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“Operation Cast Lead: *ex post* review as a mechanism for compliance
with proportionality in international humanitarian law”

by

Quintin Combrink

cmbqui001

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Supervisor:

Mr Salim Nakhjavani

University of Cape Town
Department of Public International Law

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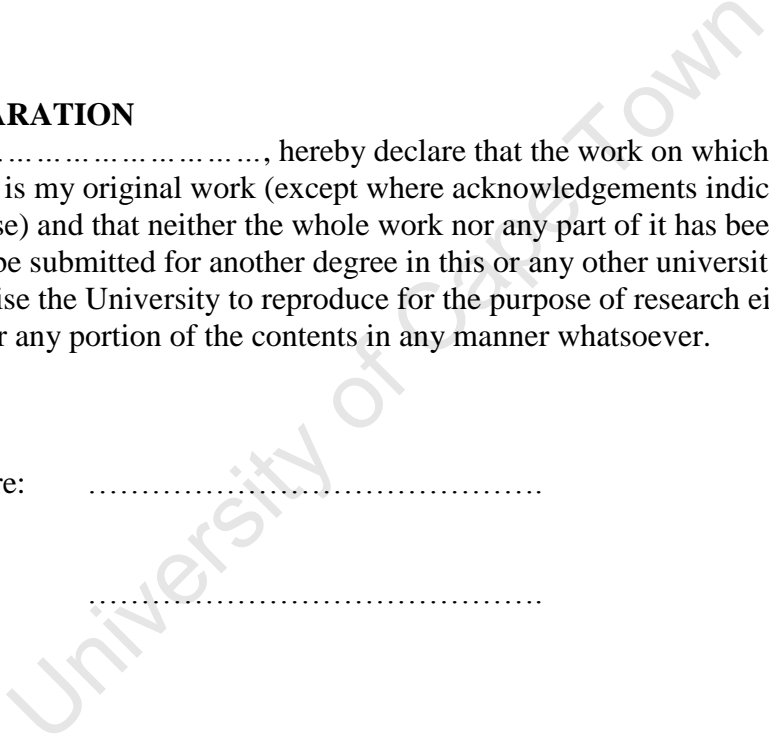
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Abstract

*“An avidity to punish is always dangerous to liberty.
It leads men to stretch, to misinterpret, and to misapply even the best of laws.
He that would make his own liberty secure must guard even his enemy from
oppression;
for if he violates his duty he establishes a precedent that will reach to himself.”*

- Thomas Paine, Dissertation on First Principles of Government, 7 July 1795.

Introduction

Although the majority of the rules of International Humanitarian Law [IHL], both conventional and customary, regulate international armed conflicts, it is non-international armed conflict that the contemporary world is predominated by.¹ After the adoption of the United Nations Charter, the era of the colonial strife, especially during the 1960's and 1970's has given way to an ever-increasing struggle of self-determination.² Sadly, the developments in IHL have been slow to reflect this reality.³

The daily lives of many civilians caught up in domestic (that is non-international) conflicts are too often ruled by fear and extreme suffering. Being displaced as a people, used as human shields, being victims of sexual violence and hate-crimes, arbitrary and indiscriminate attacks and even torture are unfortunate common realities of modern armed conflict. The challenges presented by these conflicts are, to a certain extent related to a lack of applicable rules, but more importantly, to a lack of respect for IHL.

The familiar characteristic of armed conflicts around the world that are non-international is the asymmetry of these conflicts.⁴ The asymmetry may consist of a disparity in technological power, which often translates into a disparity in compliance with the laws of armed conflict.⁵ It may also consist of differences in legal or historical status - especially when the conflict is between a state and a non-state actor.

¹ See *inter alia* M. Sollenberg (ed.) *States In Armed Conflict* (1997) 7 and Appendix 1, 13.

² J Gardam *Necessity, proportionality and the use of force by states* (2004) 121.

³ Gardam (note 2) at 121. She apportions this inadequacy to IHL's dependency on the development of International law in domestic affairs which has been *prima facie* outside of its scope.

⁴ B Roberts *Asymmetric Conflict 2010* (2000).

⁵ Y Ronen *Avoid or Compensate? Liability for Incidental Injury to Civilians Inflicted During Armed Conflict* (2009) 42 *Vanderbilt Journal of Transnational Law* 181, 12.

The extreme violation of the laws of armed conflict, namely the deliberate and systematic targeting of civilians, is usually characteristic of non-state actors.⁶ However, it is important not to fall into the subjective trap of ruling out state actors and assuming that non-state actors are the *only* parties who violate the laws of armed conflict.⁷

The Israeli Defence Force [IDF] 'Operation in Gaza', otherwise known as 'Operation Cast Lead' began with a week-long air attack, from 27 December 2008 to 3 January 2009.⁸ In addition to the continuance of the aerial bombardment, the IDF claims that it was 'necessary' to escalate the operation with ground manoeuvres on 3 January 2009,⁹ and after the Security Council had adopted Resolution 1860¹⁰ on 8 January 2009, that it was then further necessary to 'expand' those ground manoeuvres in order to 'enter deeper into Gaza' on 10 January 2009.¹¹ Operation Cast Lead lasted 22 days, ending on 17 January 2009 with Israel's unilateral declaration of a ceasefire.¹²

The "facts" surrounding the Israeli-Palestinian conflict have always been controversial. For many reasons, including the concerned parties' attempt at distorting the historical record.¹³ The Operation in Gaza is no exception. As a result

⁶ J McNee, Permanent Representative of Canada to the United Nations, Statement to the Security Council on Protection of Civilians in Armed Conflict (June 22, 2007), available at http://www.canadainternational.gc.ca/prmny-mponu/canada_un-canada_onu/statements-declarations/security_council-conseil_securite/9890.aspx?lang=eng [Accessed 15 September 2009].

⁷ '[T]here have... been what can only be called opportunistic misinterpretations of certain time tested, specific legal rules. The tendency by some actors to point to alleged violations by others, without showing any willingness to acknowledge ongoing violations of their own, has also been detrimental to the proper application of the law.' International humanitarian law and the challenges of contemporary armed conflicts (2007) 4, available at: [http://icrc.org/Web/eng/siteeng0.nsf/htmlall/ihl-30-international-conference-101207/\\$File/IHL-challenges-30th-International-Conference-ENG.pdf](http://icrc.org/Web/eng/siteeng0.nsf/htmlall/ihl-30-international-conference-101207/$File/IHL-challenges-30th-International-Conference-ENG.pdf) [Accessed 19 September 2009].

⁸ Human rights in Palestine and other occupied Arab territories, *Report of the United Nations Fact Finding Mission on the Gaza Conflict* (Advance Edited Version) (2009) 102 at para 333 [Hereinafter referred to as Goldstone], available at: http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC_Report.pdf [Accessed on 17 September 2009].

⁹ *The Operation in Gaza, Factual and Legal Aspects* (2009) 32. at para 85 [Hereinafter referred to as Operation in Gaza], available at: <http://www.mfa.gov.il/NR/rdonlyres/E89E699D-A435-491B-B2D0-017675DAFEF7/0/GazaOperationwLinks.pdf> [Accessed 26 August 2009].

¹⁰ Resolution 1860 called, *inter alia*, upon Member States to increase efforts to provide arrangements and guarantees in Gaza in order to sustain a durable ceasefire and calm.

¹¹ The Operation in Gaza (note 9) 32 at para 85.

¹² *Ibid*, 33 at para 86.

¹³ See Jews for Justice in The Middle East *Origin of Arab-Israeli conflict*, available at: http://www.ifamericansknew.org/Download/origin_booklet.pdf [Accessed 12 September 2009].

of this disparity of information insofar as the *true* facts are concerned, this article will not attempt to address the wide range of claims made by the International Community; instead it will focus on the most frequent claim made against Israel,¹⁴ the accusation of resorting to excessive, disproportionate force.¹⁵ The article will focus on the legal principles concerned; specifically exploring the *ius in bello* principle of proportionality.

Part I will be a brief introduction as to the current understanding of the IHL principles of distinction, military necessity and ultimately, proportionality. After having already discussed some of the current views on these principles, in Part II I will put forward various shortcomings and suggested remedies for *ius in bello* proportionality in modern day armed conflict. Part III will explore what I contend to be a necessary extension of IHL that will more ably provide a platform for the application of the *ius in bello* principle proportionality. I will then apply this notion to reports provided by both Israel¹⁶ and Goldstone¹⁷ regarding Israel's application of *ius in bello* proportionality during Operation Cast Lead. This article will not in any way attempt to fully explore in detail either the UNHRC Goldstone Report¹⁸ or the Israeli Ministry of Foreign Affairs' [MFA] Report¹⁹ issued by the State of Israel.

