurisdiction over the crime of aggression on the 17th July 2018.³ However, in line with the ‘equality of belligerents’ principle of just war theory, lower level commanders taking part in an aggressive war cannot be prosecuted. The ethos being that lower level soldiers are not accountable for the illegal decisions of their leaders.

The ICC can now rule a civilian’s death, or a group of civilian deaths, as both lawful and unlawful at the same time. When trying a high level leader under the crime of aggression a death maybe ruled unlawful, but when trying a lower level military commander under a war crime that same death maybe ruled lawful. This situation defies logic; it undermines foundational principles, which could delegitimise its work. The preamble to the Rome Statute states that the most serious of crimes must not go unpunished and there must be an end of impunity for perpetrators.⁴

Proportionality is considered in recent literature, asking whether the crime of aggression can be brought under the jurisdiction of the ICC via the ‘back door’ approach, making use of alternative war crimes, such as

² Lorraine Smith, ‘What did the ICC Review Conference achieve?’, Equality Arms Review, Vol 2, Issue 2, Nov2010

³ ICC Press Release: 15th December 2017, ‘Assembly activates Court’s jurisdiction over crime of aggression’ at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1350> [accessed 23rd February 2018]

⁴ *Rome Statute of the International Criminal Court*, 17/07/1998

crimes against humanity, which are already under its jurisdiction.⁵ Inevitably, this confronts the debate surrounding the conflation of the rules of *jus ad bellum* to *jus in bello*, which traditionally operates as separate conceptual regimes. This article builds upon this debate by focusing on the concept of proportionality and asking whether due to its overlapping factual features across the conceptual regimes, the ICC can exercise jurisdiction over the prohibition on the use of force, as contained in Article 2(4) of the UN Charter. The point of focus is Article 8(2)(b)(iv), of the Rome Statute, which obliges military commanders not to take action that is 'clearly excessive' to the 'overall military advantage' of an attack. The standard of proportionality used is troublesome to apply, as the variables used are incommensurable. In addition, as there are only rare instances of military commanders or soldiers being sanctioned, so the characteristics of the proportionality in *jus in bello* lacks clarity.⁶

In the absence of determinative sources to measure *jus in bello* proportionality, this article contends that the *jus ad bellum* concept of proportionality can be used as a guide for interpretative purposes. Though traditionally *jus ad bellum* and *jus in bello* have been kept separate, there is nothing unusual in factual overlaps across two areas of law that deal with the same subject matter. Though arguing that the distinction between the two regimes must be distinct in their application, the practical reality of their overlapping factual features in war, means that the use of one area of law to assist in the interpretative process of another, provides certainty to the judicial process. This is not to bring the crime of aggression, *per se*, in through the 'back door', as some would like to see, but rather to use the *jus ad bellum* for the interpretation process of the laws of armed conflict already under ICC jurisdiction.

This article consists of three sections and a conclusion. The first section demonstrates the development of *jus ad bellum* proportionality and defines its characteristics. It shows that a legitimate calculation can only be assessed on the basis of a legal war, after either of the two exceptions under the UN Charter regime are engaged and qualified with necessity. This ensures that all use of force in *jus ad bellum* must be aimed at legitimate military targets, demonstrated through a focus upon International Court of Justice (ICJ) jurisprudence. The second section considers *jus in bello* proportionality, contending that the scale of a response must be assessed by the cumulative impact of the military advantage. This is determined by the opinions of states and the jurisprudence of international

⁵ See for example the Benjamin B Frenz essay competition, Washington University of Law <https://law.wustl.edu/harris/pages.aspx?id=9126> [accessed 05/12/15]

⁶ see Aaron Fellmeth, 'The Proportionality Principle in Operation: Methodological Limitations of Empirical Research and the Need for Transparency', *Israel Law Rev*, 45:125-50

criminal law tribunals. The third section considers an overlap between the doctrines and argues that there is an inter-relation that cannot be ignored. This is not to conflate the two doctrines, but rather to argue that the ICC cannot ignore the context of the *jus ad bellum* when assessing *jus in bello* proportionality. This takes into account other areas of international law as provided for by VCLT Article 31(3)(c). This means that a lower-level military commander must determine the legality of the war as being an important distinguishing feature when assessing the proportionality or disproportionality of an attack. The conclusion is that a disproportionate use of force in *jus ad bellum* is the outer limit of its counterpart in *jus in bello*. Therefore, contrary to traditional judicial interpretation of the Court, it has the capability to consider the prohibition on the use of force in war crimes trials.

Section One - Sources of Proportionality in Jus Ad Bellum

The starting point for any assessment of proportionality under *jus ad bellum* rules is the prohibition on the use of force contained in Article 2(4) of the UN Charter. Two exceptions to the prohibition exist. Firstly, a collective decision of the UN Security Council by means of Chapter VII powers and secondly, the inherent right to self-defence under Article 51. However, when a state engages in one of the exceptions, as Bonafede states, an authorisation of the use of force does not become a 'blank cheque' to defeat the enemy.⁷ Action must be qualified with necessity, whereby a state must enquire whether there are alternative options available. Only then is a proportionality equation used to limit the excessive use of force, if considered disproportionate, the response as a whole becomes illegal. As Greenwood states, this means that a continual assessment is occurring once one of the exceptions is triggered.⁸

The UN Charter does not define proportionality; it is necessary to examine its development from just war theory rules to the status of customary international law to evaluate its meaning.

⁷Michael Bonafede, 'Here, There and Everywhere: Assessing the Proportionality Doctrine and US Uses of Force in Response to Terrorism After the September 11 Attacks', 88 Cornell L Rev, 185

⁸Christopher Greenwood, 'The relationship between *jus ad bellum* and *jus in bello*', Review of International. Studies, Vol.9 (1983), 221-34

JUST WAR THEORY

Proportionality, in *jus ad bellum*, as a limit to war originated from the traditional just war theory. Writers such as Augustine, Cicero, Vitoria and Suarez developed its concept. At its heart were rules to limit civilian casualties. According to St Thomas of Aquinas, ‘an act (*of war*) may be rendered unlawful, if it be out of proportion to the end ... if he repel force with moderation his defence will be lawful’.⁹ Hugo Grotius, arguing from concepts of a universal law inherent in human nature stated, ‘it is not for a man to put his fellow man to a wasteful use’.¹⁰ Highlighting *the Constitutions of Clemens Romanus*, he quotes ‘it is not all killing which is considered unlawful, but only that of the innocent.’¹¹ It is only when the aim of the war outweighs all of the expected killing that proportionality is legitimate. As Newton and May state, ‘the underlying premise was that force ought to be focused on the achievement of specific goals.’¹²

The *Caroline Incident* is cited for advancing the proportionality concept to its customary legal status. US Secretary Daniel Webster in his letter to his British counterpart Lord Ashburton stated, that it must be shown that the militia, acting out of necessity ‘did nothing unreasonable or excessive, since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.’¹³ The role of the principle was therefore to limit excessiveness and, restrain force within the necessity of the situation.

It should be noted that this development of proportionality occurred at a time where no prohibition on the use of force existed in international law. Prior to the drafting of the UN Charter in 1945, though viewed as a last resort in international relations, an ability to go to war was nonetheless a tool that could be utilised in the interests of state. Though limits were placed on how a state was to engage in military action, self-preservation and maintenance of international relations underpinned the relevant rules of the just war theory. Therefore, proportionality became an important caveat to limit excessive destruction of the opposing state’s civilian infrastructure and loss of innocent lives.

With no other limitations on war, proportionality, along with necessity, became the defining feature on the war’s legality or illegality. The doc-

⁹ Thomas Aquinas, *Summa Theologica*, Pt11-11, Qu.49, Art. 1

¹⁰ Hugo Grotius, *On the Law of War and Peace*, Walter Black, New York, 2, 577

¹¹ *ibid*, 38

¹² Michael Newton and Larry May, *Proportionality in International Law*, Oxford University Press, 2014, 62

¹³ Letter of 27/071842, in Green, *The International Court of Justice and self-defence in international law*, OHP, 2009, 88

trine of proportionality became intrinsic to the stated aim of the war, (whatever the aim may be) and confined by the necessity to achieve that aim. However, in the post UN Charter environment, when the Security Council is tasked with maintaining international peace and security, proportionality adopted a different meaning in international law. As will be demonstrated, it is only to be assessed after the legality to go war is triggered by UN Charter mechanisms and necessity considered. The political deadlock that exists within the Security Council means that it does not perform this task effectively. This means that states increasingly obviate the UN Charter mechanisms, and adopt an approach, which reverts to this archaic concept of proportionality found in just war theory to legitimise unilateral action.

PROHIBITION ON THE USE OF FORCE UNDER THE UN CHARTER

In the aftermath of World War II, the United Nations formed, ensuring legal responsibility for international peace and security. States did not want to repeat the atrocities of the War, so there was felt a need to place legal restrictions on its use. The use of force became prohibited under international law, save two exceptions in Article 2(4) of the UN Charter; collective decision of the UN Security Council using Chapter VII powers and the inherent right of self-defence contained in Article 51.

After an exception is triggered, the doctrine of necessity is used to ask whether there were any alternatives to the use of force. Rather than war being the last resort as a tool of international relations, any use of force is now the last resort after an exception is triggered. If force is deemed as necessary via one of the exceptions, then an assessment of proportionality is used to limit any excessiveness through constraining action by that initial necessity. Whilst an excessive use of force can still deem any action illegal, despite passing the stages of one of the exceptions, necessity and proportionality are no longer the only caveats on war as was their early counterparts in just war theory.

Under Chapter VII powers the doctrine of proportionality appears straightforward, as it pertains to the aim of the specific goal set by the Security Council. Once achieved, proportionality dictates that action must cease. As Okimoto states, Chapter VII authorises the use of force for a variety of purposes, all of which is to maintain international peace and security.¹⁴ So, by way of example, UN Security Council Resolution 678 in 1990 famously provided legal authorisation for the first Gulf War using Chapter VII powers. Once the aim of expelling Saddam Hussein

¹⁴ Keiichiro Okimoto, *Distinction and Relationship Between Jus Ad Bellum and Jus in Bello* (Studies in International Law), Bloomsbury Publishing, 2011, 1211

forces from Kuwait was achieved, express orders were made by General Schwarzkopf not to pursue Iraqi forces retreating to Baghdad. This satisfied the proportionality requirement.¹⁵

However, with the Security Council being an inherently political body, containing powerful veto holding nations of the United States, Russia, China, France and the United Kingdom, difficulties arise in securing Chapter VII consensus. This is exacerbated when one of those veto-holding nations is involved in the military campaign, leaving no collective political will to intervene. This is typified by the lack of any clear direction from the UN Security Council in the Syrian conflicts, despite being tasked by the international community in 1945 with ensuring peace and security. As Judge Jennings states, in *Nicaragua v USA*, ‘an essential element in the Charter design is missing’.¹⁶ The political deadlock that is evident on the Security Council has resulted in those powerful states who hold a veto, using force unilaterally outside of any authorisation. The list is long, but by way of example, the United States and France in Syria, Russia in Crimea, China in Taiwan and the United Kingdom in Iraq. Due to the Security Council’s inability to swiftly deal with matters that threaten international peace and security, these states attempt to push the boundaries of the legality of a war through the other exception available to them: namely, the Article 51 ‘inherent right’ of self-defence. If they do not legitimise their use of unilateral force they leave themselves open to the accusation of breaking international law. As these nations permanently belong on the Security Council, tasked with upholding the rule of international law, it seems ironic that they seek to expand UN mechanisms devices to legitimise action taken in their own interests.

‘INHERENT RIGHT’ OF SELF-DEFENCE IN ARTICLE 51

The result of powerful nations expanding the meaning of the second exception means that there now exists confusion as to what constitutes the inherent right of self-defence, between one view of an ever-expanding

¹⁵ See PBS interview with General Norman Schwarzkopf <http://www.pbs.org/wgbh/pages/frontline/gulf/oral/schwarzkopf/1.html> [accessed 06/04/2016]

¹⁶ *Military and Paramilitary Activities In and Against Nicaragua, Merits* (herein called the Nicaragua case), ICJ, 1986, Sep Op, Jennings, 534

development of customary international law to a narrow view confined by the UN Charter.¹⁷

Kretzmer prefers to term proportionality as a ‘means end’ concept, linked to the aim of an expansive view of self-defence. In his 2013 article, he devotes a section of this proposition to a discussion of what is considered legitimate under Article 51.¹⁸ Those who seek to expand the definition of the ‘inherent right’ argue that the UN Charter is not static, and that customary international law has evolved to keep up with aspects of modern warfare. They argue that the ‘inherent right’ now encompasses a pre-emptive right of attack, defence against non-state actors in the context of terrorism and a right to rescue nationals. Whereas, those who offer a more restrictive interpretation of Article 51 do so by arguing for a holistic approach to the Charter, that preserves the territorial integrity and sovereign equality of states, holding that the prohibition on the use force has the characteristic of *jus cogens*, from which customary international law cannot override. They argue that this is restrained to state on state action to repel a cross border attack that has already occurred or is imminently occurring.¹⁹ The contentious issues of the meaning of the ‘inherent right’ in the context of an ‘armed attack’ have been hotly debated and space does not allow for a detailed discussion here. Suffice it to say, that this author favours the restrictive interpretation of self-defence, not least due to all four seminal cases of the International Court of Justice (ICJ), *Nicaragua*, *Oil Platforms*, *Palestinian Wall* and *DRC v Uganda* affirming this view. Further, Article 51 places a temporal limit on self-defence action, before reporting the matter to the UN Security Council for their consideration. Interpreting Article 51 holistically to other principles of the UN Charter is preferred, namely the Preamble and Articles 2(1) and the latter half of 2(4) to respect the ‘sovereign equality’ and ‘territorial integrity’ of nations. When Article 51 is interpreted in light of the Vienna Convention on the Law of Treaties (VCLT) Article 31(1) principle of ‘good faith in accordance with the ordinary meaning’ requirement, the ‘inherent right’ must be construed strictly in accordance with the *jus cogens* status of the prohibition on the use of force.

