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The Efficacy of the Legal Infrastructure of Proportionality in Contemporary Armed Conflicts

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The Efficacy of the Legal Infrastructure of Proportionality in Contemporary Armed Conflicts

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Spring 2024

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Abstract

Proportionality in armed conflict is one of the key principles of international law, playing a crucial role in ensuring that both civilians are protected in armed conflict, but also that a military is able to accomplish its goals. This paper attempts to discern if the international legal infrastructure is well equipped to deal with proportionality in armed conflicts, especially in regard to contemporary armed conflicts. In an attempt to answer this question, this paper explores the existing legal infrastructure, looking at International Humanitarian Law as a moral system and International Criminal Law as the accompanying legal system to see how they define and deal with proportionality. This is followed by a discussion of the challenges that exist in regard to prosecuting violations of proportionality, and how this is compounded by contemporary armed conflicts. This paper finds that as a moral system, IHL is well equipped to deal with proportionality; however, ICL is lacking in terms of upholding proportionality. It suffers both from structural issues, and a lack of clarity for which revisions are needed.

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Introduction

The onset of the 2020s has seen the outbreak of two armed conflicts that have received global attention, the Russia-Ukraine war, and the Israel-Hamas war. While the Russia-Ukraine war is fought like many of the traditional wars of the 20th century in which a nation-state attempts to invade a sovereign nation, the Israel-Hamas war is fought in the style of many 21st century conflicts, centered in urban warfare, and the presence of an armed non-state actor. Relevant to both wars is international law and the role it plays in armed conflict via International Humanitarian Law (IHL), and International Criminal Law (ICL).

Buoyed by smartphones and the internet, the world now has greater access to see the horrors of warfare firsthand, raising a variety of humanitarian concerns, but also accusations of violations of international law. Among the many accusations, a repeated accusation is that one's opponent engaged in a disproportionate strike as is evident in the Russia-Ukraine war with a report alleging that Russian forces have engaged in disproportionate strikes (Tétrault-Farber & Farge, 2023).

Proportionality, as Mr. Clausen, a fellow at the International Institute of Humanitarian Law, describes it "is one of the most difficult and misunderstood topics in international law" (Clausen, 2024). What is indisputable, however, is that the laws that outline proportionality in both International Humanitarian Law and International Criminal Law were written in the 20th century. Given the age of these laws, it is important to evaluate the legal framework surround proportionality and explore the extent to which it is still effective, especially in light of the changes in the nature of armed conflict in 21st century warfare.

In synthesizing these concepts, it is important to evaluate the extent to which the international legal infrastructure is equipped to ensure the principle of proportionality is adhered

to in contemporary armed conflicts. In other words, what does the legal framework in regard to proportionality look like, and is it sufficiently developed to ensure proportionality in contemporary armed conflicts?

In order to answer this question, the laws governing proportionality will be examined in addition to past prosecutions of proportionality in order to gain an understanding of the principle of proportionality itself. Following this, the issues with prosecuting violations of proportionality will be discussed and the way in which contemporary armed conflicts exacerbate these issues will be explored. This will all be synthesized to determine the efficacy of the legal system in regard to proportionality in general, but also through the lens of contemporary armed conflict.

The implication for this research is profound, especially considering the role play proportionality plays in all armed conflicts. Evaluating proportionality in contemporary armed conflicts is an important step to ensuring that above all, innocent civilians are protected to the highest level possible in armed conflicts, but also that armed forces are not unrealistically hindered in their ability to conduct warfare in a way that would render international law purely symbolic. This research will determine whether revisions to the existing legal framework in regard to proportionality is required or if the current infrastructure is adequate and provides the necessary protections to civilians, and accountability for violators.

Research Methodology

A combination of primarily and secondary data was utilized for the analysis in this paper. The primary data consisted entirely of interviews conducted with experts on international law. Two of the individuals, Mr. Goldman and a source who requested anonymity were contacted directly through email, whereas for Mr. Clauson, the author contacted the International Institute

of Humanitarian Law who put the author in touch with Mr. Clauson. For the most part, these interviews were all conducted in a manner in which the interviewee was asked questions and then answered them to the best of their ability or gave their expert opinion. In order to analyze the primary data obtained through the interview process, detailed notes were taken over the course of all three interviews. These notes were studied following the completion of the interview and examined in relation to the existing scholarship on the issue, as well as their relevance to the research question.