Further, I will not address the initial legal question of the existence, or subsequent classification of the conflict in Gaza. Instead I will assume that an armed attack as defined in the *Tadic Case*²⁰ was amounted to, and that as such, IHL does apply.²¹ Addressing the theoretical²² concern of whether this armed conflict falls under the rules of international, or of non-international armed conflict (that is defining the status of Gaza) would be a separate discussion this paper will not be

¹⁴ A Cohen *The Principle of Proportionality in the Context of Operation Cast Lead: Institutional Perspectives* (2009) 35 Rutgers Law Record 23, 3.

¹⁵ Amnesty International, *The Conflict in Gaza: a briefing on applicable law, investigations and applicable law* (2009), available at, <http://www.amnesty.org/en/library/asset/MDE15/007/2009/en/4dd8f595-e64c-11dd-9917-ed717fa5078d/mde150072009en.pdf> [Accessed 19 September 2009].

¹⁶ Operation in Gaza (note 9).

¹⁷ Goldstone (note 8).

¹⁸ *Ibid.*

¹⁹ Operation in Gaza (note 9).

²⁰ *Prosecutor v. Tadić* (1995) ICTY at para 70.

²¹ Even though it still disputes the legal status of Gaza, it must be noted at this stage that Israel itself has accepted this premise of IHL's application in the hostilities during the operation. (Operation in Gaza, 10 at para 28.

²² The Operation in Gaza (note 9) at 11.

addressing. In assuming IHL does apply, the *ius in bello* principle of proportionality would be applicable to the conflict regardless of how it is characterized.²³

Part I. IHL discussed

Ensuring civilian protection while fulfilling military objectives during armed conflict forms the ‘backbone of the customary Laws of War.’²⁴ Typically, achieving at least *some* military advantage is necessary in the fulfilment of military objectives; unfortunately more often than not, this includes the destruction of a target.²⁵

International Humanitarian Law can be defined as the branch of International Law *limiting* the use of violence in armed conflicts by a) sparing those who do not, or no longer directly participate in hostilities and b) limiting the violence to the amount necessary to achieve the aim of the conflict. According to Sassoli and Bouvir, this brief definition leads to some basic principles of IHL:

- 1) The distinction between civilians and combatants
- 2) The prohibition on attacking those *hors de combat*
- 3) The prohibition on inflicting unnecessary suffering
- 4) The principle of Necessity and
- 5) Proportionality²⁶

Present day development of the modern and relevant rules for military procedure allows us to codify the laws of engagement within three broader principles (points 1, 4 and 5 above): distinction, necessity, and proportionality form the core of *ius in*

²³ As the Special Court for Sierra Leone held, ‘it is well settled that *all* parties to an armed conflict, whether States or non-State actors, are bound by international humanitarian law, even though only States may become parties to international treaties.’ Operation in Gaza (note 9) 10 at para 32.

²⁴ S Ghoshray *When does collateral damage rise to the level of a war crime?: expanding the adequacy of laws of war against contemporary human rights discourse* (2008) 41 Creighton Law Review 679, 6.

²⁵ Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I] at art. 51(2).

²⁶ M Sassoli and A Bouvir, *How does Law Protect in War ? Cases, Documents and Teaching Materials on Contemporary Practise in International Humanitarian Law: Vol 1, 2nd edn.* (2006) at 81-82.

bello principles.²⁷ Having established the framework of these principle components of IHL, an examination of these principles within the context of modern hostilities is required by this article. This will allow for a better understanding of the continuing principles of International Law in its current form.

I will discuss the principles of Distinction and military Necessity first, however merely as an introduction to the third core principle of Proportionality - the understanding and contemporary application of this *ius in bello* principle will be the main focus of the article.

1) The Principle of Distinction

Distinction (also sometimes known as discrimination) requires that militaries must recognize the difference between combatants and non combatants before the attack begins,²⁸ and only attack the former.²⁹ This customary international law principle is reflected in Additional Protocol I, '[t]he civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited;³⁰ rather, '[a]ttacks shall be limited strictly to military objectives.'³¹

Protocol I's prohibition of indiscriminate attack can be attributed to the codification of the distinction principle.³² Article 51(4) reflects that attacks must not be 'indiscriminate,' that is, they cannot be launched without consideration as to where harm will likely fall.³³ It is recalled by Article 22 of the Hague regulations, which reads, '[t]he right of the belligerents to adopt means injuring the enemy is not unlimited.'³⁴

²⁷ James Turner Johnson, *Morality & Contemporary Warfare* 23 (1999), at 29 tbl.3.

²⁸ M N Schmitt *The principle of discrimination in 21st century warfare*, 2 *Yale Human Rights & Development Law Journal* 143, 148-49 (1999).

²⁹ H Fischer *Comment: Human shields, homicide, and house of fires: How a domestic law analogy can guide international law regarding human shield tactics in armed conflict* *American University Law Review* (2007) 57 *Am. U.L. Rev.* 479 at 8.

³⁰ Protocol I (note 25) art. 51(2) (emphasis added).

³¹ *Ibid.*

³² M N Schmitt (note 28).

³³ Protocol I (note 25) art 51(4).

³⁴ Regulations concerning the Laws and Customs of War on Land annexed to Hague Convention IV (adopted 18 October 1907, entered into force 26 January 1910) (1907) 205 CTS 227 (Hague Regulations Art 22.), available at:

The principle of distinction contains three facets:

- 1) The prohibition placed on the targeting or attacking of civilian persons,
- 2) The prohibition placed on the targeting or attacking of civilian objects; and
- 3) The prohibition placed on indiscriminate attacks.³⁵

It follows that acts of ‘firing indiscriminately at civilian houses or bombing civilian infrastructures without [properly applying the principle of distinction] should be considered violations of ... [IHL] under the principle of distinction.’³⁶

The doctrine of distinction has the ability to make the most profound difference between life and death. Regardless of interpretations related to necessity and proportionality, correct interpretation of distinction allows, for solely military objects to be targeted.³⁷

2) The Principle of Necessity

The idea of military necessity was expressed as far back, if not further than, the 1868 St Petersburg Declaration;³⁸ however, military operations during times of armed conflict have undergone substantial changes since this. This evolution of military reality has resulted in confusions regarding the proper definition and application of military concepts like the principle of necessity. As a result of military planners and human rights organizations disagreeing over both the rudiments and interpretation of military necessity, it has become increasingly problematic to apply.³⁹

<http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/1d1726425f6955aec125641e0038bfd6> [Accessed on 15 September 2009].

³⁵ R Kolb and R Hyde *An introduction to the international law of armed conflicts* (2008) 126.

³⁶ Ghoshray (note 24) at 6.

³⁷ Ibid.

³⁸ Ibid, noting that St Petersburg Declaration renouncing the use of, in times of war, of Explosive Projectiles Under 400 Grammes Weight (signed 11 December 1868, entered into force 11 December 1868) (1868-69) 138 CTS 297: ‘...[T]he only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; that for this purpose it is sufficient to disable the greatest possible amount of men; that this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable.’

³⁹ Ghoshray (note 24) at 7.

Derived from the definition found in the St Petersburg Declaration, the notion of necessity requires a hierarchal approach in its implementation and evaluation.⁴⁰

Expressed in Article 57(3) of Additional Protocol 1:

‘When a choice is possible between several military objectives for obtaining similar military advantage, the object to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.’⁴¹

So although the principle itself is clear, its modern definition and concepts which result from it are more indistinct. The law of armed conflict is *inter alia*, a compromise based on a balance between military necessity, on the one hand, and the requirements of humanity,⁴² on the other.⁴³ A very general definition for the principle of necessity is given by Greenspan: military necessity constitutes "the right to apply that amount and kind of force which is necessary to compel the submission of the enemy with the least possible expenditure of time, life and money".⁴⁴

Contextually, military necessity refers to the necessity for measures which ‘are essential to attain the goals of war, and which are lawful in accordance with the laws and customs of war.’⁴⁵ In paying particular attention to the case law, an American writer has attempted a more precise definition than has been alluded to above:

"Military necessity is an urgent need, admitting of no delay, for the taking by a commander, of measures which are indispensable for forcing as quickly as

⁴⁰ R Kolb and R Hyde (note 35) at 47.

⁴¹ Protocol I (note 25) art 57(3).

⁴² ICRC *International Humanitarian Law - Treaties & Documents, Part III : Methods and means of warfare* 393, available at: <http://www.icrc.org/ihl.nsf/COM/470-750044?OpenDocument> [Accessed 23 September 2009].

⁴³ *Ibid*, also see Operation in Gaza, para 222.