¹⁷ See the Bowett/Brownlie debate in Christine Gray, *International Law and the Use of Force*, Third Edition, Oxford University Press, 2013, 117-119.

This author favours the Brownlie approach, for reasons that are outside the scope of this article. See Paul Dale, ‘Is the inherent right of States to self-defence susceptible to abuse?’ (unpublished) at http://www.academia.edu/29920130/Is_the_inherent_right_of_States_to_self-defence_susceptible_to_abuse_A_critique_of_the_Brownlie_-_Bowett_debate [accessed 24th February 2018]

¹⁸ David Kretzmer, ‘The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum’, *EJIL* (2013), Vol.24 No.1, 235–282

¹⁹ see Christine Grey (n16), 117-9

UNCERTAINTY OF PROPORTIONALITY

Much of the uncertainty in proportionality in the *jus ad bellum* context of self-defence stems from the differing points of view concerning the legitimacy of the unilateral force used.

Commentators, such as Kretzmer, argue that proportionality should be legitimately measured against the objective in these contentious areas.²⁰ For example, the Obama drone warfare program encompasses arguments of self-defence on two contentious issues, a pre-emptive response and as against non-state actors. In 2010, Harold Koh, Legal Advisor of the Department of State, delivered a speech in Washington DC, in which he justified the use of drones, under the Obama drone warfare program, as a legitimate self-defence response against Al-Qaeda terrorist networks.²¹ With the aim being the security of the United States from future terrorist attacks, Koh stated that the precision of the drone attack was justified as a proportionate response under *jus ad bellum* purposes, but from a *jus in bello* perspective of limiting casualties. Under this stance *jus ad bellum* proportionality not only becomes conflated with *jus in bello*, but is measured by the aim of the military action, irrespective of whether that military action be legitimate or illegitimate. This means that states begin to define what is considered a proportionate use of force for their own ends, rather than a definition constrained by UN mechanisms. The danger is that a working definition of proportionality becomes open-ended. Consequently, Dinstein suggests that once the legality of the war is legitimised that a total defeat of the enemy can ensue under the guise of proportionality. Under this approach, he argues that authorisation for the first Iraq War by means of Resolution 678 of 1990 could be legitimately used for the second Iraq War in 2003; it was proportionality rules that, according to him, provided the legitimacy of the later war.²² However, this view runs contrary to the consensus of states, along with affirmation in the Chilcott inquiry, that Resolution 678 placed a temporal limit on action, specific to the goal of expelling Iraq from Kuwait. As correctly observed when General Schwarzkopf did not chase Saddam Hussein and his forces to Beirut. Defining proportionality properly is an important caveat in drawing the line between a war's legal legitimacy and illegitimacy.

The confusion surrounding proportionality and its legitimacy in self-defence was evident when states submitted opinions to the *Nuclear Weapons Case* on the potential use of nuclear weapons, as many used

²⁰ Kretzmer (n17) 239

²¹ Speech available at <http://www.state.gov/s/l/releases/remarks/139119.htm> [accessed 07/07/2015]

²² Yoram Dinstein, *War, Aggression and Self-Defence*, 5th Edition, Cambridge University Press, 262-7

different standards of variables.²³ For example, the United Kingdom submitted that proportionality be measured, not by responding to an armed attack, but to the threat posed against the state. The Attorney General orally submitted, "[i]f one is to speak of 'disproportionality', the question arises: disproportionate to what? The answer must be 'to the threat posed to the victim State' ... [s]o one has to look at all the circumstances, in particular the scale, kind and location of the threat."²⁴

States have utilised the blurred definitions of the proportionality doctrine to legitimise their own military action. Proportionality has illegitimately become a conceptual tool to define the inherent right of self-defence. This stands in contrast to UN Charter rules defining self-defence, where necessity and proportionality calculations place extra limitations on its use. This latter view should rightly be observed in international law, as the rest of this section shall expand upon.

SOURCES OF LAW IN *JUS AD BELLUM* PROPORTIONALITY

The ICJ has discussed proportionality on a case-by-case basis. However, as Christodoulidou states, the Court has failed to provide a theoretical framework or a clear description of how it applies.²⁵ Though this author agrees that judicial opinions are mixed, there is still enough substance to provide some shape of customary international law on the doctrine. As the following sub-section shows, a working definition of proportionality in *jus ad bellum* can be extrapolated. A legitimate assessment of proportionality assessed by means of *scale, geography, timing of the response*, can only be made after 'armed attack' triggers the 'inherent right' of self-defence and a necessity of action decision by means of a last resort option taken.²⁶ Once, the inherent right to self-defence is triggered, and a necessity decision on the response as a last resort made, proportionality is then measured against the necessity of halting and repelling that attack.

²³ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J., 226,08/07/1996, (herein known as the Nuclear Weapons Case) - statements of Egypt, India, Iran, Malaysia, Netherlands, New Zealand, Solomon Islands, Sweden, United Kingdom, United States and Zimbabwe

²⁴ *ibid*, Dissenting Opinion of Schwebel, p 321

²⁵ Theodora Christodoulidou, 'The Principle of Proportionality from a *Jus Ad Bellum* Perspective', in *The Oxford Handbook of the Use of Force in International Law*, Marc Weller(eds), Jan 2015, 1189

²⁶ A reasoned explanation of these characteristics of proportionality is found in, Sina Etazazian, 'The nature of the self-defence proportionality requirement', *Journal on the Use of Force and International Law*, 25/07/2016

This ensures that self-defence action is concerned with *military targeting*, not civilian.²⁷

CHARACTERISTICS OF JUS AD BELLUM PROPORTIONALITY ACCORDING TO
THE ICJ

The judgment in *Nicaragua* states, “there is a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law”, without any real expansion of what the definition is.²⁸ As an armed attack was not established, the judgment stated that proportionality takes on a different significance. The court held that the USA acted disproportionately, in its *scale*, in the ‘mining of Nicaraguan ports, and the attacks on oil installations’ forming an ‘additional ground of wrongfulness’ as a reaffirmation that proportionality rules can define an aggressive war.²⁹ The court focused upon the delay between the alleged attack by Nicaragua and the US response, which was “long after the period in which any presumed attack by Nicaragua could reasonably be contemplated”, placing a *timing* limitation.³⁰ This timing of the response is linked to necessity, as Green states in his 2015 article, the defensive necessity had elapsed.³¹

The ICJ in *Oil Platforms*, held that the aims of proportionality are only assessed within the context of a self-defence response to a legitimate ‘armed attack’, which in this instance the Court held had not occurred (based on the inconclusiveness of evidence attributable to Iran).³² This high evidential burden demonstrates the importance of Article 2(4) and the *jus cogens* status of the prohibition on the use of force.³³ It is the armed attack, interpreted restrictively, that is the gateway for any necessary and proportionate response in *jus ad bellum*.

The submissions placed an emphasis upon military targeting, overlapping the rules of *jus in bello*. Iran used the example of attacking an ag-

²⁷ *ibid*

²⁸ *Nicaragua Case* (n15) 176

²⁹ *ibid* 122-3

³⁰ *ibid* 237

³¹ James Green, ‘Military Targeting in the Context of Self-Defence actions’, *Nordic Journal of International Law*, (2015) 84, 13

³² *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, International Court of Justice (ICJ), 6 November 2003, (herein known as the *Oil Platforms Case*) 72

³³ *Nicaragua Case*(n16)190, Kamrul Hossein, *The Concept of Jus Cogens and the Obligation Under the UN Charter*, *SCJIL*, Vol 3, Issue 1, 72-98 - for an alternate view, see James Green, ‘Questioning the Peremptory Status if the Prohibition of the Use of Force’, *MJIL*, 2011, Vol 32, Issue 2

gressor's military bases in a different part of the world as not proportionate from a *geographical* stance. They argued that self-defence must address the '*right target*', the source of threat. Iran relied upon *Nicaragua*, where the Court held that US attacks on Nicaraguan ports and installations did not meet the proportionality requirement, as they were not proportionate to any aid provided to the armed opposition in El Salvador.³⁴ Any measures taken need to be limited to the necessity of the case. The US put forward arguments that the level of casualties or damage to civilian property was the bearing of proportionality.³⁵ The targets chosen, they argued, were used for military purposes and limited by 'time, place and objective'. They further argued that they were not located in or near civilian areas.³⁶

Judge Koojimans pointed out that even if a wider view of self-defence be adopted and favour given to the United States contention that self-defence involves protecting security interests, that the US still acted disproportionately due to lack of *necessity*. He expressed that the destruction of the oil platforms was part of a larger more punitive action. The United States never contended that the oil platforms played a part in the laying of the mines. Therefore, for Koojimans the necessity and proportionate response goes beyond what was required. Judge Simma acknowledged that any use of the oil platforms for monitoring the United States may have been a nuisance to military decision-makers, however emphasising the principle of necessity, the decisions to destroy the platforms was not a necessary one and therefore disproportionate to requirements of self-defence due to its *lack of legitimacy in targeting*.³⁷

The judgment considered that for the action to be *jus ad bellum* proportionate, that the target must be a military one, overlapping the doctrine to the *jus in bello*, as will be demonstrated in Section Two. Emphasising the importance of a military target, it stated, '[t]he United States must also show that its actions were necessary and proportional to the armed attack made on it, and the platforms were a *legitimate military target* open to attack in the exercise of self-defence'.³⁸ Green argues that this demonstrates that *jus ad bellum* action taken in self-defence must be directed towards military targets only.³⁹ Legitimate military targeting was also at issue in the *Nuclear Weapons case*, in relation to the environment. The court held, '[s]tates must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit

³⁴ Oil Platforms (n31) 4.24, 4.25

³⁵ *ibid* 4.34

³⁶ *ibid* 4.35

³⁷ *ibid* 15

³⁸ *ibid* 51

³⁹ Green (n30) 2

of *legitimate military objectives*'.⁴⁰ Green concludes that unless a target is a military one, that by definition it is not the source of the armed attack, therefore it is unlikely that a civilian target will be proportional when balanced against the goal of stopping an attack.⁴¹

Further, in *Oil Platforms*, the Court assessed the *scale* of the response, when it stated that it cannot 'close its eyes to the *scale* of the whole operation', which involved the destruction of a number of other vessels and frigates. Acting in armed response to the unidentified mining of the US Navy missile frigate *USS Samuel B Roberts*, without loss of life or sinking, that 'Operation Praying Mantis as a whole, nor the part of it that destroyed the platforms, be considered proportionate.'⁴² The Court arguably created confusion on proportionality by previously stating in the same paragraph that had they found that the attack on the civilian oil tanker *MV Sea Isle City* qualified as an armed attack, that the response by the US three days later in destroying the two oil platforms may have been considered proportionate.⁴³ At issue is whether the initial mining of a merchant ship, as opposed to a US Navy ship, if hypothetically being considered an 'armed attack', would bear a difference upon the proportionality requirement in the context of the small-scale response of destroying the platforms. Green argues that it does. He deduces that one reading of this paragraph could be that the military to civil distinction of the target of the initial armed attack is of importance to the Court's findings. He states that, 'the nature of the target attacked (military or merchant) has a bearing on what constitutes a proportional response'.⁴⁴ The Court appears to offer a differing deontological weight on the initial armed attack.