All three individuals interviewed were selected for their expertise and experience in regard to international humanitarian law. The anonymous source works for the Security Council at the Permanent Mission of Switzerland to the UN and has worked for various NGOs that deal with IHL. The second interviewee, Christopher Clauson, is a fellow and military instructor for the International Institute of Humanitarian Law. He is also a Major in the United States Army Judge Advocate General's Corps. The third interviewee, Robert Goldman, is the president of the International Commission of Jurists and a law professor at American University. He gave this interview in his capacity as a law professor, not in his capacity as the president of the International Commission of Jurists.

In order to collect the data in an ethical manner, several important elements were included as part of the interview process. First, a complete and thorough explanation of the assignment was given so that the interviewee would be fully informed regarding the nature of the project. This involved a discussion of the research question, as well as the background of the author as a university student. Following this, the interview subjects were informed about the way in which their responses would be used. In this, they were presented with the opportunity to review the quotes that are going to be used in the final paper to ensure that it accurately reflects

their opinion if they wished or presented the opportunity to remain anonymous. One interview subject asked to remain anonymous, while the other two permitted the use of their name.

In addition to the use of primary data, secondary data was also utilized. This primarily took the form of academic literature from a variety of sources including NGOs, the ICRC, university journals and as well as several others. The articles were selected in order to provide further analysis and insight well as to provide differing opinions and analysis on relevant topics including but not limited to IHL, ICL, proportionality, insurgencies and modern weaponry. This secondary data was complimented by the use of original documents including the Geneva Convention, the Rome Statute and international case law.

Literature Review

On the topic of proportionally and international law, there is a fair amount of existing scholarship; however, on many issues there is not a consensus. This will be explained below with an examination of the existing scholarship on the topic.

There is disagreement among scholars on what should comprise customary international law as an article in The University of Chicago School of Law's Journal of International Law titled *Proportionality in Customary International Law: An Argument Against Aspirational Laws of War* discusses. This article lays out the argument that customary international law should be centered on the Rome Statute, which provides greater clarity (Kilcup, 2017). This is at odds with the ICRC, who is firmly in favor of the AP I as the law for CIL.

In turning more towards the issue of ICL and proportionality, much of the existing research on the topic can be found in in *Dealing with the Principle of Proportionality in Retrospect: The Application of the Principle in International Criminal Trials*. This article takes

the stance that revisions are needed in regard to international criminal trials, as this article highlights many of the issues with prosecutions of proportionality, such as issues with the presumption of innocence, issues with evidence collection, as well as providing insight into past attempted prosecutions (Bartels, 2013).

Proportionality in the Conduct of Hostilities: The Incidental Harm Side of the Assessment deals with the most controversial issues of proportionality, by explaining what elements of proportionality are considered settled law, and which are more controversial (Gillard, 2018). This includes a discussion of issues such as reverberating harms, dual-use objects, and human shields, portraying these concepts as unsettled in international law with certain scholars arguing for their inclusion in proportionally calculations and others disagreeing.

A key writing on the topic of IHL as a whole is *International Humanitarian Law: Is IHL a Legal or a Moral System?*, which puts forth the idea that IHL, especially in regard to proportionality, is a moral system as opposed to a legal system (Khen, 2016). This is at odds with the argument in *Proportionality in Customary International Law: An Argument Against Aspirational Laws of War* which is in favor of providing greater clarity and structure to IHL so that it can be more of a strict legal system (Kilcup, 2017). The central difference in these two trains of thought is if IHL should explain what is and what is not legal, or what someone should do.

Other elements of scholarship on the issue address elements of proportionally in armed conflict, but there is a lack of unifying piece that synthesizes proportionality across IHL and ICL. For example, *Proportionality in Armed Conflicts: A Principle in Need of Clarification* discusses the ways in which proportionality as a law is in need of clarification but does not discuss issues directly related to prosecution (Clarke, 2012). In a similar manner, *The Duality of the*

Proportionality Principle within Asymmetric Warfare and Ensuring Superior Criminal

Responsibly discusses if a new proportionality standard is needed for asymmetric warfare, and the punishments than can be imposed on commanders who violate proportionality but lacks a full discussion of elements of urban warfare (Knoops, 2019).