⁴⁴ M. Greenspan, 'The Modern Law of Land Warfare,' Berkeley and Los Angeles, 1959, pp. 313-314

⁴⁵ F. Lieber, 'Instructions for the Government of Armies of the United States in the Field' (known as the Lieber Code), 1863, art. 14, available at: <http://www.icrc.org/ihl.nsf/73cb71d18dc4372741256739003e6372/a25aa5871a04919bc12563cd002d65c5?OpenDocument> [Accessed 22 September 2009].

possible the complete surrender of the enemy by means of regulated violence, and which are not forbidden by the laws and customs of war."⁴⁶

This definition is based on four foundations: 'urgency, measures which are limited to the indispensable, the control (in space and time) of the force used, and the means which should not infringe an unconditional prohibition.'⁴⁷ It has been contended however that this definition has many disadvantages - specifically stemming from its restrictive nature.⁴⁸

The confusion as to the true understanding and application of the principle of Necessity, I contend, can be largely overcome by accepting its interpretation in the Nuremberg Trials where it was formally incorporated:

'[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.... It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war; it allows the capturing of armed enemies and others of peculiar danger, but does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces.'⁴⁹

Military necessity does not permit situations of absolute derogation from rules drafted in peremptory norms; there is a limit on the application of this principle. However, military necessity does give military commanders some freedom of

⁴⁶ Ghoshray (note 39) citing W. Downey, 254, In "*The Hostages Trial*" (Trial of Wilhelm List and Others), the American military tribunal declared that: "Military necessity or expediency do not justify a violation of positive rules [...] The rules of international law must be followed even if it results in the loss of a battle or even a war." The tribunal added that the prohibitions contained in the Hague Regulations "are superior to military necessities of the most urgent nature except where the Regulations themselves specifically provide the contrary" (15 ' Law Reports ', p. 175, and 8 ' Law Reports, ' pp. 66-69)

⁴⁷ *International Humanitarian Law* (note 42).

⁴⁸ *Ibid.*

⁴⁹ Ghoshray (note 24) at 3, citing J D Reynolds, *Collateral damage on the 21st century battlefield: enemy exploitation of the law of armed conflict, and the struggle for a moral high ground*, 56 A.F. L. Rev 1, 15 (2005), available at http://findarticles.com/p/articles/mi_m6007/is_56/ai_n14700122.

judgment ‘[when] this is explicitly provided for in the Protocol, as well as in unforeseen cases or when the applicable rules are very unclear.’⁵⁰

Military necessity is limited to measures which are essential to ensure the success of an operation that is planned, and are lawful according to the other rules of the Protocol, or of international law applicable in the particular case.⁵¹

3) *Proportionality in IHL*

Historical Background

In order to explore proportionality let me begin by laying some foundation as to its history. I will not mention too much detail here as the true nature of the ancestry of this *ius in bello* principle is outside of the scope of the article.

Gardam makes the point that the notion of proportionality predates even Thomas Aquinas’ notion of Just War Theory.⁵² In brief, this Theory required that ‘the overall evil a war would cause was balance by the good that would be achieved’ and that once the decision to wage war was made, the conduct or means within the war was of secondary (no) concern.⁵³ At this stage in history it is important to note that there was no distinction made between *ius ad bellum* and *ius in bello* as is the case in modern armed conflict. The just cause simply warranted the means to an end. This mentality was typified by St Augustine’s Christian ‘Just War Theory’ where there was no significant limitation on the methods of warfare.⁵⁴

⁵⁰ Article 45 of the first Convention of 1949, lays down that judgement in unforeseen cases are to be provided for by the Commanders-in-Chief in conformity with the general principles of the Convention. Even though the Parties to a conflict may only be bound within the interpretation of IHL in a particular case, they will never be exempted from fundamental general humanitarian requirements. This concept, based on the Preamble of Hague Convention IV of 1907, is known as the Martens Clause and is specified in Article 1, paragraph 2, of the Protocol: “In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.”

⁵¹ *International Humanitarian Law* (note 42) at para 1406.

⁵² Gardam (note 2) at 33

⁵³ *Ibid.*

⁵⁴ See F H Russel, *The Just War in the Middle Ages* (Cambridge University Press, Cambridge, 1975.)

It was not until the time of the later canonists and the secular law of arms of the middle ages that the world saw an emergence of the notion of proportionality in the conduct of hostilities.⁵⁵ Johnson is of the opinion that the first limits on warfare in classic war doctrine were derived primarily from the influence of the Chivalric Code.⁵⁶

The nineteenth century that saw the demise of the Just War Theory and the development of State sovereignty, especially in terms of decisions to wage war; this is where *ius in bello* began to materialize.⁵⁷ *Ius in bello* and *ius ad bellum* became two bodies of rules; this era Gardam calls the ‘Golden Era’ of *ius in bello*, saw much of the means and methods of warfare codified in the second half of the nineteenth century – most notably reflected in the Hague Conferences of 1899 and 1907.⁵⁸ The attention given to the notion of proportionality in establishing the limit to suffering during times of conflict is reflected in this developmental movement.⁵⁹

Contemporary understanding in modern IHL

Ius in bello proportionality imposes on states the obligation not to use military means that are more destructive than necessary to accomplish their legitimate goals.⁶⁰ This principle is an attempt to balance the potential and actual military and humanitarian interests, that is, the military necessity and concept humanity.⁶¹ Proportionality is the strongest civilian protection available in customary international law;⁶² even if it isn’t explicitly specific mentioned, it is a character in many provisions of the Additional Protocol I to the Geneva Conventions of 1949.⁶³

⁵⁵ J T Johnson, *Ideology, Reason and the Limitation of War* (1975) pp26-80.

⁵⁶ *Ibid*, at 80.

⁵⁷ Gardam (note 2) at 49.

⁵⁸ Gardam (note 2) at 50.

⁵⁹ *Ibid*.

⁶⁰ Fischer (note 29).

⁶¹ A.P.V. Rogers *Law on the Battlefield* (1996) 17.

⁶² Ghoshray (note 24) at 7.

⁶³ International Court of Justice, Dissenting Opinion of Judge Higgins, available at: <http://www.icj-cij.org/docket/files/95/7525.pdf?PHPSESSID=f4f54f2c221c9e6403d19ec03229d593> [Accessed 21 September 2009].

It's modern authority is found *inter alia*, in Article 51(5)(b) of Additional Protocol I. Article 51 of the 1977 Protocol Additional to the Geneva Convention is an 'iteration of *ius in bello* principles because it purports to establish the immunity of non combatants.'⁶⁴ This Additional Article to Protocol I expressly prohibits the launching of military objectives which, "may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."⁶⁵

The principle of proportionality does not nullify military objectives, rather it provides some 'restrictive covenants surrounding military objectives' to reduce, *inter alia*, civilian casualties in military operations.⁶⁶ It makes it mandatory for the military planners, under Article 57(2)(a)(ii) of Protocol I, "to take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects."⁶⁷

The principle of proportionality goes to the very core of evaluating the extent of collateral damage.⁶⁸ Article 8(2)(b)(iv) of the Rome Statute of the ICC⁶⁹ draws a parallel to the above mentioned Protocol on the issue of the "elements of a crime" by drawing on the word 'excessive' found in Article 51(5)(b). It states that a (disproportionate) actionable offence of causing 'excessive incidental death, injury or damage' can only be established when such actions are deemed to be 'clearly excessive' and that excess and proportion is to be assessed 'in relation to the concrete and direct military advantage anticipated.'⁷⁰ This establishes a clearly threshold of

⁶⁴ A.P.V. Rogers, (note 61) "Protocol I was negotiated ... to the very concept of proportionality".

⁶⁵ Protocol I (note 25) art 51(5)(b).

⁶⁶ Ghoshray (note 36).

⁶⁷ Protocol I (note 25) art 57(2)(a)(ii).

⁶⁸ Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998, art. 8(2)(b)(iv).

⁶⁹ Ibid.

⁷⁰ See elements of crimes as reflected by art 8(2)(b)(iv) of the Rome Statute (note 68).

proportionate military attack: that it must follow a clear line of "concrete and direct" anticipatory "military advantage."⁷¹

At a conceptual level, the notion of proportionality is noble; it aims to limit the sufferings of civilians in times of conflict. The sources of this concept are ancient, and find themselves rooted deeply in the history of international law.⁷² However, in practice this principle raises many questions.⁷³ It is clear from practice that the concepts of proportionality and civilian immunity do not necessarily provide clear guidelines for conduct during times of conflict.⁷⁴

It is simple to pronounce that civilians are protected from being the object of attack, but in reality, many justified military actions have injured or killed civilians.⁷⁵ The harsh truth is, that '...[m]embers of the armed forces are not liable for... incidental [collateral] damage, provided it is proportionate to the military gain expected of the attack.'⁷⁶ The challenge as it logically follows, would be to determine how much, if any, collateral damage would be proportional and as such permitted within the ambit of IHL?

Part II. Shortcomings of the contemporary test for Proportionality

Ghoshray states that the 'humanitarian spirit of IHL obliges a military planner to follow a two step process *before* targeting a particular object.'⁷⁷ Firstly, that the

⁷¹ Ghoshray (note 24) at 8.

⁷² Gardam (note 2) at 2.