In *DRC v Uganda*, the ICJ affirmed the requirement for an armed attack and necessity, adding a *geographical limitation* on the response. The Court held that in self-defence 'the taking of airports and towns many hundreds of kilometres from Uganda's border would not seem proportionate ... nor be necessary to that end'.⁴⁵ Christodoulidou notes that the implication is that *remoteness* of actions violates the principle of proportionality.⁴⁶ Uganda's counterclaim to the DRC, in justification of their troops being within the border was that it was acting in self-defence against rebel groups. As the acts of the groups were not attributable to the

⁴⁰ Oil Platforms Case (n31)

⁴¹ Green (n30) 13

⁴² Oil Platforms Case (n31) 77

⁴³ *ibid* 77

⁴⁴ Green (n12) 86-87

⁴⁵ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, (herein known as DRC v Uganda) ICJ,01/07/2000, 147

⁴⁶ Christodoulidou (n25) 1191

DRC, the court held that an ‘armed attack’ for the purposes of Article 51 of the UN Charter had not occurred.⁴⁷

IS JUS AD BELLUM PROPORTIONALITY ASYMMETRIC TO AGGRESSION OF THE ARMED ATTACK OR THE NECESSITY OF REPELLING THE ATTACK?

In order to halt and repel an ‘armed attack’ disproportionate dimensions may be required, as Robert Ago states, ‘[i]t would be mistaken...to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct.’⁴⁸ In *Oil Platforms*, Iran suggested an equation that any self-defence response should be proportionate to the ‘actual needs of self-defence’. They argued that proportionality was not measured against the aggression, but rather proportionate in the measures needed to repel the armed attack.⁴⁹ There are two elements, ‘the degree and form of force to be used’ and ‘the target chosen for measures in self defence’⁵⁰ In *Nuclear Weapons*, the Separate Opinion of Judge Fleischhauer stated that even recourse to a nuclear response may satisfy the requirement of proportionality.⁵¹ Judge Higgins in her dissent, cited Ago, asserting that the response need not be symmetric to the initial attack, but rather be proportionate to repelling that attack.⁵² Robert Ago explains that it is a mistake to think that proportionality is assessed between the conduct of the armed attack and that of the response. The opposing conduct may be greater than the initial armed attack and assume what appears to be a disproportionate dimension. The lawfulness he suggests should be measured by achieving the desired result.⁵³

Those who seek to expand on the definition of self-defence employ Higgins’ view to justify an expansive view of proportionality. For instance, Dinstein writes that ‘[o]nce a war is legitimately started ... it can be fought to the finish (despite any ultimate lack of proportionality).’⁵⁴ Kretzmer terms this approach a ‘just deserts’ proportionality, before then arguing that Ago, supported by Higgins, is suggesting a ‘means-end’ test.⁵⁵ On the contrary, Ago has re-iterated that a proportional use of

⁴⁷ (n44) 147

⁴⁸ Robert Ago, ‘Addendum to the Eighth Report on State Responsibility’, *Yearbook of International Law Commission*, 1980, Vol II(1), A/CN.4/318/ADD.5-7, 60, 121

⁴⁹ *Oil Platforms* (n31) para 4.21

⁵⁰ *ibid* 4.22

⁵¹ (n23) SepOp Fleischhauer

⁵² *ibid* diss op 5

⁵³ Ago (n47) 69

⁵⁴ Dinstein (n21)

⁵⁵ Kretzmer (n16), 238

force must be measured as the necessity of repelling a legitimate Article 51 'armed attack', whether the opposing conduct is greater or not. Judith Gardam has noted that 'it is the repulsion of the attack giving rise to the right that is the criterion against which the response is measured', and that the "restoration of the territorial *status quo ante bellum*" is the key to the measure.⁵⁶ She concludes, that the nature and magnitude of the anticipated or actual armed attack will dictate the characteristic of the response.⁵⁷

Greenwood argues that in modern warfare, proportionality rules construed in the manner of repelling of an armed attack has implications for subsequent hostilities.⁵⁸ When proportionality is triggered, it is assessed by the means and methods of warfare. Christoudouplas states that proportionality provides for extra limitations, such as the choice of weaponry, geographical limits, decisions on air strikes and how any action influences the aim of the campaign; namely, repelling an armed attack.⁵⁹

It is when *jus ad bellum* proportionality is assessed under this construction, along with the four characteristics, of the *scale of force* used, *geographical limitations*, *timing requirements* and *legitimate military targeting* that there is an inter-relation with the *jus in bello*, to which Section two shall now expound. Section three of this thesis contends that proportionality framed in this manner acts as a perimeter to its *jus in bello* counterpart. Thus, when a decision to attack a military target is taken by a military commander, it can only be considered as proportionate or disproportionate by taking in to account the overlapping features of *jus ad bellum* rules.

Section Two - Sources of Proportionality in Jus in Bello

Proportionality within *jus in bello* is concerned with the military action on the battlefield, it is assessed in detail on the micro-level, as opposed to the *jus ad bellum* reasoning for going to war on the macro-level. The doctrine is evaluated by measuring two variables: the anticipated military advantage of an attack against any incidental or excessive loss of civilian life. Like *jus ad bellum* proportionality, to assess the concept we turn to its historical development and formation in customary international law.

⁵⁶ Judith Gardam, *Necessity, Proportionality and the Use of Force by States*, CUP, 2004, 156

⁵⁷ *ibid* 179

⁵⁸ Greenwood (n6) 221-234

⁵⁹ Christidoupoulos (n24) 1193

JUST WAR THEORY

Hugo Grotius wrote that, '[n]o action shall be attempted whereby innocent persons may be threatened with destruction'.⁶⁰ The likely consequences of battlefield strategy were rooted in deontic considerations, special duties were owed to one class of persons over another, with an emphasis placed on restricting civilian deaths. Thomas Hobbes, in *De Cive*, called for a prohibition of cruelty in war, stating, 'to hurt a man without reason is contrary to the laws of nature ... the breach of this law is commonly called cruelty'.⁶¹

The American Civil War put legal analysis of the doctrine under the spotlight. The Lieber Code began as a request from General in Chief of the Union Armies over his confusion as to what constituted the defining features of lawful and unlawful combatants.⁶² Military targeting in the laws of warfare became concerned with military necessity, though there was an allowance any incidental or unavoidable loss of civilian casualties.⁶³

The concept further developed in the Preamble to the 1868 St Petersburg Declaration, which holds that the only legitimate object of war for States to achieve is to weaken the military forces of the enemy.⁶⁴ The laws of warfare developed, through the Hague Conventions of 1899 and 1907, resulting in the Geneva Conventions of 1949.⁶⁵ To confirm its customary status, a number of military manuals re-iterate the principle of proportionality within an attack and many states have enacted legislation to make the carrying out of an attack an offence if it violates proportionality.⁶⁶

The balancing of targeting military objectives with the loss of civilian life was paramount to the laws of warfare. Its justiciability under international law is now confirmed by international criminal law courts; for

⁶⁰ Grotius (n9) 734

⁶¹ Thomas Hobbes, *De Cive* EWII Ch3, 11

⁶² see Newton and May (n11) p106

⁶³ Article 14 defined military necessity, whilst Article 15 allowed for the incidental or 'unavoidable destruction persons other than 'armed' enemies. Article 19 instructs commanders to take into consideration non-combatants.

⁶⁴ Saint Petersburg Declaration of 1868, or in full *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*

⁶⁵ (n11), p 109

⁶⁶ Rule 14 ICRC Proportionality in Attack, fn, lists the military manuals of Australia, Belgium, Benin, Cameroon, Canada, Colombia, Croatia, Ecuador, France, Germany, Hungary, Indonesia, Israel, Kenya, Madagascar, Netherlands, New Zealand, Nigeria, Phillipines, South Africa, Spain, Sweden, Switzaerland, Togo, United Kingdom, United States

example, tribunals dealing with the former Yugoslavia (ICTY), Rwanda (ICTR), the Special Court for Sierra Leone (SCSL) and more recently, the permanent International Criminal Court that is the focus of this article.

UNCERTAINTY IN CUSTOMARY INTERNATIONAL LAW

In the Appeals Chamber, the ICTY in *Kupreskic*, asserted that proportionality is to be found within customary international law, as it has not been contested by states. Even those who have not ratified instruments are bound by its principle.⁶⁷ The problem in providing a working definition is that clear examples tend to be used in its assessment. The Chamber in *Galic*, stated that the principle of proportionality is ‘a largely subjective standard ... its application may involve the prohibition of at least the most glaringly disproportionate injuries to civilians’.⁶⁸ For example, it would be legitimate to bomb a railway bridge to prevent armaments from reaching the battlefield if a civilian was sitting by the riverbank, but illegitimate when a scheduled train filled with civilians is about to cross. The *Final Report to the Prosecutor by the Committee* established to review the NATO bombing campaign in the Former Yugoslavia, stated that, “[u]nfortunately, most applications of the principle of proportionality are not quite so clear cut. It is much easier to formulate the principle of proportionality in general terms”.⁶⁹

In the formulation of customary international law, Fellmeth states, state practice in warfare has shown a general disregard for civilian deaths.⁷⁰ Carpet bombing, the use of toxic gases, landmines, sea mines, unguided rockets and the use of the atomic bomb during World War II have all demonstrated that states do not live up to their rhetoric during times of war. Additionally, military practice is generally secret, with access to the battlefield constrained and decisions taken with great urgency.⁷¹ These realities make it difficult to assess the custom of proportionality through any sort of empirical observation. As the Appeals Chamber stated, in *Tadic*, ‘[w]hen 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

⁶⁷ *Kupreskic et al (Appeals Judgement)*, IT-95-16-A, ICTY, 23/10/2001; Trial judgment IT-95-16-T, 14/1/200, 524.; *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, June 2000, 39ILM1257, 48

⁶⁸ *Stanilav Galic*, IT-98-29-T, ICTY, 5/12/2003, 8

⁶⁹ (n66) 48

⁷⁰ Fellmeth (n5)

⁷¹ *ibid*

of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour'.⁷²

In the absence of observable state practice, lessons in the formation of custom can be taken from the US Court of Appeals, New York, in *Filar-tiga v Pena-Irala*, regarding the prohibition of torture found in international human rights law (IHRL). It held that declarations made by states could be a binding source of custom, as it creates an expectation of adherence. The UN Secretariat memorandum of the Office of Legal Affairs was relied upon, which says that, 'insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognised as laying down rules binding upon the States'.⁷³ In the absence of any empirical data, it is necessary to examine the *opinio juris* of states through treaties ratified and submissions to tribunals, so that a legitimate proportionality calculation can be assessed by a military commander.

SOURCES OF LAW IN JUS IN BELLO PROPORTIONALITY

As battlefield technology advanced, minimising cruelty in war began to take on legal character. Newton and May note that there is a direct line in the doctrine from the Lieber Code to the 1977 Additional Protocols of Geneva Conventions.⁷⁴ Like its *jus ad bellum* counterpart, proportional military targeting became constrained by necessity. In the same manner, it allowed for an incidental or unavoidable loss of civilian casualties, by placing limits on excessiveness.⁷⁵ Laws of warfare were developed through the Hague Conventions of 1899 and 1907, with Article 22 stating, that 'the right of belligerents to adopt means of injuring the enemy is not unlimited'. Then codified in the Geneva Conventions of 1949 and formulated in Article 35 of Additional Protocol I of the Geneva Convention. Though these treaties do not contain the word 'proportionality', a principle developed within a notion of restraint in hostilities.⁷⁶

Proportionality is legally codified in Article 85(3)(b) of Additional Protocol I to the Geneva Conventions. Article 57 and 58 expands upon precautions to be taken in an attack, with an emphasis upon the military objective expected to be gained, which have to an extent, elaborated upon precautions to be taken in attack. For instance, warnings should be

⁷² *Tadić*, ICTY, Appeal 02/10/1995, 99

⁷³ *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980); 34U.N.ESCOR, Supp. (No. 8)15, U.N.Doc. E/cn.4/1/610 (1962) (memorandum of Office of Legal Affairs, U.N. Secretariat).