This project aims to insert itself into the gap that exists in the literature. There is not an article that takes a holistic approach to looking at how the entire legal infrastructure deals with issues of proportionality, and the relative effectiveness of this, which this paper aims to do.

Analytical Framework

For the purpose of this paper, proportionally will be understood as a principle in the conduct of hostilities. While certain areas of international law deal with proportionally in other regards, such as proportionally in World Trade Organization law or in Maritime Boundary issues, this paper is limited in scope to proportionally in armed conflicts (Cottier et al., 2012). As such whenever proportionally is mentioned, it is in reference to the principle of proportionally in armed conflicts.

A discussion of proportionally would be incomplete without first discussing distinction and precaution, the other key principles of armed conflict. Distinction focuses on who or what can be legally targeted by a military strike. As a general principle, a strike is only legal from a distinction standpoint if the target of the strike is a military target, not at a civilian target (“The Principle of Distinction”, n.d.). Precaution deals with the idea that a miliary, when conducting a strike, must take action to ensure as little civilian casualties as possible (“Rule 15”, n.d.). When analyzing with the proportionally of a strike for the purpose of this paper it is understood that both distinction and precaution were adhered to in the attack. In other words, when proportionally is discussed below, it can be assumed that the attack was aimed at a military

target, satisfying distinction, and that all available measures were implemented to limit civilian casualties, satisfying the principle of precaution.

Military attacks will be viewed as they are established by the First Additional Protocol to the Geneva Convention (AP I) which defines a military attack as “acts of violence against the advisory, whether in offence or defense” (Heynes et al., 2023). In discussing the current law on proportionality, proportionality in IHL and ICL will be examined independently as despite dealing with the same concept, they differ in their jurisdiction and language. The anonymous source explained the difference between the two well, stating “AP I governs what is a lawful strike, and the Rome Statute is for prosecuting individuals” (Anonymous, 2024). As will be explained below, AP I refers to the Additional Protocol I of the Geneva convention, which is part of IHL, and the Rome Statute refers to the written law that outlines ICL.

Over the course of the analysis, IHL will be viewed as a moral system as opposed to a legal system when it comes to issues of proportionality. This framework is centered on the idea that a law legal system explains what is and what is not legal, whereas a moral standard explains what one ought to do (Khen, 2016). By the very nature of proportionality, is it extremely difficult, if not impossible for a comprehensive legal system to exist to tell a commander if a strike is legal or illegal before it occurs. This is the case because proportionality puts combatants in a moral dilemma in which they must decide if their actions are in line with the moral principle of the double-effect doctrine, which mandates that the positive effect of an act compensate for the negative of the act, a situation in which the law does not give any clear or direct answer (Khen, 2016). As a result, IHL will not be viewed as a comprehensive legal doctrine that informs commanders about the legality of every strike, rather it will exist as a general guiding principle for which they should adhere to.

While IHL will be viewed as a moral principle in regard to proportionality, there are cases in which a violation of proportionality is obvious to the point where a criminal legal system is required (Khen, 2016). This is the purpose of ICL which exists as a compliment to IHL by prosecuting individuals who violate IHL. ICL provides the necessary procedural rules to prosecute individuals who violate IHL outside of traditional state jurisdiction (Boogaard, 2023).

Contemporary armed conflict has been categorized by a rise in urban violence and insurgencies. NATO strategists are acknowledging that at least in the short term, the future of war is in urban settings (Konaev & Spencer, 2018). This is accompanied by a rise in insurgencies. To quote Frank Hoffman, “the complex terrain of the world’s amorphous urban centers is fast becoming the insurgent and terrorist’s jungle of the twenty-first century” (Hoffman, 2011). As a result, for the purpose of this analysis, contemporary armed conflicts will be defined as situations in which a state fights an insurgency in urban warfare. While this is not encompassing of all elements of contemporary armed conflict, urban insurgencies comprise the future of warfare and is defining 21st century conflict.