⁷³ Ibid at chapter 4.

⁷⁴ Ghoshray (note 71): Professor Emanuel Gross begs the question in addressing the issue of non-state actor groups engaged in terrorism: 'How will a democratic state conduct a war against an undefined enemy which is dispersed among the civilian population? Should the democratic state remain subject to the rules of war and avoid causing harm to population... and thereby also avoid causing harm to the terrorists themselves? Or, does the goal of eradicating terrorism justify all means, including collateral injury to innocent civilians ...?' *Use of Civilians as Human Shields: What Legal and Moral Restrictions Pertain to a War Waged by a Democratic State Against Terrorism?*, 16 Emory Int'l L. Rev. 445, 456 (2002) at 478.

⁷⁵ Human Rights Watch, *Fatal Strikes: Israel's Indiscriminate Attacks in Lebanon: Attacks on Fleeing Civilians* (2006), available at: <http://hrw.org/reports/2006/lebanon0806/5.htm#Toc142299223>, [Accessed 20 September 2009].

⁷⁶ Major General A.P.V. Rogers, Lecture delivered at Lauterpacht Center for International Law, University of Cambridge: *Command Responsibility under the Law of War* (1999), available at: www.lcil.cam.ac.uk/Media/lectures/doc/COMDRESP.doc [Accessed 20 September 2009].

⁷⁷ Ghoshray (note 71) (emphasis added).

planners ensure the ‘aggressive manoeuvre is a viable military objective’, and secondly that the planners ‘determine... whether the resulting collateral damage is proportional to the intended military advantage expected to be achieved.’⁷⁸

At face value this two step approach seems to be fairly credible, however it present a *prime facie* point of concern - the likely definition of ‘viable military objective’. If the global military community is not able to reach a standard acceptance as to what a viable military objective is, then, regardless of its contents, applying the principle of proportionality would, by extension, be impossible.

The ICTY notes in *Oric* that Article 52 of Additional Protocol I defines what constitutes a military objective: military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action while offering a definite military advantage.⁷⁹ Judge Higgins, in her dissent to the *Nuclear Weapons Advisory Opinion* has put this issue to rest:

‘... [E]ven a legitimate [military] target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack.’⁸⁰

It follows from what Higgins has said here that any argument advanced which places the importance of attaining the military objective, be it defined as legitimate or otherwise, above that of the compliance with the principle of proportionality must be rejected as unlawful.

⁷⁸ Ghoshray (note 35).

⁷⁹ *Prosecutor v. Oric* (2006) at para 587, citing Protocol I (note 25) art 52(2). See also *Strugar* Trial Judgement para 295; *Galić* Trial Judgement para 51.

⁸⁰ *Legality of the Threat or Use of Nuclear Weapons* I.C.J. Rep. (1996): International Court of Justice, Dissenting opinion of Judge Higgins, para 20, available at: <http://www.icj-cij.org/docket/files/95/7525.pdf?PHPSESSID=f4f54f2c221c9e6403d19ec03229d593> [Accessed 21 September 2009].

Proportionality equation

In analysing the true nature of proportionality, certain shortcomings become exposed. Gardam attempts to more comprehensively understand what the *ius in bello* principle evident in both Protocol I⁸¹ and the Rome Statute⁸² equates to. To do this she explores three ‘component parts’ of what she calls ‘the proportionality equation.’⁸³ They are 1) the meaning of ‘attack’, 2) what is encompassed by the term ‘military advantage’⁸⁴ and 3) what should be considered in determining ‘excessive collateral damage’⁸⁵. In breaking down what constitutes the make-up of proportionality in this way, it becomes easier to realise, and potentially overcome, some of its inherent pitfalls.

1) The meaning of ‘attack’

As mentioned in the outline of this paper I will not be exploring the meaning or definition of the concept of ‘attack’, rather at this point I will address contentions surrounding the actual *understanding* of the concept.

There is a view that the proportionality test is intended to apply to attacks as individual military operations of a specific unit;⁸⁶ that small military operations should each be seen as separate from one another in terms of the application of proportionality. This approach is however limiting as it does not always reflect the reality of an overall military operation of which a single attack is merely a part of. Modern armed conflict is complex, often requiring many small operations and intricate interdependence of different military components. Also, the application of

⁸¹ Protocol I (note 25).

⁸² Rome Statute (note 68).

⁸³ Gardam (note 2) at 98-104, (also component parts of Ghoshray’s two step process mentioned above).

⁸⁴ Protocol I (note 25) art 51(5).

⁸⁵ Protocol I (note 25) art 51(5)(b); Rome Statute (note 68).

⁸⁶ See C Swinarski, B Zimmermann (eds.) *ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 603.

the principle of proportionality would be very difficult at the lower level of command.⁸⁷

Gardam draws on reservations and interpretive declarations by States with respect to Protocol I in her conclusion on this point. The notion of an attack in assessing military advantage in the Protocol is understood to ‘encompass an overall operation that may be constituted by several targets [or operations]’⁸⁸

2) ‘[M]ilitary advantage’

The major factor in determining the military advantage in the context of the proportionality equation is the importance of the target for achieving a particular military objective.⁸⁹ It follows that the more vital the target in question is to military strategy, the higher the acceptable level of civilian casualties and damage to civilian property will be. A further problem here is that IHL presupposes that parties to an armed conflict have rational aims⁹⁰

Military advantage however is somewhat limited in terms of what can be factored into the equation by the Protocols’ ‘concrete and direct military advantage’.⁹¹ The ICRC Commentary proposes that the military advantage anticipated from an attack ‘should be substantial and relatively close, and that advantages which are hardly perceptible, and those which would only appear in the long term, should be disregarded.’⁹²

This more narrow evaluation however, would exclude military advantage from being assessed on a cumulative basis. The issue raised in the *Kupreskic* judgment⁹³ regarding the other extreme of case-by-case analyses though is that ‘it may happen that single attacks on military objectives causing incidental damage to civilians... do

⁸⁷ F Mulinen *The Law of War and the Armed Forces* (1978) 202 IRRC 20 at 42-3, available at: <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JMEB> [Accessed 25 September 2009].

⁸⁸ Gardam (note 2) at 100.

⁸⁹ Ibid.

⁹⁰ M Sassoli and A Bouvir (note 26).

⁹¹ See *inter alia*, *Prosecutor v Galic* (2003) ICTY para 58 in applying Protocol I (note 25) art 51(5).

⁹² See C Swinarski, B Zimmermann (note 86) at 684.

⁹³ *Prosecutor v Kupreskic (Trial Judgement)* (2000).

not [individually] appear on their face to fall foul *per se* of the loose prescriptions of Articles 57 and 58 (or of the corresponding customary rules)' while if assessed cumulatively, may have been the case.⁹⁴

If casualties are expected to result in excess of concrete and direct military advantage anticipated, then the attack should not be pursued.⁹⁵

It is now commonly accepted that 'military advantage taken into consideration should be that which results from the action as a whole, and not simply from one of its isolated or particular components.'⁹⁶

3) The determination of 'excessive collateral damage'

As Ghoshray alludes to, the Protocol requires steps to be taken in the planning stages of a military operation. Gardam says the last of which is the final assessment of whether or not, despite the precautions taken, the attack may still result in excessive civilian casualties, injury to civilians or damage to civilian property in light of the anticipated military advantage.⁹⁷ This assessment of potential collateral damage would be far easier if there was a list of requirements for the military planners to consider. It would make both comprehension and compliance with the Protocol by military planners more procedural and as such likely.

I would contend though that the existence of such a checklist would, by its nature, delimit the nature of the assessment, thereby undermining the essential ability of the interpretation of the Protocol to adapt to changes in methods and means of evolving warfare.

⁹⁴ Ibid at para 526.

⁹⁵ See *inter alia* *Stanislav Galic* (2003) ICTY (note 91).

⁹⁶ See *Final Report to the prosecutor by the committee established to review the NATO bombing campaign* against the Federal Republic of Yugoslavia (2000) [hereinafter *NATO Bombings*] at para 52: 'The committee understands [the assessment of military advantage], to refer to an *overall* assessment of the totality of civilian victims as against the goals of the military campaign,' available at: <http://www.icty.org/sid/10052> [Accessed 15 September 2009].

⁹⁷ Gardam (note 2) at 102.

In calculating expected levels of collateral damage and to what extent they may be deemed to be 'excessive' or not, planners will be forced to 'revisit many of the assessments undertaken so as to minimize casualties.'⁹⁸ These would primarily include, but not be limited to, the characteristics and choice of weapons for the operation and the nature and location of the target(s).

Weapons have a wide range of differing capabilities and also vary in terms of target accuracy. In modern armed conflict there is a greater presence and availability than ever before of weapons that are controlled by sophisticated guidance systems. These weapons should be employed for the furtherance of civilian safety during times of hostilities over those that would be more likely to cause unnecessary (albeit incidental) harm.