⁷⁴ Newton (n11) 109

⁷⁵ *ibid*

⁷⁶ Newton (n11) 91

given if circumstances allow, or an attack cancelled if it becomes apparent that the objective is not a military one.⁷⁷ If a choice is available for the means to carry out a specific military objective, the one causing the least danger to civilians should be chosen.⁷⁸ The *Eritrea-Ethiopia Claims Commission* held in *Central Front- Ethiopia's Claim 2* that Article 57 proportionality reflects customary international law on proportionality as far as precautionary measures are concerned.⁷⁹

As observed at the ICTY in *Kupreskic*, the principle is applied in conjunction with discrimination rules of Article 51(4) and (5)(b).⁸⁰ In *Gotovina*, the Trial Chamber used 'discrimination' and 'proportionality' interchangeably. The case concerned the firing of shells on an apartment housing Milan Martić, a senior Serbian commander. The shelling commenced between 7.30-8.00am, as well as in the evening, from a distance of 25 kilometres away. There was only a slight chance of hitting the building creating significant risk for a high number of casualties. A disproportionality finding, was held from evidence of the indiscriminate attacks. The Trial Chamber held that the risk was excessive in light of the military advantage, though the Chamber did not elaborate about how to assess that advantage.⁸¹ The decision was overturned by three votes to two, at the Appeals Chamber, which held that the Trial Chamber had not made a comparative analysis of the military advantage. The majority disagreed over the disproportionate calculation of shells falling 200 metres and stated that disproportionate attacks were only of limited value to the doctrine of discrimination.⁸² Gardam states though related to discrimination, the rules are conceptually different. Discrimination specifies situations in which the level of civilian casualties is deemed unacceptable; proportionality allows for an assessment to be made, while taking into account the factor of the military advantage. As some civilian deaths and damage to civilian infrastructure are inevitable and acceptable in war, the proportionality doctrine is designed as a restraint on the level deemed acceptable, through choice of targets being militarily advantageous.⁸³

ROME STATUTE OF THE ICC

Article 8(2)(b)(iv) of Rome Statute codifies the principle of proportionality, which reads,

⁷⁷ Article 57 (2) Additional Protocol I, 1977; Newton (n12)

⁷⁸ *ibid*, Article 57(3); Newton (n12)

⁷⁹ *Eritrea-Ethiopia Claims Commission, Central Front- Ethiopia's Claim 2*

⁸⁰ *Kupreskic* (n66), Gardam (n56) 94-5

⁸¹ *Gotovina et al. Vol 2*, IT-06-90-T, (ICTY), 15/04/2011, 1910-11

⁸² *Gotovina and Markac*, IT-06-90-A, ICTY, 16/11/2012, 82

⁸³ Gardam (n55) 94-5

‘Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated’

To assess the Article within the context of customary international law, it is necessary to discuss the customary meaning of ‘armed conflict’, as the trigger mechanism for the Rome Statute. A discussion of the definition of ‘intentionally launching an attack’, followed by the principles of distinction and military necessity is required. Afterwards, proportionality can be assessed.

TRIGGERING NEXUS OF PROPORTIONALITY

In *jus ad bellum* self-defence, an ‘armed attack’ is the nexus for use-of-force proportionality. Similarly, before any proportionality assessment of *jus in bello*, an ‘armed conflict’ nexus must be triggered. The two types of nexus contain overlapping factors, yet have variants in their characteristics.

The first is that an ‘armed conflict’ can refer to either international and internal armed conflicts within a state (e.g., wars of national liberation). As Common Article 3 states, ‘armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties’ can suffice for an ‘armed conflict’ nexus. The Appeals Chamber of the ICTY in *Tadic* stated that in addition to an ‘armed conflict’ existing in the use of force between States, that it also exists in, ‘protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.’⁸⁴ An ‘armed conflict’ having the added characteristic of applying to internal situations means that IHL, as a body of law, can offer a higher protection due to its broader application.

However, Article 8(2)(b) states that war crimes, including 8(2)(b)(iv), are applicable to international armed conflicts, excluding an internal conflict application. This means that the nexus as far as proportionality is applied, share characteristics, as only an international armed conflict

⁸⁴ *Tadic* Prosecutor v. Dusko Tadic (Appeal Judgement), IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999, p70

overlaps with the *jus ad bellum* context due to the international character of an ‘armed attack’ requiring state action.⁸⁵

There is a further, though recognised as debateable differential in the size of the triggering incident. An ‘armed attack’, according to *Nicaragua*, must be the most grave of incidents and mere frontier incidents are not sufficient.⁸⁶ Whereas some argue, that an ‘armed conflict’ may cover a solitary incident.⁸⁷ For example, in March 2007, fifteen UK marines were captured in Iranian waters and taken into custody for thirteen days. The United Kingdom argued that the laws of armed conflict continued to apply, this despite Article 2(4) not being engaged. Gasser states, ‘any use of armed force by one State against the territory of another, triggers the applicability of the Geneva Conventions between the two States’, which may include the detaining of prisoners or controlling a part of its territory.⁸⁸

MEANING OF “INTENTIONALLY LAUNCHING AN ATTACK”

As far as a proportionality assessment under the Rome Statute goes, after jumping the hurdle of an international armed conflict nexus, ‘intentionally launching an attack’ is to be considered as central to an analysis of proportionality. This is to be viewed as something more than an isolated incident. When interpreted holistically, even more so, in the context of Article 51(b) and 57(2), the customary international law definition would suggest a military operation. In practice, modern warfare dictates that singular attacks are usually part of a more complex military operation, with a particular objective.⁸⁹ Gardam argues that any proportionality equation must take into account the broader picture, because an operation in isolation may appear disproportionate.⁹⁰

⁸⁵ As held in *Nicaragua* (n16) ‘effective control test’. For a view that a differential exists with regards to an ‘armed attack’ being committed by only one state, whereas an ‘armed conflict’ requires a response see Alexander Orakhelashvili, ‘Undesired, Yet Omnipresent: Jus ad Bellum in Relation to Other Areas of International Law’, *Journal on the Use of Force and International Law*, 09/10/2015

⁸⁶ *Nicaragua* (n15) 191

⁸⁷ see Hans-Peter Gasser, *International Humanitarian Law: an Introduction*, in: *Humanity for All: the International, Red Cross and Red Crescent Movement*, Haug (ed.), Paul Haupt Publishers, Berne, 1993, 510-511 in fn 7 ICRC Opinion Paper, March 2008

⁸⁸ *ibid*

⁸⁹ Gardam (n55) 99

⁹⁰ *ibid*

ASSESSMENT OF PROPORTIONALITY ONLY AFTER DISTINCTION AND
MILITARY NECESSITY

Proportionality is interpreted along with other aspects of IHL; before a military commander is able to make a legitimate proportionality equation, he must consider the principles of distinction and military necessity in targeting.⁹¹ Like *jus ad bellum* proportionality, the doctrine co-exists with areas of laws dealing with warfare.

The Appeals Chamber of the ICTY in *Galic*, stated that, the practical application of the principle of distinction means that all feasible precautions are taken in limiting civilian damage. Like its *jus ad bellum* counterpart where a leadership decision is made, once the military character of an attack is determined, only then does the military commander consider proportionality, from a reasonable well-informed person stance.⁹² This is evident from Article 48 of Additional Protocol I of the Geneva Conventions, ensuring that he is targeting a ‘military objective’. It is from this objective which a proportionality equation can be made. As Cannizaro states, this does not require the commander to be prudent or charitable, but rather his actions to be based upon a careful analysis of the facts available and an objective balancing of the advantage.⁹³

IHL provides guidelines on the distinction between civilian and military objects. The principle differs with discrimination, which concerns general targeting, such as indiscriminate rockets fired from the Gaza Strip by Hamas towards Israel without specific knowledge as to where they land, in the hope of (rather than directed) striking of the civilian population. Though the resulting civilian damage is the same, the mental requirement is different. Controversially in *Galic*, *Blaskic*, *Kordic* and *Strugar*, the ICTY allowed for the civil law notion of *dolus eventualis*, akin to common law recklessness, to satisfy the *mens rea* element.⁹⁴ This has led some commentators to suggest that ‘distinction’ has been confused with ‘proportionality’, because it allows for criminal liability under targeting with a high risk of civilian casualties.⁹⁵ Prohibited targets, in ‘distinction’ include undefended towns, villages, dwellings or buildings not used for military purposes, hospitals, historic monuments and reli-

⁹¹ Newton (n11) 102

⁹² *Galic* (n63) 57-8

⁹³ Enzo Cannizaro, ‘Proportionality in the Law of Armed Conflict’, in Clapham (eds), *The Oxford Handbook of International Armed Conflict*, OUP, 2014, 340

⁹⁴ *Galic* (n63), *Blaskic*IT-95-14-A, *Kordic*IT-95-14/2-A, *Strugar*IT-01-42-A

⁹⁵ See Jens Ohlin, ‘Targeting and the Concept of Intent’ (2013) 34 *MJIL*, 92-8, *ibid*; Robert Cryer et al, *An Introduction to International Criminal Law and Procedure*, Third Edition, Cambridge University Press, June 2014, 292

gious buildings.⁹⁶ By way of example, it was reported by Human Rights Watch, in March 2016, that Saudi Arabia had deliberately conducted air strikes against civilians in Yemen, by targeting food factories, warehouses, farms and power stations, resulting in more than 3,200 civilian deaths and causing long term damage to infrastructure.⁹⁷ ‘Distinction’ is concerned with all that is deliberate.

Military necessity, in *jus in bello*, is a general principle of IHL and sometimes portrayed as the source of a proportionality requirement.⁹⁸ The doctrine dictates that an attack, as part of the military objective, must make an effective contribution on the military advantage.⁹⁹ Its characteristics are generalised, not readily quantifiable through legal sources and lacks substantive content.¹⁰⁰ An early mention of the doctrine is found in Article 13 of the Lieber Code, “Military necessity ... consists of the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war”.¹⁰¹ The *Hostages Case* held that the doctrine is not a defence to war crimes. It does not ‘justify a violation of positive rules ... [which are] superior to military necessities of the most urgent nature except where regulations themselves specifically provide to the contrary.’ Instead ‘[m]ilitary necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money’.¹⁰² The ICRC supports this view by stating that the doctrine permits measures which weaken the enemy, which are necessary to achieve a military objective, as long as it is not forbidden in IHL.¹⁰³

Schmitt writes, that the principle reinforces and sustains the individual rules of IHL and exists in equilibrium to humanitarian needs. It is a sym-

⁹⁶ Cryer et al (ibid) 290-2

⁹⁷ Bombing Businesses, Saudi Coalition Airstrikes on Yemen’s Civilian Economic Structures, July 10, 2016 <https://www.hrw.org/report/2016/07/10/bombing-businesses/saudi-coalition-airstrikes-yemens-civilian-economic-structures> [accessed 23/08/16]

⁹⁸ Gardam (55) 7

⁹⁹ Article 52, Additional Protocol I

¹⁰⁰ Marco Sassoli et al, *How Does Law Protect in War*, ICRC, available at <https://casebook.icrc.org/casebook/doc/glossary/military-necessity-glossary.htm> [accessed 23 Aug 2016]

¹⁰¹ Gardam (n56) 8, see also Nobuo Hayashi, Contextualizing Military Necessity, EILR, International Law and Policy Institute, Vol27,30/07/2013

¹⁰² *Hostages Case, List & others*, VIIIILRTWC66-9

¹⁰³ ICRC, “Practice Relating to Rule 14. Proportionality in Attack Section B. Determination of the anticipated military advantage”, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14_sectionb [accessed 12th Aug, 2016]

biotic relationship, which determines how rules of IHL are applied on the battlefield, and, as with the development of treaty law, states must consider both military and humanitarian interests.¹⁰⁴ This was reiterated at the Israeli Supreme Court, in *Beit Sourik Village Council v Israel*, which describes IHL and military necessity as two poles, delicately balanced ‘against the rights, needs, and interests of the local population’.¹⁰⁵ Hayashi says that the principle in its normative interaction with the law of armed conflict asks, ‘whether a certain kind of conduct tends to constitute or is deemed capable of constituting a material military necessity or non-necessity’. Before asserting that ‘international humanitarian law should obligate, authorise, restrict, or prohibit this kind of conduct.’¹⁰⁶ As such, once military necessity is assessed as legitimate, it operates in relation to other rules of IHL, which for the purpose of this thesis, are the rules that protect civilians from disproportionate attacks.

MEANING OF A ‘CONCRETE AND DIRECT OVERALL MILITARY ADVANTAGE ANTICIPATED’

This leads on to what is meant by the term ‘concrete and direct overall military advantage’ and begs the questions as to whether military action taken in an illegal war can delegitimise the ‘military advantage’.

Footnote 36 of the Elements of Crimes incorporates an interpretive assistance to Article 8(2)(b)(iv). It states that, ‘[t]he expression ‘concrete and direct overall military advantage’ refers to a military advantage that is foreseeable by the perpetrator at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack”. The provision of the advantage not being linked to a geographical or temporal requirement is at a variance with limitations set out in *DRC v Uganda* in *jus ad bellum*. However, this variant reinforces the inter-relationship between the two regimes, as expanded upon in the following section. The differences in geographical and temporal requirements reflects a cumulative impact of the military advantage in *jus in bello*.