Analysis

Proportionality in International Humanitarian Law

Proportionality in IHL is outlined by Article 51(5)(b) of Additional Protocol I of the Geneva Convention which states, “an attack 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” (“Article 51”, n.d.). Although this is only applicable to intrerstate conflicts, this issue is mitigated by Customary International Law (CIL), which serves as the binding mechanism for

proportionality in cases of intrastate conflicts or situations when an unsigned country is party to the conflict (Kilcup, 2017). The International Committee of the Red Cross (ICRC), who is widely regarded as the guardians of IHL, claim that AP I's definition of proportionality is binding as CIL, a claim supported by an ICRC study which found that states nearly universally accept the proportionality policy as a matter of public policy (Kilcup, 2017). As a result, proportionality as it currently exists in AP I will be regarded as the legal standard for proportionality in IHL for the purpose of this analysis.

IHL in regard to proportionality mandates an act as opposed to outlawing one. In other words, AP I acts as a prescriptive and action guiding document for commanders, explaining what they should do (Kilcup, 2017). In regard to proportionality, this requires an attacking commander conduct a proportionality analysis to weight the military advantage against the incidental harms that would occur from the attack (Gillard, 2018). The anonymous source emphasized that evaluating "violations of proportionality requires an ex-ante assessment of the evidence" (Anonymous, 2024). The source elaborated, "you need to look at the measures taken and information present before the attack, not the results of the attack" (Anonymous, 2024). In other words, it is not considered a disproportionate attack under IHL if the attack results in an excessive amount of incidental harm in comparison to the military advantage, it is only a violation of IHL if the commander had access to information prior to the attack that the incidental harms were in excess of the military advantage.

Through a combination of case law, ICRC writings and academic scholarship, there is a standard of what should occur in a proportionality analysis to ensure compliance with IHL. In a proportionality analysis, it is imperative to consider the anticipated military advantage from the attack. A commander cannot consider political, economic, or other similar benefits such as

weakening the moral of civilians as benefits from the attack, the benefits must be viewed purely through the anticipated military advantage (Gillard, 2018). In the past, there has been significant debate over whether military advantage should be viewed in a case-by-case basis or cumulative basis (Brown, 1976). Several states argued that the military advantage should be viewed in a cumulative manner in which the military advantage in context of the larger war should be considered while the ICRC was in favor of the idea that only the immediate advantage gained from the attack should be considered (“Rule 14”, n.d.). However, the ICRC has recently accepted as CIL to consider long term benefits of an attack, and thus, the attack in the larger context of the war in proportionally analysis (Lovitky, 2024). The interpretation increases the strength of the military advantage in the proportionality balancing equation, and thus, allows for greater collateral damage on the part of civilians.

IHL requires that the expected military advantage mentioned above be of similar value to the incidental harms of the attack. As the wording of AP I illustrates, the incidental harm refers only to injury or death to civilians or to damage to civilian objects. When undergoing a proportionality analysis prior to launching an attack, a military commander must deal with several important elements of incidental harm to ensure the analysis is accurate. First, is the idea of causation, which argues that only the harms occurring from the physical effects of the attack should be considered. While this can be complicated by situations in which there is more than one actor present, it is generally held that damage caused by the physical attack regardless of the actions of the other actor must be considered, such as the use of human shields, yet situations in which executions of the civilian population are promised in retaliation to an attack are excluded from any analysis (Gillard, 2018).

In addition to the causation element, foreseeability is an important element that must be considered by the commander in planning in his or her attack. The foreseeability element requires that all harms that were reasonably foreseeable at the time attack be considered by the commander (Gillard, 2018). For example, if an actor snuck a number of civilians into a military base without the knowledge of the intelligence community of the attacking force, the commander would not need to consider the deaths of the civilians in the proportionality analysis due to a lack of knowledge of their existence. Once the foreseeability and causation elements of an attack are cemented, an analysis of the likelihood of the incidental harms occurring must be determined, before assigning a weight to these incidental harms.