The nature and location of the target as mentioned above are also of primary importance. Whether or not, and consequently the extent to which, the target is intermingled with the civilian population needs to be established. The nature and importance of the potentially effected civilian property must be examined.⁹⁹

Following from this is a point of (mis)understanding that attracts many differing views, especially in modern IHL - to what extent must a military planner take into account the likely casualties resulting from a planned military operation if the defender deliberately places military objectives near to civilian objects?

Preferring a more humane approach, Gardam suggests that instead of discounting the applicability of the principle of proportionality in limiting the anticipated casualties completely, that the planners' force be assessed in terms of what they have control over.¹⁰⁰ So although the tactic of exposing civilians to risk will not necessarily prevent an attack on a target, it will regulate the manner in which it is carried out.¹⁰¹

⁹⁸ Ibid.

⁹⁹ See J D Reynolds *Collateral damage on the 21st century Battlefield: enemy exploitation of the law of armed conflict, and the struggle for a moral high ground* (2005) 56 *Air Force Law Review* 1, 15 (2005).

¹⁰⁰ Gardam (note 2) at 104.

¹⁰¹ Kolb (note 35) refers to the application of art 57(3) of protocol I in NATO Bombings (note 96) at paras 71-79. Also see ICRC *General rules on methods and means of warfare*, available at:

After having reaffirming the fact that the use of civilians as human shields is contrary to the rules of the Protocol under Article 51(7), I conclude this point by highlighting that the failure of the defending state to abide by these rules does not relieve the attacker from its obligation under Article 51(8), to consider whether the casualties will be excessive or not.¹⁰²

When assessing the potential for and scope of collateral damage, the question of a time frame is also of importance. Whether this assessment of humanitarian considerations should be conducted in the short term or long term is unclear. Nowhere is there any reflection on the importance of long term damage assessment.¹⁰³ Greenwood points out that the Protocol was negotiated with the primary intention of limiting casualties during attacks.¹⁰⁴ However, if short term effects are the narrow focus of assessment then there is likely to be a lower threshold and as such a less effective limit on the level of collateral casualties suffered during an attack.¹⁰⁵

The geographical location can also be of significant importance. If an attack on the area would result in for example a landslide or flood, this would obviously have a massive effect on the potential civilian, and other, loss of life and property.

In determining whether an attack was proportionate, it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator would have acted in the same way in the heat of battle.¹⁰⁶ An issue that arises out of this is that the assessment of a commanders proportionality is made

http://www.icrc.org/web/eng/siteeng0.nsf/html/section_ihl_methods_and_means_of_warfare?opendocument [Accessed 22 September 2009].

¹⁰² See Protocol I (note 25) art 58, detailing the precautions to be taken against the effects of attack – these are mandatory and cannot be justifiably waved in any circumstance.

¹⁰³ Gardam (note 100).

¹⁰⁴ C. Greenwood *Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflict* in P. Rowe (ed.) *The Gulf War (1990-1991) in International Law and English Law* (1993) 63 at 79.

¹⁰⁵ P. Rowe *Kosovo 1999: The Air Campaign – Have the provisions of Additional Protocol I withstood the test?* (2000) IRRC at 147, available at:

<http://www.icrc.org/web/eng/siteeng0.nsf/html/57JOCT> [Accessed 23 September 2009].

¹⁰⁶ *Galic* (note 91) at para 58, ‘The Trial Chamber notes that the rule of proportionality does not refer to the actual damage caused nor to the military advantage achieved by an attack, but instead uses the words “expected” and “anticipated”.

in hindsight. While it is easy to make assumptions and critique actions pursued on the battlefield, it is difficult if not impossible to accurately interpret the true circumstances of a military operation after the fact.

If sufficient warnings of immanent attacks are not given to the population before the time, this would also be a major factor to consider when assessing the likely extent of excessive civilian collateral damage. It is however understood by the wording of Article 57(2)(c) that advanced warnings need to be given if the circumstances do not permit.¹⁰⁷ Here it must be noted that this subjective assessment of the circumstances on behalf of the military planner (in deciding whether or not the circumstances warrant a warning) is an inherent problem in of itself.

Even though Protocol I, along with the principle of proportionality, enjoys a customary international law status, the difficulty remains in its application. As the Committee established to review NATO's bombing campaign in the former Yugoslavia emphasised:

'The main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied. It is relatively simple to state that there must be an acceptable relation between the legitimate destructive effect and undesirable collateral effects. ... Unfortunately, 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 than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values.'¹⁰⁸

The concept of proportionality suffers from a fault inherent in any attempt to balance (in this case military) rights and (humanitarian) interests – as noted in the NATO case,¹⁰⁹ the concepts are incomparable.¹¹⁰ It would be impractical, even impossible, to provide the different variables with correspondingly different values.¹¹¹

¹⁰⁷ Protocol I (note 25) art 57(2)(c).

¹⁰⁸ NATO Bombings (note 96) at para 48.

¹⁰⁹ NATO Bombings (note 96).

¹¹⁰ Cohen (note 14) at 9, citing Asa Kasher & Amos Yadlin, *Military Ethics of Fighting Terror: An Israeli Perspective*, 4 J. OF MIL. ETHICS 3, 22 (2005)

¹¹¹ See W.J. Fenrick, *Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia*, (2001) 12 European Journal of International Law 489, 499.

To assign these variables values would be the attempt at balancing military advantage against human lives; how should one assess the worth of a (or thousands of) human life? Even if this hurdle was overcome, Cohen puts forward the problem of further distinguishing the values of these human lives between those of citizens from both sides of the conflict –would the values attached to the lives of the attacking or defending (military entity) be weighted more heavily, or would they be equal?¹¹²

Further, Cohen questions whether or not the parties involved in hostilities would be entitled to ‘protect their own citizens or soldiers at the cost of endangering uninvolved enemy civilians, [and if so] at what ratio?’¹¹³

Looking past these moral issues regarding the nature of proportionality, the temporal element of its character presents one particularly noteworthy issue. As has been discussed, the test of proportionality is applied *ex ante*, that is, before the actual military operation. Hence, the military and humanitarian effects of the attack, as well as the harm it is designed to prevent, are ‘merely speculative and ultimately depend on subjective risk assessments’ by military planners.¹¹⁴

This ‘balancing’ test suffers from a serious drawback in the modern era of armed conflict; it depends on individual subjective human characteristics. During times of war these ‘human characteristics become severely infected with prejudice, irrationality, hatred and barbarism.’¹¹⁵

These, and other limitations not mentioned above, seem to raise many legal questions with respect to several major military operations of the recent past.¹¹⁶ The formula of proportionality in article 51(5)(b) of Protocol I, remains ambiguous and difficult to implement. It is because of this ambiguity, that the international community is left with these questions that will *for now* unfortunately be left unanswered.

¹¹² Cohen (note 14) at 2.

¹¹³ See Eyal Benvenisti, *Human Dignity in Combat: The Duty to Spare Enemy Civilians* (2006) 39 Israeli Law Review 81, 92-93.

¹¹⁴ Cohen (note 14) at 4.

¹¹⁵ Ghoshray (note 71).

¹¹⁶ Gardam (note 2) at 101.

After having expanded on Gardam's 'Equation of Proportionality' and further extensively discussed the understanding of the principle of *ius in bello* proportionality, at this point I arrive at an unnerving conclusion. In order to determine the extent to which the civilian casualties would be "excessive" when weighed against the anticipated military advantage, (to be found disproportionate in terms of IHL), one would ultimately need to evaluate the factual circumstances concerning the military exercise; evaluating the principle of proportionality depends on the facts of the case at hand. Hackneyed

Proposed solutions to overcoming shortcomings in interpretation of proportionality

Having enumerated but a few modern points of debate regarding *ius in bello* proportionality, I will now advance two proposed steps towards more easily applying the principle(s) in question. Finally I will arrive at what I will conclude to be the most feasible mechanism for the application and assessment of contemporary *ius in bello* proportionality.

Doctrine of Double Effect

The doctrine of double effect 'is often invoked to explain the permissibility of an action that causes a serious harm, such as the death of a human being, as a side effect of promoting some good end.'¹¹⁷ Fischer suggests that the application of the Doctrine of Double Effect ("DDE") as a means of performing 'the calculus necessary to determine when unintended, but foreseeable, civilian casualties are morally justified in the context of a military action'.¹¹⁸ In his opinion this doctrine 'balances parties' interests in defence and civilian immunity while accounting for actors'

¹¹⁷ Stanford Encyclopaedia of Philosophy, *Doctrine of Double Effect*, available at: <http://plato.stanford.edu/entries/double-effect/> [Accessed 28 September 2009].