Though the selection of the target would have already been made under military necessity, distinction and discrimination rules, the advantageous aspect of the target is a proportionality question that is inevitably

¹⁰⁴ Michael N. Scmitt, ‘Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance’, 01/05/2010, VJIL, Vol50, Issue4, 796

¹⁰⁵ *Beit Sourik Village Council v. The Government of Israel*, HJC 2056/04, Israel: Supreme Court, 30 May 2004, 34

¹⁰⁶ Hayashi (n96)

inextricably linked to the military objective of the war, traditionally a *ius ad bellum* question.¹⁰⁷

According to ICRC commentary, the ‘military advantage’ should be ‘substantial and relatively close’, with ‘concrete and direct’, meaning ‘specific’.¹⁰⁸ A cumulative impact of a military advantage is arguably reflected in Article 8(2)(b)(iv) by adding the word ‘overall’. A number of states upon ratifying Additional Protocol I of the Geneva Convention made declarations as their understanding of the term to mean a cumulative military advantage, rather than an advantage from an isolated attack. Australia, Belgium, Canada, France, Germany, Italy, Netherlands, New Zealand, Spain and the UK, in the drafting procedures of the Statute, all stated that ‘military advantage’ used in Article 51 and 57 of the Geneva Conventions refer to the cumulative impact.¹⁰⁹ To confirm its customary status, a number of states offer the cumulative impact as their interpretation of its meaning in their military manuals. For instance, Australia, Belgium, Canada, Ivory Coast, Netherlands, Nigeria, Spain, USA and UK military manuals, all state that the attack must make a relevant contribution the operation as a whole, rather than the isolated incident.¹¹⁰ Gardam has reservations that the military advantage should not to be linked to the long term cumulative impact on the war, despite conceding that a significant number of state parties have determined that proportionality measured as part of the whole operation is a more workable definition.¹¹¹ The cumulative view is more sound. The ICRC Representative, at the Rome Conference stated that ‘the word ‘overall’ could give the impression that an added unspecified element has been added to the Additional Protocol I’. The intention, he explains, was that the phrase reflected the consensus that a military advantage must be understood to mean that a particular target can have a military advantage over a lengthy period of time and affect areas outside of its immediate vicinity. This meaning already exists in Additional Protocol I and, as such, should not be interpreted to mean there is a variant between the Protocol and the Rome Statute.¹¹² Cassesse notes that when one is evaluating proportionality, it is not the isolated attack that is to be assessed, but rather the gains

¹⁰⁷ see Gardam (n55) 100

¹⁰⁸ *ibid* 101

¹⁰⁹ ICRC, “Practice Relating to Rule 14. Proportionality in Attack Section B. Determination of the anticipated military advantage”, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14_sectionb [accessed 12th Aug, 2016]

¹¹⁰ *ibid*

¹¹¹ Gardam (n55) 102

¹¹² UNDoc. A/CONF183/INF/10, 13/07/1998, 1-2

deriving from the attack and all its possible implications to the weakening of the enemy.¹¹³

The Appeals Chamber at the ICTY in *Kupreskic*, stated that proportionality can be measured in the cumulative, but the principle must be enacted within the Martens Clause, which concerns ‘the laws of humanity, and the requirements of public conscience’, to be construed narrowly, offering higher protection to civilians. The danger of assessing the cumulative effect of the military advantage in this manner, says the Appeals Chamber, is that while the excessive loss of civilian life may not appear excessive to an isolated incident, when the impact of the advantage is assessed in the cumulative it means that those same civilian deaths could be deemed acceptable. This is a grey area which has the possibility of running contrary to the demands of humanity.¹¹⁴ *The Final Report to the Committee on the NATO bombing campaign in the Former Yugoslavia* offers some guidance, first of all noting that this was a progressive statement, but asserting that the principle remains ambiguous and unclear. The cumulative impact it stated, can be lawful, and therefore must refer to an ‘overall assessment of the totality of civilian victims as against the goals of the *military campaign*.’¹¹⁵ It is the effect on the military campaign therefore, that can be assessed as the military advantage, rather the impact from any isolated incidents. There must be an expectation in the eyes of the ‘reasonable commander’ that the advantage adds substance to the campaign of the war.

Yet, what is a military campaign, if it is not to add substance to the repelling and halting of an armed attack in *jus ad bellum*, or to necessitate a Chapter VII Resolution? This leaves open the question of whether those gains derived from an attack is the aim of the war in *jus ad bellum*, or merely a contribution to that aim. Under either view, the *jus in bello* proportionality becomes inextricably linked to its *jus ad bellum* counterpart. It would be a mistake to interpret the word in a vacuum, as it follows that the military advantage calculated in a proportionality assessment does not contribute to the war effort itself; the military objective becomes futile and arguments of military necessity become meaningless.

¹¹³ Antonio Cassese, *International Law*, 2nd edition, OUP, 2005, 418

¹¹⁴ Prosecutor v. Kupreskic et al. (Appeal Judgement), IT-95-16-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 23 October 2001, pp524-6

¹¹⁵ (n62) 52

MEANING OF 'CLEARLY EXCESSIVE' AND ITS LINKS TO NECESSITY

List and Others held that judges should not consider with hindsight knowledge of the damage caused to civilians.¹¹⁶ In a Memorial *Amicus Curiae*, *Rights International in Galic* states that the problem in defining what is 'excessive' is that any calculi used in gauging civilian deaths is always measured from a position of hindsight.¹¹⁷ Further, in *Kordic*, the Appeals Chamber at the ICTY stated that an attack would have been 'excessive' based on the information available at the time, which ultimately caused no harm.¹¹⁸ Therefore, actual damage to civilian life and infrastructure cannot be taken into account. Instead, what matters is the knowledge of the commander immediately before an attack, as assessed from the 'reasonable commander' stance. Adding the word 'clearly', the Rome Statute has arguably added confusion to the concept of proportionality. However, Cryer et al writes that a number of states in the drafting process were concerned that judges are not military commanders and may make judgments without taking into account the urgency of decision-making on the battlefield within the 'fog of war'. He states that the word 'clearly' became a compromise, ensuring that proportionality would not be measured with hindsight to satisfy the *mens rea* element.¹¹⁹

An alternative approach to assessing actual damage is required. In *Galic*, the *amicus curiae*, employed human rights law to assist in the meaning of 'excessive' by linking the foreseeable consequences of proportionality to *necessity*. Using human rights law to assess elements of necessity and proportionality is supported at the ICJ, when Judge Shahabuddeen in his Dissenting Opinion in *Nuclear Weapons*, states, *inter alia*, that proportionality is a basic principle of human rights law.¹²⁰ In *Alejandro et al v Cuba*, the Inter-American Commission, considering the right to life, noted that the Cuban agents made no effort to guide the aircraft out of a restricted area, making a link to *necessity*, by examining alternative means available.¹²¹ The European Court of Human Rights (ECtHR) held, in *Satik and Others v Turkey*, that recourse to physical force be made only if strictly *necessary*. If the objective is lawful then the Court would not find a violation.¹²² Further, in *McCann v UK*, the Court's decision was based upon an assessment of alternatives available. Linking proportionality to necessity, the Court concluded that the operation, which resulted in the shooting of IRA suspects by British security forces,

¹¹⁶ (n97)

¹¹⁷ *Galic* (n63), submission by 'Rights International'

¹¹⁸ *Kordic* (n89) 55-68

¹¹⁹ Cryer et al (n91) 295-297

¹²⁰ *Nuclear Case* (n23) 103

¹²¹ *Alejandro et al v. Cuba*, Case11.589, 86/99, 29/09/99, Inter-Am. CHR

¹²² *Satik and Others v. Turkey*, Application No. 31866/96, 27, ECtHR

breached their right to life.¹²³ The substantive provisions within IHRL measure the variable against a *lawful* objective. This strict test in restricting foreseeable consequences has similarities to the concept of military necessity (as borne out in section 2.4.3). A military commander must weigh alternative options for the military advantage anticipated.¹²⁴ Additional Protocol I, Article 57 (2)(a)(ii) states that combatants ‘take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event minimising, incidental loss of civilian life, and injury to civilians’. In cases where the use of force is necessary, a range of military options, in the means and methods of warfare, are available to limit the loss of civilian life.¹²⁵

Making use of human rights law to assess foreseeable consequences in proportionality, as linked to necessity, begs the question as to how the *jus in bello* concept can operate within what is otherwise an illegal war in *jus ad bellum*? The definition of ‘excessive’ does not exist in isolation. Problems occur when if it is to be interpreted as a legitimate legal consequence within a war that itself is considered illegal. Though the effects of the *application* of proportionality differ under the respective regimes, there exists enough overlapping factors to extract shared substantive principles; resulting in *jus ad bellum* proportionality constraining its *jus in bello* counterpart, with the knock effect being that the ICC has jurisdiction to consider the legality of a war when interpreting Article 8(2)(b) (iv).

Section Three - the Relationship Between the Two Proportionality Regimes

Dinstein states, ‘any attempt to transplant rules or caveats from one domain to the other is likely to cause confusion’.¹²⁶ However, whilst it maybe desirable for some to keep the rules separate for reasons of clarity, this runs counter to the actual development of the two doctrines that deal with the same subject matter. Arguments to keep the regimes separate in order to avoid confusion is merely concerned with consequential reasoning, which does not address the two overlapping conceptual frameworks. Both regimes of proportionality have been demonstrated to be inextricably linked to each other. Treating *jus ad bellum* and *jus in bello* proportionality in isolation, as being divorced from its counterpart, runs coun-

¹²³ *McCann and Others v United Kingdom* (21 ECHR97GC)

¹²⁴ *Galic* (n63) 541

¹²⁵ *ibid* 542

¹²⁶ *Dinstein* (n22) 233

terintuitive to the fact both can often address the same incidents in modern warfare. As from a conceptual stance the two regimes share substantial defining features and they address the same incidents on the ground, arguing that they having shared rules may cause confusion is not a sufficient justification to maintain their separation. It is not that rules have been transplanted from one regime to another, as Dinstein suggests, but that in modern warfare those rules cannot be assessed without referring to its counterpart, as it defies battleground practice and the judgments of international tribunals.

Firstly, both regimes are dictated and compartmentalised by necessity, being the aims of the war in *jus ad bellum*, and the military objective as assessed within the aims of war in *jus in bello*. Secondly, in *jus ad bellum*, proportionality is measured against the necessity of repelling an armed attack. In *jus in bello* proportionality is measured against the military necessity of the advantage anticipated. Thirdly, in *jus ad bellum*, assessment is continual after the use of force nexus has been triggered, through the means and methods of warfare. In *jus in bello*, those means and methods of warfare are measured against the overall cumulative impact of the overall military advantage. Finally, the military advantage of a campaign itself stems from the *jus ad bellum* justifications of the exception to the prohibition on the use of force.

When assessing the same conduct and actions, it would be a mistake to think that a *jus ad bellum* violation could be nullified by claiming those same acts are legal in *jus in bello*. As such, the *jus ad bellum* concept of proportionality, dictates how and when the *jus in bello* concept is to be measured. The four characteristics of *jus ad bellum* proportionality, discussed above, are the *scale*, *geographical limitations*, *time-frame* of the response and *military targeting*, which are linked to the necessity of the aim of either of the two exception on the use of force contained in Article 2(4) of the UN Charter. The necessity of the war in *jus ad bellum* constrains the military advantage to be gained in the *jus in bello*. Hence, any assessment of a breach of Article 8(2)(b)(iv) of the Rome Statute must take into account the legality of the war.

Before expanding upon this issue, it is necessary to discuss the perceived dangers that flow from such a stance. Whilst it is acknowledged that any dangers from the Court adopted this approach are based upon a consequential reasoning, rather than conceptual reasoning, it is nonetheless important to consider some serious concerns that support their separation.

ADDRESSING PERCEIVED DANGERS OF CONFLATING THE
PROPORTIONALITY RULES

If *jus in bello* proportionality in either regime is to be measured within the context of a war, it can be argued that any action on the battlefield is proportionate to achieve those ends, even the deliberate targeting of civilians. For example, General Sherman's 'March to the Sea' from Atlanta to Savannah during the American Civil War in 1864, resulted in widespread death of civilians and destruction of infrastructure across the southern State of Georgia. For Sherman, this was a form of psychological pressure on the civilian population to 'feel the hard hand of war'. Civilians were not off limits, he believed the effect would be to end the war quickly, resulting in less future civilian deaths in a lengthier war.¹²⁷ Similarly, the dropping of the atom bomb in Hiroshima and Nagasaki, by the United States, contributed to the surrender of Japan in World War II. Likewise, the destruction of Dresden by the United Kingdom contributed to the defeat of Germany.

Using this reasoning, Judge Higgins, dissenting in *Nuclear Weapons*, stated that a nuclear attack could meet the test of proportionality when assessed 'against untold suffering or the obliteration of a State or peoples' and 'related to the very survival of a State or the avoidance of infliction ...of vast and severe suffering on its own population'.¹²⁸ This means that a military commander could argue that any scale of attack is proportionate when assessed with the context of the war effort. However, section two demonstrated that the cumulative approach taken in assessing the military advantage is not the aim of the war, but a *contribution* towards that aim. It is therefore possible to consider a disproportionate *jus in bello* act within the *jus ad bellum* parameters by other means. To address this concern, it is *disproportionality* rather than *proportionality* that can be defined by *jus ad bellum*.

Okimoto argues that the combining force should strengthen the regulation of excessive use of force in *jus ad bellum*.¹²⁹ *Jus in bello* regulates more detailed aspects as to what and who can be attacked, the weapons used and how force is engaged in detailed situations, which is contended by this article, as taking the aim of the war as its frame of reference.¹³⁰

There is an added danger that a military commander could argue a normally disproportionate response is proportional through a *jus ad bellum* argument for a fair and just war. Koutrolis states this is conflation,

¹²⁷ Sherman letter to Henry W. Halleck, 24/12/1864, <http://www.civilwar.org/education/history/primarysources/william-t-sherman-to-henry.html> [accessed 06/08/16]

¹²⁸ *Nuclear Weapons* (n23) DissOp, Higgins, 18,21

¹²⁹ Okimoto (n14) 298

¹³⁰ *ibid*

whereby any attempt to justify a potential *jus in bello* violation is made merely by arguing that the war is legal by *jus ad bellum* principles.¹³¹ The Trial Chamber of the ICTY addressed this point specifically in *Kordic*, stating that ‘military defensive operations in self-defence do not provide a justification for serious violations of international humanitarian law’.¹³² Harris notes, though this was with application to excluding criminal liability, it also applies to proportionality.¹³³ Moreover, the Appeals Chamber stated that those people who believe they are fighting a just cause and can therefore violate international norms, ‘have to understand that international law is applicable to everybody, in particular during times of war’.¹³⁴ The same Chamber in *Boskoki* stated, ‘[t]he fact that a state is acting in lawful self-defence (*jus ad bellum*) is irrelevant for a determination ... [of] ... a serious violation of international humanitarian law’.¹³⁵ Green writes that if it is assumed that the regimes offer the same requirements then all a state need to do is show that it is compliance with one branch and it can rest its case.¹³⁶ Footnote 36 of the Elements of Crime, addresses this danger on the issue of proportionality when it states, *inter alia*, that “the concrete and direct overall military advantage ... does not address justifications for war or other rules related to *jus ad bellum*”. Therefore, a military commander being charged under Article 8(2)(b)(iv) cannot invoke *jus ad bellum* legal justifications for the war to address a finding that his disproportionate targeting was legal. Further, in *Taylor*, the *Special Court for Sierra Leone* had an opportunity to rule on the conflation of the doctrines when the defence made a submission that his crimes were ‘neutral in its nature’ from a factual basis. The prosecution responded by first addressing the specifics of the factual argument, and secondly by submitting that the neutrality argument of the war conflates the *jus ad bellum* and *jus in bello*. Whilst preferring the prosecution’s argument on the former factual points, the Tribunal disappointingly ignored this latter submission.¹³⁷ However, this point was specifically addressed in relation to mitigation in sentencing in both the ICTY in *Kordic* and the Special Court for Sierra Leone in *Fofana*. Both tribunals rejected the view that a lower sentence would be appropriate for those

¹³¹ Vaous Koutrolis, *The Relationship Between Jus ad Bellum and Jus in Bello, Independence versus Conflation*, 04/12/12, podcast available at <https://podcasts.ox.ac.uk/relations-between-jus-ad-bellum-and-jus-bello-independence-versus-conflation>

¹³² *Kordic*, IT-95-14/2-T,(ICTY), 26/02/2001, 452

¹³³ Thomas Harris, ‘Can the ICC Consider Quesztions on Jus Ad Bellum in a War Crimes Trial?’, 48 Case W.R es J. Int’l L. 273(2016),2 99-230

¹³⁴ *Kordic* (n89) 1082

¹³⁵ *Boskoski and Tarculovski*, IT-04-82-A,29/05/2010, 31

¹³⁶ Green (n30) p26

¹³⁷ *Taylor*, SCSL-03-1-T, 18/05/ 2012, 393-395

fighting a ‘just cause’.¹³⁸ Harris argues that this means the ICC are not able to consider the *jus ad bellum*. However, the Court here is expressing the dangers that flow from conflation, holding that a separation of the two doctrines serve differing purposes. This reinforces the argument that has been made, that distinction between the two regimes only concerns the effects of its *application*.¹³⁹ Though alleviating the danger posed through conflation, this reasoning is a separate argument to the proposal that a military commander is liable under IHL, if the military advantage anticipated is one gained through an aggressive war.

It is clear from the case law that the dangers highlighted by those who seek to preserve a *jus ad bellum* and *jus in bello* distinction are alleviated, when viewed that it is the *effect* of application of the separate regimes that differs. It does not follow that the two regimes lack influence over each other, when it comes to concurrent issues over the same act. Dangers of conflation must be addressed, in order for successful prosecution of international crimes.

CHALLENGING THE ‘EQUALITY OF BELLIGERENTS’ PRINCIPLE

Traditionally, in keeping with the *jus in bello* and *jus ad bellum* distinction, an equal application of the law of armed conflict applies to every soldier, irrespective of whether he or she is fighting a lawful or unlawful cause. This means that soldiers who fight an aggressive war, are also restricted in the way they fight on the battlefield, despite the fact that the war itself is illegal. Further, those soldiers engaging in an illegal war, who are captured as prisoners of war, are accorded protections through the Geneva Conventions.¹⁴⁰ This aspect of granting soldiers who are fighting an illegal war IHL protections has been controversially challenged in modern warfare strategy, in regards to terrorism. For example, prisoners held by the US in Guantanamo Bay have been stripped of the protections granted to ‘prisoner of war’ status, argued, in part, by the view that ‘terrorists’ are engaged in an illegal war. Similarly, Vietnam refused to grant protections to US soldiers, arguing that they were engaged in an aggressive war.¹⁴¹ The *opinio juris* stemming from states is

¹³⁸ Kordic (n89) 1082, *Kondewa (the CDF Accused)*, SCSL-04-14-T, 02/08/2007, 534

¹³⁹ Harris (n130)

¹⁴⁰ Michael Waltzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4th Edition, Basic Books, 2006, 35-41

¹⁴¹ Timothy McCormack et al, *Yearbook of International Humanitarian Law*, Cambridge University Press, 2003, Vol 6, 175

one of condemnation of this view.¹⁴² As Waltzer argues, soldiers are not responsible for the high level policy decisions of fighting an aggressive war, meaning that they should be accorded humanitarian protections.¹⁴³

Despite the protections offered to individuals fighting an aggressive war, there is a view that this separation of legal regimes in itself is controversial. It means that the unjust soldier can irrespective of his status as an aggressive soldier, fight in an otherwise lawful manner. McMahan argues that this is inconceivable. A soldier in the knowledge he is fighting an aggressive unjust war could cease his illegal activity in warfare if the possibility of attracting criminal liability hung over him.¹⁴⁴ Waltzer suggests that the equality of belligerents principle serves as a higher protection for innocents. If an unjust soldier were left unrestricted by the laws of armed conflict, because he or she knew they were already engaging in criminal behaviour, it would mean that the soldier would gain an advantage by being allowed to fight using whatever means.

Whether the 'equality of belligerents' principle resides within conceptual definitions of international law, or in the field of ethics is debateable.¹⁴⁵ As far as ethics surrounding proportionality goes, Letsas states it is a free standing concept embedded with moral reasoning. Judicial interpretation, adopts an interpretative methodology of proportionality that rests within moral reasoning, in the Dworkinian sense of the balancing of principles in hard cases.¹⁴⁶ Proportionality, as traditionally understood, means that bad effects are weighed against the good effects of an attack. It follows for McMahan that the military advantage must therefore be *good*, eliminating the possibility of a calculation made due to the *bad* effect of the advantage anticipated by the aggressor.¹⁴⁷

It is contended that the separation of regimes is largely influenced by the historical context of the laws of war, rather than conceptual reasoning to keep the regimes apart. Each concept served in its purpose, in time and place, in reference to the historical significance of war and its relationship to law. As stated in Section One, during the 19th Century the threat of war was a last resort in international relations and therefore legal. The *jus ad bellum* concept in this period of history lay dormant and never

¹⁴² Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law, Vol IV, Official Records, 1978, 177-90

¹⁴³ Waltzer (n137),

¹⁴⁴ Jeff McMahan, Unjust War, http://philosophyfaculty.ucsd.edu/faculty/rarneson/Courses/mcmahanjeffUnjust_War.pdf [accessed 17/08/2016]

¹⁴⁵ Orakhelashvili (n82), 247-8

¹⁴⁶ George Letsas, The Moral Dimension of Proportionality, UCL CLP Public Lecture 17/03/2016; see also Letsas, 'Rescuing Proportionality', *Rowan Cruft and Massimo Renzo (eds), Philosophical Foundations of Human Rights*, OUP

¹⁴⁷ Jeff McMahan, *Killing in War*, OUP, 2009, 30

really moved on from Grotius. The letters of the Caroline may have helped to clarify its concept, but rather than providing legal constraints on war, as they were written some years after the actual incident, they were more concerned with diplomatic measures of self-preservation.¹⁴⁸ A state could still enter into an aggressive, yet legal war, so the laws of armed conflict had to develop to serve as a restraint in protecting innocent lives. As Gardam notes that *jus in bello* evolved as the only practical legal restriction on fighting. Otherwise armies would be able to adopt an unrestrained warfare strategy with little accountability.¹⁴⁹ So, whilst keeping the regimes separate may have had significance in its early development, there is little need to maintain a separation in the post UN Charter environment.

International law became concerned with decisions between states in the immediate aftermath of World War II, with the birth of the United Nations. *Jus ad bellum* legal rules developed rapidly in the aftermath, as an international response to ensure that aggressive wars of the likes of the Nazi regime could not occur again. However, by this time, the *jus in bello* had already developed into its own independent and distinct legal regime existing in customary international law, resulting in a codification through the Geneva Conventions of 1949. There was now an inclination towards peaceful negotiation of international disputes and a consensus that the protections offered by international humanitarian law served as a higher protection over the individual.

Human rights in the form of the Universal Declaration of Human Rights, along with humanitarian considerations under the Geneva Conventions dominated the international stage. Preserving a distinction, the judgment of the Nuremberg Military Trials stated, ‘the same rules of international law are valid as to what must be done, may be done ... even if the declaration of war is *ipso facto* a violation of international law.’¹⁵⁰ Orakhelashvili states that the argument for this stance is questionable. It rests within Common Article 2 of the Geneva Conventions, which states, ‘the present Conventions shall apply to *all cases* of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them’. Orakhelashvili argues that Common Article 2 does not require an equal application of the laws of armed conflict, but rather ‘details situations to which the Conventions apply’. It does not follow that acts otherwise inconsistent with *jus ad bellum* rules, are legally justified by means of *jus in bello*, or any other area of international law.¹⁵¹ To ar-

¹⁴⁸ Gardam (n55),

¹⁴⁹ *ibid*

¹⁵⁰ *Oppenheim’s International Law*, II Lauterpacht, 174

¹⁵¹ Orakhelashvili (n82)

gue that the Geneva Conventions legal justify acts otherwise considered unlawful, is contrary to the spirit of the signatories and drafters, who were concerned with a prevention of the death and destruction witnessed during the War.

In addition, Orakhelashvili argues that the equal protection of individuals, such as unlawful soldiers being granted prisoner of war status, is not the same as equal rights of belligerents across all activities. The Preamble of Additional Protocol I, states that there should be no ‘adverse distinction based on the nature or origin of the armed conflict’, which means that individuals are protected. It does not follow that an unlawful act becomes immune through the application of the Conventions.¹⁵² In addition, the Preamble states that there is nothing in the Conventions that ‘can be construed as legitimising or authorising any act of aggression or any other use of force inconsistent with the Charter of the United Nations’. This means that there is not an identical position of individuals belonging to the aggressor and the victim state. Proportionality is ‘tailored towards the task of repelling the initial armed attack on the victim state’, supporting the view taken by this article that the *jus ad bellum* criteria forms the ‘outer limit’ of any application of the same principle in *jus in bello*.¹⁵³

On this view, the *jus ad bellum* proportionality constrains *jus in bello* proportionality and any military action taken outside of the legal framework on the prohibition of the use of force contained within the UN Charter, raises criminally liability.

SOME SHARED CHARACTERISTICS OF PROPORTIONALITY ACROSS BOTH REGIMES

Scale of damage

A determinant characteristic across *jus ad bellum* and *jus in bello* proportionality are measured through the scale of damage caused.

According to the ICJ, as mentioned in Section One, scale was a determining factor in assessing *jus ad bellum* proportionality in *Nicaragua* and *Oil Platforms*. The Israel – Lebanon conflict is often used as an example of disproportionality in self-defence. Israel had the right to self-defence, due to Hezbollah firing indiscriminate rockets into Israeli border towns. However, the response of airstrikes against military targets, brought about the death of approximately 1,300 Lebanese people and the displacement of 1.5 million people, representing 25% of the Lebanese

¹⁵² *ibid*, 248-9

¹⁵³ *Ibid*, 249

population and 500,000 Israeli civilians.¹⁵⁴ Though Israel had the right to defend itself, that right was delegitimised through the scale of an excessive use of force.

Section two demonstrated that in *jus in bello* a standard of what is 'clearly excessive' is used as a determinant. The difference in measuring the scale of damage is to be determined by its opposing variable, the cumulative impact of the military advantage as adding substance to the campaign. For example, *the ICC Prosecutor's Report on the Situation in North Korea*, of June 2014, calculated damage to determine whether North Korea may have committed a war crime: 159 civilian houses, 15 warehouses, ten public facilities and six shops, costing some \$4.3 million dollars.¹⁵⁵ Though it concluded that it could not proceed through lack of relevant information available, scale was a determinant factor, weighed against the military advantage of force used.