¹¹⁸ Fischer (note 29) citing See Stanford Encyclopedia, War, (Edward N. Zalta ed., 2005), <http://plato.stanford.edu/entries/war/> (distilling Aquinas's concept of the DDE into a mathematical formula). A classic statement of the DDE is that if an actor ("X") considers an attack ("T"), which the actor believes will produce both good effects ("J") and bad effects ("U"), "the DDE permits X to perform T only if: 1) T is otherwise permissible; 2) X only intends J and not U; 3) U is not a means to J; and 4) the goodness of J is worth, or is proportionately greater than, the badness of U."

motives'.¹¹⁹ However, this is about all Fischer says about the applicability of this Doctrine and I believe this speaks of to its inadequacy in modern times of conflict.

The bridging of *ius ad bellum* and *ius in bello*

Benvenisti suggest that bridging the divide between *ius in bello* and *ius ad bellum*, by 'expanding the *ius in bello* proportionality test to include aspects of the *ad bellum* conditions, offers a possible response to the... challenges [of the application of the principle of proportionality].'¹²⁰

He states that 'according to the traditional *ius in bello* standard, each enemy is entitled to pursue its adversary until its total defeat..., it increasingly becomes relevant to inquire - at least in political discourse, if not in positive law - to what extent continuing the fight is necessary [and proportionate].'¹²¹

By allowing *ius in bello* proportionality analysis to be able to take into account not only the *ad bellum* question of 'who is to blame for the commencement of hostilities', but also for it to incorporate 'the decision of one of the parties to pursue unrelated goals or to prolong the military confrontation instead of negotiating its end,' he contends that it would offer a more comprehensive assessment of the legality of the military action.¹²²

Under this proposed 'bridged' framework, the party who had either no legitimate reason to resort to force, or no good reason to pursue it further, 'would be more limited in its ability to justify the infliction of harm on non-combatants when pursuing its military objectives.'¹²³

¹¹⁹ Fischer (note 29) at 9.

¹²⁰ E Benvenisti *Use of Force: Rethinking the Divide Between Jus ad Bellum and Jus in Bello in Warfare Against Non-state Actors* (2009) 34 *The Yale Journal of International Law* 541 2.

¹²¹ While some believe that the jus ad bellum assessment is applicable throughout the military conflict, see, e.g., Christopher Greenwood, *The Relationship Between Ius ad Bellum and Ius in Bello*, 9 *Rev. Int'l Stud.* 221 (1983), others maintain that the ad bellum proportionality requirement becomes irrelevant once war is raging, see, e.g., Yoram Dinstein, *War, Aggression and Self-Defence* 237-42 (4th ed. 2005). But even Greenwood maintains that the ad bellum and the in bello norms that apply simultaneously should remain insulated from each other.

¹²² Benvenisti (note 120) at 3.

¹²³ *Ibid.*

If these propositions were to become part of the law, Benvenisti contends they would effect a major change: *ius in bello* proportionality analysis would then require the attacker to explain the necessity of attaining the military objective. The necessity of such action is taken for granted [through the subjective valuation by the military planners] in traditional IHL.

While I would not be completely opposed to the notion of ‘contextual assessment’ lying at the heart of Benvenisti’s proposal, I would be wary to encourage further blurring of the divided between these two regimes of law. If the *ad bellum* resort to force is deemed to be unfit and as a result the *ius in bello* actions are rendered equally unfit, then there would be no incentive for armed forces to act in line with IHL once engaged in unlawful armed hostilities. If we begin to mix the applications in certain instances, and of certain rules of armed conflict, the rule of law will become even more (unnecessarily) complex; both in understanding and in application.

Part III. The contemporary future?

I believe the most realistic means of accurately applying proportionality in contemporary society can be extrapolated from the Israeli Supreme Court sitting as the High Court of Justice (HCJ) in the *Targeted Killing case*.¹²⁴ Without going into the facts of the case, Justice Aaron Barak (then President of Israel's Supreme Court) postulated in his judgment that ‘...operations ought to be made subject to *ex ante* and *ex post* examination or investigation.’ Further that ‘that examination must – thus determines customary international law – be of an objective character.’¹²⁵

With relation to *ex ante* review; bearing in mind the precautionary obligations introduced by article 57 of Protocol I,¹²⁶ Barak held that a ‘meticulous examination’ of every case potentially giving rise to collateral damage is required prior to the

¹²⁴ *Public Commission Against Torture in Israel v Government of Israel* [2006] [hereinafter *Targeted Killing*], available at: http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf.

¹²⁵ *Targeted Killing* (note 124) at para 54.

¹²⁶ Protocol I (note 25) art 57(2)(a).

attack.¹²⁷ Barak then not only went on to introduced a requirement for *ex post* review, but he stated that this review process should ultimately be subject to *judicial* supervision; that 'judicial review of the decisions of the objective examination committee should be allowed'¹²⁸ Peer review by other states or organs of state would be insufficient as a result, *inter alia*, of the political pressure in the global community. So it seems that for the Israeli Supreme Court, the solution to the ambiguity of the application of the term "proportionality" lies in investigations, both before and after the military operations, and ultimately if necessary by the judiciary.¹²⁹

This, however, Cohen recognises is not without its complications. I agree with him that the existence of these investigative procedures does nothing in terms of further defining the principle of proportionality and how it should apply. In my view though, it provides the essential platform for this to happen in future.

Drawing on 'reasonableness' arguments, he explores at depth what he sees as apt requirements for *ex ante* investigations.¹³⁰ After only mentioning this concept briefly, I will instead primarily focus on what would be required in *ex post* review.

The *ex ante* review is one of the basic requirements of Protocol I,¹³¹ and it seems that most armies *are* using legal advisors to verify that such a review is undertaken.¹³² Whatever the context, states must be able to verify that their militaries conduct an *ex ante* proportionality review prior to military operations.¹³³

Ex post reviews can have many different meanings. Ultimately though, what it provides for is an accountability mechanism to be in place. Whether it be in the form of internal or external investigations, it is a means of evaluating the

¹²⁷ *Targeted Killing* (note 124) at 46.

¹²⁸ *Ibid* at 54.

¹²⁹ See A Cohen & Y Shany, *A Development of Modest Proportions: The Application of the Principle of Proportionality in the Targeted Killings Case*, 5 J. INT'L CRIM. JUST. 310, 317 (2007).

¹³⁰ Cohen (note 14) at 6.

¹³¹ *Ibid*.

¹³² *Ibid*, See Kenneth Anderson, *The Role of the United States Military Lawyer in Projecting a Vision of the Laws of War*, 2 CHI. J. INT. L. 445 (2003) (discussing legal advisors in modern military conflicts).

¹³³ Cohen (note 130).

effectiveness and legality of military missions. *Ex post* review ensures that a judicial body will eventually examine the actions of a military commander;¹³⁴ that there is a separation of powers. It stands to reason that a commander who knows that he will be held accountable for his actions is more likely to err on the side of caution in considering all possibilities when reaching a decision whether or not to act.

As is the case with many investigations, there is the possibility for an *ex post* review to have inaccurate results. In cases involving accusations of human rights violations, many courts have given effect as to how an investigation should, in their eyes be conducted. Most succinctly and expansive though, would be the description given by the European Court of Human Rights in the *Isayeva* case.¹³⁵

The European Court of Human Rights ruled that the death of civilians provided *prima facie* grounds for claiming violation of the right to life, and deemed the internal Russian investigation that exonerated all participants to have been insufficient.¹³⁶ Here the court specified that in order for an investigation in these matters to be considered adequate, four criteria had to be met:

- 1) The formal and practical independence of the investigators from the persons whose actions they were examining;
- 2) The ability of the investigation to lead to effective remedies including, where appropriate, criminal investigations;
- 3) The promptness of the investigation; and
- 4) The availability of public scrutiny.¹³⁷

International law does not limit the implementation of an *ex post* review to only these requirements. However, I contend that the four requirements set out by the ECHR provide the general basis for the type of investigation that should be initiated into operations involving civilian casualties.¹³⁸

¹³⁴ Cohen (note 14) at 7.

¹³⁵ *Isayeva v. Russia* (2005) EHRR.

¹³⁶ *Ibid* at 215-24.

¹³⁷ *Ibid* at 209-14.

¹³⁸ Cohen (note 134).