The scale of damage is a shared characteristic across both regimes of a proportionality assessment, meaning an identical feature exists.

Military targeting as one act across jus ad bellum and jus in bello

Green states, state that the practice is difficult to review. It is not possible to determine whether the concept of military targeting is done from a *jus ad bellum*, or *jus in bello* perspective.¹⁵⁶ Military commanders take into account the *jus ad bellum* aim of the war itself, when making decisions on the battlefield. For instance, in the NATO campaign in Kosovo, under the legally dubious premise of humanitarian intervention to protect ethnically Albanian civilians, a decision was made to bomb a radio television station in Serbia. NATO headquarters felt they were justified because the station 'was making an important contribution to the propaganda war which orchestrated the campaign against the population of Kosovo'. In *the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign*, it was stated, *inter alia*, that one aim of targeting the station was 'to destroy the nerve system and apparatus that keeps Milosevic in power'. As a result, the Report concluded, "[a]ssuming the station was a legitimate objective, the civilian casualties were unfortunately high but do not appear to be clearly disproportionate."¹⁵⁷ One reading of this Report is that disproportionality was measured not only against its immediate military advantage, but also against removing Milosevic from power, as an aim of the war, as set out

¹⁵⁴ Middle East crisis: Facts and Figures, BBC Report http://news.bbc.co.uk/1/hi/world/middle_east/5257128.stm [accessed 03 sept 2016]

¹⁵⁵ ICC Prosecutor's Report, 'Situation in the Republic of North Korea', June 2014, Article 5, 80-2

¹⁵⁶ Green (n30)

¹⁵⁷ (n62) 77

by President Bill Clinton on March 24th, 1999. Despite the war being illegal as unilateral humanitarian action, without UN Chapter VII support, proportionality assessments were made on military targeting with the reasons for going to war in mind.

The conflating of military targeting in *jus in bello*, to contribute to the aim of the war in *jus ad bellum* in state practice is not new. On the 2nd May 1982, during Falklands conflict, the Argentinian cruiser, *The General Belgrano*, was sunk by the British submarine *HMS Conqueror*. At issue was that the cruiser was outside a 200 nautical mile exclusion zone and was sailing away from the islands, posing no immediate threat. The United Kingdom had previously declared in a message to Buenos Aires through the Swiss Embassy, that it had reserved the right to take ‘whatever additional measures may be needed in the exercise of its right to self-defence under Article 51 of the United Nations Charter’. Any approach by Argentinian vessels or aircraft “which could amount to a threat to interfere with the *mission* of the British forces in the South Atlantic will encounter the appropriate response”.¹⁵⁸ The targeting of the *Belgrano* was justified as a proportionate measure under rules of self-defence and related to “the mission of the British forces”.

Military targeting is integral to the proportionality requirement under both regimes.¹⁵⁹ It would be a mistake to interpret Article 8(2)(b)(iv) as a free standing entity, ignoring *jus ad bellum*. This is a shared characteristic, both linked to the aim of the war, reinforcing the argument that proportionality in substance across the regimes are identical.

Geographical and time frame differences over both regimes

At first glance there appears a substantial difference between the character of the two regimes. According to the ICJ *jus ad bellum* proportionality has geographical and temporal limitations, (Section One). Whereas, in referring to the military advantage, (Section Two), Footnote 36 of the Elements of Crimes to Article 8(2)(b)(iv) states that “[it] may or may not be temporally or geographically related the object of the attack”. However, rather than signifying separation, this differential signifies that the regimes are linked. Even Dinstein states, that the Footnote 36 interpretive provision is a natural consequence of the requirement to consider the larger picture in *jus in bello*.¹⁶⁰ Taking into account the cumulative impact of the military advantage, as expounded in Section Two, it is not surprising that the advantage may be remote from a geographical or time-frame

¹⁵⁸ Martin Middlebrook, *The Fight for the Malvinas*, Penguin Books, 22/11/1990, 74-5; Gardam (n56) 172

¹⁵⁹ Greenwood (n6) 12

¹⁶⁰ Yoram Dinstein, *The Conduct of Hostilities under the Law of Armed Conflict*, Cambridge University Press, 3rd Edition, 2016, 431

reference. The ICRC suggested, at the drafting stage of the Rome Statute that the feigned attack on Calais by Allied forces, during the D-Day attack on Normandy fooled Germany into thinking an invasion was occurring some miles away. This was used as an example of how the military advantage should not be constrained by geography.¹⁶¹ The advantage of such an attack was cumulative in its approach and as such linked to the aim of the war.

This permissible aspect of remoteness has its limits, which has been shown to be the *jus ad bellum* limit. The ICRC commentary to Article 57 of Additional Protocol I indicates that a close relationship between targets exists, because the ‘expression ‘concrete and direct’ was intended to show that advantages which are hardly perceptible and those which only appear in the long term should be disregarded.”¹⁶²

Else states, that the lack of a geography and time scale limit in *jus in bello* refers to the foresight of the military commander.¹⁶³ Likewise, Yee notes that an attack on an inhabited town or village may appear excessive to a military commander on the ground, yet look minimal in the larger framework from the foresight of higher command. A commander operating his unit in urban warfare will not have the geographical considerations of other towns in mind, whereas an air commander, in charge of a large scale bombing campaign may have to take into account the impact of the entire operation many miles away and on a longer time scale.¹⁶⁴ The lack of a geographical or time scale limitation is an aspect of the *application* of proportional rules, in determining the *mens rea* of the military commander, not a matter for differentiating conceptual features.

Therefore, it is the differences in the effect of the *applicability* of rules, which warrants a distinct approach across the two regimes in geography and time constraints. This does not mean that the ‘concrete and direct military advantage’ anticipated as being remote, is at odds with its *jus ad bellum* counterpart. All military targeting emanates from *jus ad bellum* considerations, and as such, geographical and time scale limits as of the kind set out in *DRC v Uganda* acts as a perimeter for action taken within *jus in bello*. Reiterating the view taken in this article that *jus ad bellum* proportionality acts as the outer perimeter for *jus in bello* proportionality.

¹⁶¹ ICRC PrepComm, Rome Statute, <http://opiniojuris.org/2006/07/24/proportionality-under-the-rome-statute/>, [accessed 27/07/16]

¹⁶² ICRC Commentary on the Additional Protocols of 08/06/1977 to the Geneva Conventions of 12/08/1949, 17/10/1987, 2209, 208

¹⁶³ Ryan Christian Else, Proportionality in the Law of Armed Conflict: The Proper Unit of Analysis for Military Operations, Vol 5, Issue1, 2010, 5 U.St.Thomas J. L & Pub. Pol’y 210

¹⁶⁴ Sienho Yee, *International Crime and Punishment, Selected Issues*, University Press of America, Vol21, 11-2

This inevitably leads to the conclusion that a military attack, traditionally assessed in *jus in bello* terms, cannot be assessed as legitimately proportionate when acting outside of the legalities of the war.

Conclusion

The arguments contained within this article demonstrates that a relationship between *jus ad bellum* and *jus in bello* characteristics of proportionality exist, which means that the ICC already has the capability to consider *jus ad bellum* principles for its interpretation of Article 8(2)(b)(iv). After 17th July 2018, it would be wrong to assume that only the high-level leadership of a state can be tried for the act of an illegal war. It is argued that lower-level military commanders can, and always have, been able to be tried for a disproportionate attack that takes the legality or illegality of the war as a frame of reference.

Proportionality, when measured in modern warfare, contains shared characteristics that go to the roots of their conceptual definitions. It has been shown that proportionality under either regime contains trigger mechanisms. Under *jus ad bellum* it is the engagement of a UN Charter exception to the use of force, followed by necessity, from which proportionality is to be measured. Its characteristics are measured by scale, military targeting, geographical and time limitations, as measured against the necessity of repelling an armed attack in *jus ad bellum*, or fulfilling the requirements of a Chapter VII UN Resolution. These characteristics have a relationship with its *jus in bello* counterpart and as such, must act as the perimeter for Article 8(2)(b)(iv).

When the two regimes overlap and proportionality rules are running concurrently across the same incident, IHL traditionally being under the jurisdiction of the ICC is the area of law to which it automatically turns. However, the Rome Statute being an international treaty means, according to VCLT Article 31(1)(c), that those rules are to be interpreted taking into account other areas of international law. As the ICJ famously reiterated in *Nuclear Weapons*, '[a] use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law'.¹⁶⁵ As Okimoto states, the reality of war means that shared factors are taken into account because of the effects on civilian infrastructure.¹⁶⁶

¹⁶⁵ *Nuclear Weapons* (n23) 42

¹⁶⁶ Okimoto (n13) 1216

As demonstrated in Section Three, case law suggests an act considered legal in International Humanitarian Law cannot justify *jus ad bellum* violations. This observes ILC draft Articles on the Responsibility of States for International Wrongful Acts (Article 30(a)), which is demonstrated as in *DRC v Congo* where it held that action taken hundreds of miles inside the border is considered as disproportionate. Uganda would have been obliged to cease operations, even if they were deemed proportionate in IHL.¹⁶⁷

The substantial overlap between the two regimes leads some commentators, such as Kretzmer, to argue that proportionality after the engagement of a legitimate war is only concerned with *jus in bello*. This ignores the obvious fact that *jus ad bellum* and *jus in bello* proportionality share characteristics.¹⁶⁸ This means that proportionality under *jus in bello* should not be viewed in a vacuum, as Orakhelashvili states, the laws of armed conflict emanate from *jus ad bellum* principles.¹⁶⁹

International Humanitarian Law flowing from *jus ad bellum* principles was aptly demonstrated in the UN Secretary General's Panel Enquiry in to the Flotilla Incident of May 2010, when Israeli Defence Forces boarded six Turkish vessels, killing nine and wounding others. The panel assessed proportionality *in jus ad bellum*, highlighting both the UN Charter and the *Caroline incident*, stating once the hurdle of necessity is overcome, use of force must not be excessive. On proportionality, it stated that '[t]he principle is clear but its application in any set of particular facts is far from simple'.¹⁷⁰ It noted that there was an uncertain status of Gaza in international law, but relying upon Judge Higgins Separate Opinion in *Palestinian Wall*, held that Israel had the right to self-defence, a *jus ad bellum* question, and therefore went on to assess that the naval blockade as proportionate to those ends. In making their assessment, they did so from both International Humanitarian law and International Human Rights Law principles, clearly demonstrating that proportionality in modern warfare can only be assessed in the light of a what was considered to be a legal use of force. It rejected the Turkish argument that an 'armed conflict' triggering International Humanitarian Law did not exist in Gaza, concluding that the naval blockade is proportionate and needs to remain as such, in order to avoid similar incidents in the future.

The Panel concluded that proportionality must be enacted with prudence, through assessing alternative non-violent methods at a comman-

¹⁶⁷ (n44) 251-4

¹⁶⁸ Kretzmer (n16)

¹⁶⁹ Alexander Orakhelashvili, *Overlap and Convergence: the Interaction Between Jus ad bellum and Jus in bello*, *Journal of Conflict and Security Law*, 2007, 164

¹⁷⁰ Report of the Secretary General's Panel of Inquiry on the 31 May 2010 Flotilla Incident, September 2011, appendix I, 42

der's disposal, such as warnings given and the principle of distinction observed. The military advantage of the attack, it stated must be weighed against collateral casualties and if excessive, then considered illegal.¹⁷¹ This view on how proportionality in *jus in bello* is to be framed within *jus ad bellum* parameters is welcomed, which demonstrates an understanding of how the doctrines have developed. The implication for the proportionality element across both regimes is clear, that in order to make an assessment on excessive use of force against the military advantage, it must do so, from the perspective of whether that use of force is legitimate under the rules of *jus ad bellum*.

This is not to conflate the procedural aspects in the fields of application of the two regimes, but rather due to the shared characteristics, that *jus ad bellum* proportionality be used as a framework for assessing Article 8(2)(b)(iv). The legality of the war itself defines its parameters and as such the ICC have within its jurisdiction the capability to rule on the prohibition of the use of force, when assessing the military commanders decision to attack. Modern warfare now dictates that any attacks pursued towards the military advantage, should always contribute towards either the stated aim of the Security Council Resolution or, the repelling of a legitimate armed attack under Article 51. Any action taken outside of those stated aims is disproportionate.

Sources

PRIMARY SOURCES

International Court of Justice

- Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (ICJ), 09/07/2004
- Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda*, (herein known as DRC v Uganda) ICJ, 01/07/2000
- Eritrea-Ethiopia Claims Commission held in Central Front- Ethiopia's Claim 2*
- Iran v US*, Merits, 06/11/2003
- Hostages Case, List & others*, VIII LRTWC66-9
- Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996, 226, International Court of Justice (ICJ), 8 July 1996

¹⁷¹ *ibid* 72, 78, 150, 162; appendix I, 40-42, 47

Military and Paramilitary Activities In and Against Nicaragua, Merits, ICJ, 1986

European Court of Human Rights

Satik and Others v. Turkey, Application No.31866/96, 27, ECtHR
McCann and Others v United Kingdom(21 ECHR97GC)

International Criminal Courts and ad hoc tribunals

Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, June 2000, 39ILM1257, 48

Prosecutor's Report, 'Situation in the Republic of North Korea', ICC, June 2014, Article 5

Prosecutor v. Tihomir Blaskic (Appeal Judgement), IT-95-14-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 29 July 2004

Prosecutor v Boskoski and Tarculovski, IT-04-82-A, 29 May 2010

Prosecutor v. Moinina Fofana, Allieu Kondewa (the CDF Accused), SCSL-04-14-T, 02/08/2007, 534

Prosecutor v. Stanilav Galic, IT-98-29-T, ICTY, 5/12/2003

The Prosecutor v. Gotovina et al. Vol 2, IT-06-90-T, (ICTY), 15/04/2011, 1910-11

Prosecutor v. Ante Gotovina and Mladen Markac, IT-06-90-A, ICTY, 16/11/2012, 82

Prosecutor v. Dario Kordic, Mario Cerkez (Appeal Judgement), IT-95-14/2-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 17 December 2004

Prosecutor v. Dario Kordic, Mario Cerkez (Trial Judgement), IT-95-14/2-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 26 February 2001

Prosecutor v. Kupreskic et al (Appeals Judgement), IT-95-16-A, ICTY, 23/10/2001; Trial judgment IT-95-16-T, 14/1/200, 524

Prosecutor v. Pavle Strugar (Appeal Judgment), IT-01-42-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 17 July 2008

Prosecutor v. Dusko Tadic (Opinion and Judgment), IT-94-1-T, ICTY, 07/05/1997, 588-607;

Prosecutor v Tadić, ICTY, Appeal 02/10/1995, 99

Prosecutor v. Charles Ghankay Taylor, SCSL-03-1-T, 18/05/ 2012, Domestic and other Tribunals

Alejandro et al. v. Republic of Cuba, Case 11.589, 86/99, 29/09/99, Inter-Am. CHR

Beit Sourik Village Council v. The Government of Israel, HCJ 2056/04, Israel: Supreme Court, 30 May 2004
Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980)

Treaties

Charter of the United Nations, 24 October 1945, 1 UNTS XVI
Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287
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, 18 October 1907
Lieber Code, Government of Armies of the United States in the Field, General Order № 100
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3
Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6
Vienna Convention on the Law of Treaties, 23/05/1969, vol. 1155, p. 331

SECONDARY SOURCES

Books

Aquinas, Thomas, *Summa Theologica*, Pt11-11, Qu.49, Art. 1L.&POL'y489,493(2000);
Cassese. A, *International Law*, 2nd edition, OUP, 2005, 418
Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Armed Conflict*, Oxford University Press, 2014
Cryer. R, Friman. H, Robinson. D, Wilmshurst E, *An Introduction to International Criminal Law and Procedure*, Third Edition, Cambridge University Press, June 2014
Dinstein. Y, *The Conduct of Hostilities under the Law of Armed Conflict*, Cambridge University Press, 3rd Edition, 2016
Dinstein. Y *War, Aggression and Self-Defence*, 5th Edition, Cambridge University Press
Gardam. J, *Necessity, Proportionality and the Use of Force by States*, Cambridge University Press, 2004
Green. J, *The International Court of Justice and self-defence in international law*, Oxford Hart Publishing, 2009, 88

- Grey. C, *International Law and the Use of Force*, 3rd edition, Oxford University Press, 2013
- Grotius. H, *On the Law of War and Peace*, Walter Black, New York
- Haug. H (eds.), *Humanity for All: the International, Red Cross and Red Crescent Movement*, Paul Haupt Publishers, Berne
- Hobbes. T, *De Cive* EWII Ch3, 11
- ICRC Commentary on the Additional Protocols of 08/061977 to the Geneva Conventions of 12/08/1949,17/10/1987,2209
- Lauterpacht. H, *Oppenheim's International Law*, II, 174
- Leawoods. H, *Gustav Radbruch: An Extraordinary Legal Philosopher*, 2 WASH. U. J.
- McCormack. T, McDonald. A, Cambridge University Press, *Yearbook of International Humanitarian Law - 2003*, Volume 6; Volume 2003
- McMahan. J, *Killing in War*, OUP, 2011
- Middlebrook. M, *The Fight for the Malvinas*, Penguin Books, 22/11/1990, 74-5
- Newton. M, May. L, *Proportionality in International Law*, Oxford University Press, 2014, 62
- Ohlin. J(ed) *Theoretical Boundaries of Armed Conflict and Human Rights*, Cambridge University Press, 2014
- Okimoto. K, *Distinction and Relationship between Jus ad Bellum and Jus in Bello*, Bloomsbury Publishing, 2011
- Waltzer. M, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*,4th Edition, Basic Books, 2006
- Weller. M (eds), *The Oxford Handbook of the Use of Force in International Law*, Jan 2015
- Yearbook of International Law Commission*,1980, Vol II(1), A/CN.4/318/ADD.5-7, 60, 121
- Yee. S, *International Crime and Punishment*, Selected Issues, University Press of America, Vol 21

Journal Articles

- Bonafede. M, 'Here, There and Everywhere: Assessing the Proportionality Doctrine and US Uses of Force in Response to Terrorism After the September 11 Attacks', 88 Cornell L Rev, 185
- Chetail. V, 'The Contribution of the International Court of Justice to international humanitarian law', IRRC, June 2003, Vol 85, 235-269
- Else. R, 'Proportionality in the Law of Armed Conflict: The Proper Unit of Analysis for Military Operations', Vol 5, Issue1, 2010, 5 U. St. Thomas J.L & Pub. Pol'y, 210
- Estreicher. S, 'Privileging Asymmetric Warfare (Part II)?: The Proportionality Principle under International Humanitarian Law', Chicago Journal of International Law, Vol 12, Issue 1, 143-57

- Etazasian. S, 'The nature of the self-defence proportionality requirement', *Journal on the Use of Force and International Law*, 25/07/2016
- Fellmeth. A, 'The Proportionality Principle in Operation: Methodological Limitations of Empirical Research and the Need for Transparency', *Israel Law Rev*, 45:125-50
- Fenrick. W, 'Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia', *European Journal of International Law*, 2001, Vol 12, No 3, 489-502
- Ferencz. D, 'Aggression in Legal Limbo: A Gap in the Law that Needs Closing', *Washington University Global Studies Law Review*, 2013, Vol 12, Issue 3, 507-22
- Franck. T, 'On Proportionality of Countermeasures in International Law', *The American Journal of International Law*, 2008, Vol 102, No 4, 715-67
- Gardam. J, 'Proportionality and Force in International Law', *The American Journal of International Law*, 1993, Vol 87, 391-413
- Green. J, 'Military Targeting in the Context of Self-Defence actions', *Nordic Journal of International Law* (2015) 84, 13
- Green. J, 'Questioning the Peremptory Status of the Prohibition of the Use of Force', *MJIL* 2011, Vol 32, Issue 2
- Green. J, 'The Oil Platforms Case: An Error in Judgment?', *Journal of Conflict and Security Law* (2004), Vol 9 No 3, 357-86
- Greenwood. C, 'The relationship between *jus ad bellum* and *jus in bello*', *Review of International Studies*, Vol 9 (1983), 221-34
- Harris. T, 'Can the ICC Consider Questions on *Jus Ad Bellum* in a War Crimes Trial?', 48 *Case W. Res J. Int'l L.* 273 (2016),
- Hayashi. N, 'Contextualizing Military Necessity', *Emory International Law Review*, International Law and Policy Institute, Vol 27, 30/07/2013
- Hosseini. K, 'The Concept of *Jus Cogens* and the Obligation Under the UN Charter', *SCJIL*, Vol 3, Issue 1, 72-98
- Kretzmer. D, 'The Inherent Right to Self-Defence and Proportionality in *Jus Ad Bellum*', *EJIL* (2013), Vol. 24 No.1, 235-282
- Letsas. G, 'Rescuing Proportionality', In Rowan Cruft and Massimo Renzo (eds), *Philosophical Foundations of Human Rights*. Oxford University Press
- Ohlin. J, 'Targeting and the Concept of Intent' (2013) 34 *MJIL*, 92-8
- Orakhelashvili. A, 'Overlap and Convergence: the Interaction Between *Jus ad bellum* and *Jus in bello*', *Journal of Conflict and Security Law*, 2007
- Orakhelashvili. A, 'The interaction between Human Rights and Humanitarian Law', *European Journal of International Law*, 2008, Vol 19, no1, 161-182

- Orakhelashvili. A, ‘Undesired, Yet Omnipresent: Jus ad Bellum in Relation to Other Areas of International Law’, *Journal on the Use of Force and International Law*, 09/10/2015
- Otieno. M, Wabuke. E, Otieno. S, ‘The Fission and Fusion in International Use of Force: Relating Unlawful Use of Force and the War Crime of Disproportionate Force Not Justified by Military Necessity, Case Western Reserve Journal of International Law, 2016, Vol 48, Issue 1, 303-27
- Schmitt. M, ‘Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance’, 01/05/2010, VJIL Vol 50, Issue4
- Smith. L, ‘What did the ICC Review Conference achieve?’, *Equality Arms Review*, Vol 2, Issue 2, Nov 2010
- Ventura M, Gillett. M, *The Fog of War: Prosecuting Illegal Uses of Force as Crimes Against Humanity*, *Washington University Global Studies Review*, 2013, Vol 12, Issue 3, 523-38
- Wright. J, ‘Excessive ambiguity: analysing and refining the proportionality standard’, *International Review of the Red Cross*, 2012, Vol 94, No 886, 819-884

Other secondary sources

- Ago. R, ‘Addendum to Eighth Report on State Responsibility’, II(1) *Y.B. Int’l. L. Comm.* 13, (1980)
- Bombing Businesses, Saudi Coalition Airstrikes on Yemen’s Civilian Economic Structures, July 10, 2016 <https://www.hrw.org/report/2016/07/10/bombing-businesses/saudi-coalition-airstrikes-yemens-civilian-economic-structures> [accessed 23/08/16]
- Dale,P. ‘Is the inherent right of States to self-defence susceptible to abuse?’ at http://www.academia.edu/29920130/Is_the_inherent_right_of_States_to_self-defence_susceptible_to_abuse_A_critique_of_the_Brownlie_-_Bowett_debate
- Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law, VolIV, Official Records, 1978, 177-90
- Koh. H – Washington DC speech available at <http://www.state.gov/s/l/releases/remarks/139119.htm> [accessed 07/07/2015]
- ICRC, “Practice Relating to Rule 14. Proportionality in Attack Section B. Determination of the anticipated military advantage”, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14_sectionb [accessed 12th Aug, 2016]
- International Criminal Court, *Elements of Crimes*, U.N. Doc. PCNICC/2000/1/Add.2 (2000).
- Koutrolis. V, *The Relationship Between Jus ad Bellum and Jus in Bello, Independence versus Conflation*, 04/12/12, podcast available at

- <https://podcasts.ox.ac.uk/relations-between-jus-ad-bellum-and-jus-bello-independence-versus-conflation>
- Letsas, G, *The Moral Dimension of Proportionality*, UCL CLP Public Lecture (attended) 17/03/2016
- McMahan, J, *Unjust War*, paper http://philosophyfaculty.ucsd.edu/faculty/rarneson/Courses/mcmahanjeffUnjust_War.pdf [accessed 17/08/2016]
- Middle East crisis: Facts and Figures, BBC Report http://news.bbc.co.uk/1/hi/world/middle_east/5257128.stm [accessed 03 sept 2016]
- Heller, K, 'Proportionality Under the Rome Statute', *Opinio Juris Blog*, , <http://opiniojuris.org/2006/07/24/proportionality-under-the-rome-statute/>, [accessed 27/07/16]
- PBS interview with General Norman Schwarzkopf <http://www.pbs.org/wgbh/pages/frontline/gulf/oral/schwarzkopf/1.html> [accessed 06/04/2016]
- Report of the Secretary General's Panel of Inquiry on the 31 May 2010 Flotilla Incident, September 2011
- Sassoli, M, *How Does Law Protect in War*, ICRC, available at <https://casebook.icrc.org/casebook/doc/glossary/military-necessity-glossary.htm> [accessed 23 Aug 2016]
- Sherman letter to Henry W. Halleck, 24/12/1864, <http://www.civil-war.org/education/history/primarysources/william-t-sherman-to-henry.html> [accessed 06/08/16] UNDoc.A/CONF183/INF/10, 13/07/1998,1-2
- 34 UNESCOR, Supp. (No. 8) 15, U.N. Doc. E/cn.4/1/610 (1962) (memorandum of Office of Legal Affairs, U.N. Secretariat).