A potential concern that may in future arise out of these four criteria is that nowhere is there an indication as to their relative weighting in value, either in assessment or application. However, Cohen asserts that an *ex post* investigation conducted in accordance with the guidelines set in the *Isayeva* case is 'likely to force soldiers and commanders to consider an operation's impact on 'collateral damage' and its compliance with the requirements of proportionality when they plan or carry out an attack.'¹³⁹ He goes on to add that in order for such an investigation to be [more] effective, the members of the investigative team 'should include military personnel capable of assessing the reasonableness of the actions undertaken by the attacking force.'¹⁴⁰

Application and Conclusion

While Israel is not a party to either the Rome Statute or the Additional Protocol, it accepts the principles of distinction, military necessity, and proportionality to reflect customary international law.¹⁴¹

Israel claims to be the victim of Palestinian aggression but the sheer asymmetry of power between the two sides leaves little to no room for doubt as to who is the real victim. This is indeed a conflict between 'David and Goliath, but the Biblical image has been inverted - a small and defenceless Palestinian David faces a heavily armed, merciless and overbearing Israeli Goliath. The resort to brute military force is accompanied, as always, by the shrill rhetoric of victimhood and a farrago of self-pity overlaid with self-righteousness.'¹⁴²

When addressing the issue of the ongoing hostilities in Israel, on 23 September 2009, during his speech before the U.N, President Obama expressed that the price of the conflict is paid by both Israeli and Palestinian citizens. That 'after all

¹³⁹ Ibid.

¹⁴⁰ The commission of the United Nations, appointed to investigate the Qana incident in Lebanon in 1996 was headed by a retired General. See The Secretary-General, *Report of the Secretary's General Military Advisor Concerning the Shelling of the United Nations Compound at Qana on 18 April 1996*, U.N. Doc. S/1996/337 (1 May 1996).

¹⁴¹ Operation in Gaza (note 9) 44 at para 120.

¹⁴² A Shlaim *How Israel brought Gaza to the brink of humanitarian catastrophe*, 7 January 2009, available at: <http://www.guardian.co.uk/world/2009/jan/07/gaza-israel-palestine> [Accessed 25 September 2009].

the politics and all the posturing, [the issue(s)] is about the right of every human being to live with dignity and security.’¹⁴³ This ‘dignity and security’ I believe needs to be sought through the legal framework of *ex ante* and *ex post* review.

Ex ante review: According to reports, both independent and from the MFA, the Israeli Defense Force [IDF] required military planners to take humanitarian law into account during the planning stages of the operation.¹⁴⁴ Also it is clear that legal advisors were involved in the planning of many operations, and provided advice regarding specific targets.¹⁴⁵

Prima facie evidence suggests that the *ex ante* process seems to have complied with proposed norms insofar as it has followed the correct *steps* of legitimate planning. The content of this planning, or rather the results of the humanitarian assessments undertaken before the military operation, would remain public debate without the existence of the *ex post* review.

Ex post review: In applying this principle to Operation Cast Lead, Israel’s compliance with the suggested framework is somewhat less convincing. Here I will consider the credibility of two *ex post* investigations that have taken place on the subject of Operation Cast Lead; one by the IDF¹⁴⁶ and one commonly referred to as the Goldstone Report.¹⁴⁷

¹⁴³ Text of Obama's speech at the United Nations, September 23, 2009 [NRO Staff], available at: <http://corner.nationalreview.com/post/?q=MjU5YWQzZDdmYTc2ZmE0MGJmY2Y3ZGMzODYwOjU5YmNzc> [Accessed 25 September 2009].

¹⁴⁴ Y Feldman, *Operation Cast Lead: The Military Advocates Let the IDF Win*, HAARETZ, Jan. 23, 2009, (Hebrew), available at: <http://www.haaretz.co.il/hasite/spages/1057768.html> [Accessed 19 September 2009]. See also Operation in Gaza (note 9) 10.

¹⁴⁵ Ibid.

¹⁴⁶ Operation in Gaza (note 9).

¹⁴⁷ Goldstone (note 8). Goldstone is scheduled to appear in Geneva to present the report in person on the 29th of September, during the Council debate under its permanent agenda item on Israel. Presenting a similar but separate report on the January 2009 Hamas-Israel war, already released and available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A%20HRC%2012%2037_AEV.pdf, will be UN High Commissioner for Human Rights Navi Pillay.

IDF Report

The IDF's position is that the only investigations that will take place are internal military commissions, and criminal investigations by the IDF's Chief Legal Advisor.¹⁴⁸ It contends that while there are internal investigations currently underway,¹⁴⁹ conclusions can be drawn from already complete investigations made by the IDF.¹⁵⁰

Results from five teams of investigators, appointed by the IDF to look into specific incidents in Operations Cast Lead were released on April 22, 2009 by the IDF spokesperson.¹⁵¹ These investigations found *inter alia* that throughout the fighting in Gaza, the IDF operated in accordance with international law and that any incidents that may have been contrary to humanitarian values were unavoidable, and that they regrettably occur in all combat situations.¹⁵²

Internal investigations such as these and those resulting in the 'Operation in Gaza' report, conducted by the IDF themselves, however, do not in my mind, meet the necessary threshold of impartiality of *ex post* investigations as suggested by both Israeli and international jurisprudence.

The four characteristics of an *ex post* review set out in the *Isayeva* case require firstly the 'formal and practical independence of the investigators from the persons whose actions they were examining'. In the present case, the very nature of the internally-appointed investigators being members of the IDF would logically lead to a degree of bias in their findings. As a result of their association to the IDF, their independence from the subjects under investigations would not be *formal*, neither

¹⁴⁸ Cohen (note 14) at 9, noting the Letter of Senior Assistant to the Attorney General to the Association of Civil Liberties in Israel (Feb. 24, 2009) (on file with author).

¹⁴⁹ The MFA's response to the question, 'what is the status of the investigations?' is available at: http://www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Hamas+war+against+Israel/FAQ-Operation_in_Gaza-Legal_Aspects.htm#42 [Accessed 25 September 2009].

¹⁵⁰ IDF spokesperson *IDF Announcement: Findings from Cast Lead Investigations*, April 22 2009 available at: <http://idfspokesperson.com/2009/04/22/idf-announcement-findings-from-cast-lead-investigations/> [Accessed 25 September 2009].

¹⁵¹ Cohen (note 112) at 9.

¹⁵² IDF spokesperson (note 150).

would it be *practical* to assume there wouldn't be the potential for bias. IDF commissions are not independent, and cannot be so.¹⁵³

Secondly, the ability of the investigation to lead to effective remedies, including where appropriate, criminal investigations, is required. The military guidelines of the IDF allow for effective remedies and for criminal investigations to be both recommended and initiated.¹⁵⁴ However, there was no mention of the scope of these commissions extending to include the power to impose or even to recommend any sanctions.¹⁵⁵

As Cohen notes, criminal investigations would become problematic for at least three reasons; 'the legal advisors unit of the IDF was involved in many of the decisions that require investigation';¹⁵⁶ secondly, that 'the legal advisors [could not be] completely independent';¹⁵⁷ and third, that 'a criminal investigation is always (and always should be) about the rights of the accused, not necessarily about learning the truth.'¹⁵⁸

So in theory this would be possible, however, this step would necessitate their being an allowance made for this to happen. Also it would require an unfavourable, unbiased finding out of the investigation which is unlikely to occur within internal investigative framework.

Thirdly, the investigation would need to be prompt. Here there are no hard and fast rules, however in the case at hand I would accept the timeframe employed by the IDF's investigations that were reported on in April, however, I would agree

¹⁵³ The announcement claims that the officers were independent, and that they were not part of the chain of command in Operation Cast Lead. Cohen (note 14) at 9 suggests, that independence means 'not only being formally independent, but also disconnected from the investigated institution.'

¹⁵⁴ MFA FAQ: *The Operation in Gaza - Factual and Legal Aspects* (2009), available at: <http://www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Hamas+war+against+Israel/FAQ-Operation+in+Gaza-Legal+Aspects.htm#42> [Accessed 24 September 2009].

¹⁵⁵ The full reports were not released, so one cannot be sure. Regardless, even in cases where the reports found "mistakes", the IDF's spokesperson announcement does not mention any sanctions.

¹⁵⁶ Cohen (note 14) at 9 cites Colonel, Advocate Pnina Sharvit-Baruch (retired), former IDF chief legal advisor for international law, Lecture at Tel Aviv University (Feb. 2, 2009).

¹⁵⁷ Cohen (note 14) at 9: The Legal Advisors unit is a military unit, headed by the IDF's chief attorney. The IDF's chief attorney is appointed by the Minister of Defence according to the recommendation of the IDF's chief of staff. Military Adjudication Law, art. 177 (1955) (Isr.).

¹⁵⁸ Cohen (note 151).

with Goldstone that the six month delay in criminal investigations is undue and unjust.¹⁵⁹

Lastly, the *Isayeva* case requires the availability of public scrutiny. As the MFA outlines, all decisions of the Military Advocate General may be subject to further review by the Attorney General of the State of Israel.¹⁶⁰ The fact that it was decided that all findings of the five major field investigations, and the Military Advocate General's decisions, be transferred for review by the Attorney General is a mere factual scenario. The words 'may be subject to further review' (emphasis added) impose a restriction that could prevent this process from taking place. And after all, how much public scrutiny would be afforded by the Attorney General on review anyway?

After having applied the requirements from the *Isayeva* case, it becomes clear in my mind that the *ex post* reviews, commissioned and or completed by the IDF itself, lack credibility in international law and consequently so would their findings.

Goldstone Report

Following the adoption on 12 January 2009 of resolution S-9/1 by the United Nations Human Rights Council at the end of its 9th Special Session,¹⁶¹ on 3 April 2009, the President of the Human Rights Council established an international independent Fact Finding Mission with the mandate: "to investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during or after."¹⁶²

The Mission comprised of four people: Professor Christine Chinkin, Professor of International Law at the London School of Economics and Political

¹⁵⁹ Goldstone (note 8) 505 at para 1617.

¹⁶⁰ MFA *FAQ: The Operation in Gaza* (note 154).

¹⁶¹ United Nations fact finding mission on the Gaza conflict, available at: <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/FactFindingMission.htm> [Accessed 26 September 2009].

¹⁶² *Ibid.*

Science, who was a member of the High Level Fact Finding Mission to Beit Hanoun (2008); Ms. Hina Jilani, Advocate of the Supreme Court of Pakistan and former Special Representative of the Secretary General on Human Rights Defenders, who was a member of the International Commission of Inquiry on Darfur (2004); Colonel Desmond Travers, a former officer in the Irish Armed Forces and member of the Board of Directors of the Institute for International Criminal Investigations (IICI); and as the missions head, Justice Richard Goldstone, former member of the South African Constitutional Court and former Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda. The mission also had the support of a Secretariat, provided for by the Office of the High Commissioner for Human Rights (OHCHR).¹⁶³

The requirements from the *Isayeva* case require firstly the ‘formal and practical independence of the investigators from the persons whose actions they were examining’. As alluded to above, the members of the mission were all highly skilled in their various fields, with vast (including military) experience between them, and had no direct association to any of the parties they were examining. On this basis I would contend that the mission satisfies the first requirement of impartiality.

The ability of the investigation to lead to effective remedies including, where appropriate, criminal investigations is required as the second characteristic of credible *ex post* review. One of the reports’ listed recommendations is that, within the framework of Article 40 of the Charter of the United Nations, ‘in the absence of good faith investigations that are independent and in conformity with international standards, having been undertaken...’ (by the appropriate authorities of the State of Israel) ‘... or being under way within six months of the date of its resolution, again acting under Chapter VII of the Charter of the United Nations, [the Mission] refer[s] the situation in Gaza to the Prosecutor of the International Criminal Court pursuant to Article 13 (b) of the Statute of the International Criminal Court.’¹⁶⁴ It is clear from its exhaustive list of recommendations that it was within the missions mandate to provide both remedies and avenues for criminal investigations.

¹⁶³ Ibid.

¹⁶⁴ Goldstone (note 8) 547 at para 1766(3).

As already mentioned, the definition of the expediency element to the *ex post* review is a contentious one. I would contend though the mission was given the date of 29 September as its submission date and as such has fulfilled its temporal requirement.¹⁶⁵

Lastly the requirement of public scrutiny needs to be satisfied. An advanced edited version of the missions report was issued on 15 September 2009.¹⁶⁶ This, coupled with the public nature of the Missions report of its findings on 29 September would be more than adequate in my view.

In applying the same requirements to the Goldstone Report as I have to the IDF review(s), I conclude the (UNHRC) Mission's report, to not only have adequately satisfied them, but also that the report and nature of the review itself is credible in international law.

Having established this, I would further argue that the *actual findings* of the report would be supported by the same impartial credibility. The Missions mandate was investigative; commissioned to inspect, analyse and report back to the international community on its findings. If the credibility of this *ex post* review is understood to be accepted, which would be my contention, then it stands to reason that the facts presented by the report would also be accurate.

The report found *inter alia* that both Israel and Palestinian militant groups took actions amounting to war crimes, and possibly crimes against humanity;¹⁶⁷ that “[w]hile the Israeli government... sought to portray its operations as essentially a response to rocket attacks in the exercises of its right to self-defence..., the mission considers the plan to have been directed, at least in part, at a different target: the people of Gaza as a whole.”¹⁶⁸ Also that Operation Cast Lead was “a deliberately disproportionate attack [by the IDF] designed to punish, humiliate and terrorize a civilian population, radically diminish its local economic capacity both to work and

¹⁶⁵ United Nations fact finding mission on the Gaza conflict (note 161).

¹⁶⁶ Goldstone (note 8).

¹⁶⁷ N MacFarquhar *Inquiry finds Gaza war crimes from both sides*, available at: http://www.nytimes.com/2009/09/16/world/middleeast/16gaza.html?_r=1 [Accessed 21 September 2009].

¹⁶⁸ Goldstone (note 8) 523 at para 1680.

to provide for itself, and to force upon it an ever increasing sense of dependency and vulnerability.”¹⁶⁹

Ultimately it held in paragraph 1692, that ‘whatever violations of international humanitarian and human rights law *may* have been committed, the systematic and deliberate nature of the activities described... leaves the Mission in no doubt that responsibility lies in the first place with those who designed, planned, ordered and oversaw the operations.’¹⁷⁰

While IHL aims to circumscribe certain behaviour in armed conflict, there will always be States, non-State armed groups and individuals who will not be deterred from violating the rules, regardless of the penalty involved.

“It is the view of the Mission that universal jurisdiction is a potentially efficient tool for enforcing international humanitarian law and international human rights law, preventing impunity and promoting international accountability. In the context of increasing unwillingness on the part of Israel to open criminal investigations that comply with international standards and establish judicial accountability over its military actions in the Occupied Palestinian Territory, and until such a time as clarity is achieved as to whether the International Criminal Court will exercise jurisdiction over alleged crimes committed in the Occupied Palestinian Territory, including in Gaza, the Mission supports the reliance on universal jurisdiction as an avenue for States to investigate violations of grave breach provisions of the Geneva Convention of 1949, prevent impunity and promote international accountability.”¹⁷¹

The global motivation for accountability in modern international law for violations of IHL is great.¹⁷² Cases specifically pertaining to Israel are pending before national courts of several States, such as Spain¹⁷³ the Netherlands¹⁷⁴ and Norway¹⁷⁵; in South

¹⁶⁹ Ibid 525 at para 1690.

¹⁷⁰ Ibid 526 at para 1692.

¹⁷¹ Ibid 515 at para 1654.

¹⁷² A McDonald *Operation Cast Lead: Drawing the Battle Lines of the Legal Dispute* (2009) 16 Human Rights Brief 25 7.

¹⁷³ Ibid, citing “Auto, 4 May 2009, Juzgado Central de Instrucción No. 4, Audiencia Nacional; Auto No. 1/09, 9 July 2009, Sala de lo Penal Pleno, Audiencia Nacional.”

¹⁷⁴ Ibid, citing PCHR, “*Torture victim seeks prosecution of former head of Israeli general security services*”, press release, 6 October 2008, available at: <http://www.pchrgaza.org/files/PressR/English/2008/92-2008.html>.

¹⁷⁵ Spiegel Online International, “War crimes in Gaza? Palestinian lawyers take on Israel”, 6 May 2009, available at: <http://www.spiegel.de/international/world/0,1518,628773,00.html> [Accessed 23

Africa, a request for prosecution is being considered by the National Prosecuting Authority.¹⁷⁶

Operation Cast Lead is just one of many contemporary demonstrations of the difficulties of compliance with IHL in modern armed conflict. Reality in the Operations aftermath has shown that the foundational principles of IHL that are by design intended to ensure the protection of civilians, ‘took a severe beating in this conflict.’¹⁷⁷ It is clear that “[a]ll allegations of violations of international humanitarian law and human rights violations during the Gaza military operations must be investigated by credible, independent and transparent accountability mechanisms, taking fully into account international standards on due process of law.”¹⁷⁸

In an attempt to accommodate the harsh realities of modern warfare, and by doing so avoid wanton disregard for the rights of civilians during times of hostilities, what I propose by this article is tantamount to the extension of IHL.

I concur with Cohen¹⁷⁹ in proposing that an *ex post* investigation is essential to the pursuit of justice for all civilians caught up in the exploits of modern armed conflict and that this *ex post* review be based on the requirement of *ius in bello* proportionality; the application of the principle of proportionality requires that, to truly ascertain the level(s) of compliance with IHL in times of hostilities, an *ex post* review *must* be established.

September 2009. Lawyers in Norway are seeking an arrest warrant against several senior Israeli officials.

¹⁷⁶ The request, against more than 70 persons, was submitted by civil society organizations under a South African law which gives effect to the Rome Statute and makes the prosecution of war crimes and crimes against humanity a legal obligation; available at <http://www.mg.co.za/article/2009-08-05-ngos-in-sa-press-for-charges-over-israels-gaza-offensive> [Accessed 10 September 2009].

¹⁷⁷ McDonald (note 172).

¹⁷⁸ Goldstone (note 8) at para 80.

¹⁷⁹ Cohen (note 134).

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