Proportionality in IHL can be simplified down to a good faith application of the existing rules by a reasonable military commander (Knoops, 2009). In other words, so long as the commander conducts a proportionally analysis which leads him or her to believe that the incidental harms that are foreseeable and would be caused by the attack are not in excess of the overall military advantage, then the attack is in compliance with IHL. It is here where IHL as a moral system in regard to proportionality is relevant. This deliberation of the commander in good faith regarding the outcome of the attack is a moral deliberation, and one cannot expect a clear solution which can be impossible in issues of proportionality (Khen, 2016).

Proportionality in International Criminal Law

Proportionally in ICL is governed by the Rome Statute, which outlines both the crimes that can be prosecuted as war crimes, as well as the elements of those crimes. The Rome Statute states that the war crime of excessive incidental death, injury or damage (the relevant proportionality statute) occurred if “the attack was such that it would cause incidental death or

injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated” (“Rome Statute, 1998). In addition, the elements of the crime also mandate that the “perpetrator knew the attack would cause” incidental harms that were clearly excessive to the military advantage (“Rome Statute, 1998). Finally, the application of this law is limited to interstate conflicts. While there are many similarities between the language of the Rome Statute and AP I, the Rome Statute includes additional clarifications relevant to the prosecution of the violations of proportionality.

One important element is the inclusion of “clearly” when describing the excess of the attack. The term “clearly” excessive implies a higher standard than that outlined in AP I, requiring a gross and obvious disproportionate strike for an individual to be prosecuted (Kilcup, 2017). In addition to the use of clearly, the Rome Statute also is distinguishable from AP I in two ways. The first is the consideration of the overall military advantage. As aforementioned, there is historical disagreement amongst nations and the ICRC regarding whether proportionality should be considered in a case-by-case basis or cumulative basis. The Rome Statute is clear on the matter, allowing commanders to consider the attack in light of the entire military operations, which can increase the weight of the attack in the proportionality calculus (Kilcup, 2017). Another important distinction is the written requirement that the perpetrator knew the attack was going to be proportional. This incorporates a mens rea requirement into the law, placing the burden on prosecution to not only prove the incidental harms of the attack were grossly and obviously disproportionate, but also that the perpetrator knew the attack was going to be grossly and obviously disproportionate prior to the attack (Kilcup, 2017). The actual result of the attack

as well as information that comes to light after the attack is not relevant to the prosecution of the individual.

Aside from the differences listed above, the overarching idea of proportionality is a common one across IHL and ICL. Elements such as causation, foreseeability or discussions of incidental harms are applicable to ICL in the same manner as IHL. ICL seemingly is more permissive towards civilian deaths; however, this is just a reflection of its role in prosecuting only the obvious violations of proportionality.

Prosecutorial Challenges Associated with Proportionality

There are a number of challenges associated with prosecuting alleged violations of proportionality inherent to the structure of the international legal system that are exacerbated by contemporary armed conflicts. The first of these many challenges includes the difficulty in balancing two subjective, and to some extent, incomparable concepts: military advantage and incidental harm. Central to this issue is the idea that “no precise formulation can be established to weigh these two unlike factors” (Goldman, 2024). In a similar light, “objective standards for appraisal of intended military advantage is nearly non-existent” (Bartels, 2013). Furthermore, differing values between militaries regarding civilians, military casualties and similar factors can complicate the ability of international law to make universal declarations regarding proportionality (Clarke, 2012). This is somewhat rectified by the language of the Rome Statute which according to Mr. Clausen, requires a strike to be so excessive, “so bad as it is to slap you in the face like a 10-day old rotting fish” (Clausen, 2024). In other words, for a strike to be prosecuted as a clearly excessive strike, it has to be so disproportionate that it is universally understood to be that way.

Prosecutions of alleged disproportionate attacks is further complicated by the difficulties in obtaining reliable evidence. The anonymous source mentioned discussed how a reason that so few individuals have been prosecuted for disproportionate strikes is that a prosecutor “needs access to ex ante assessment, which is very difficult to obtain” (Anonymous, 2024). In this, the source is referencing the importance of obtaining the proportionality analysis conducted by the belligerent, as to see if they knew the attack was going to be excessive with respect to civilian casualties in light of the military advantage. This presents such a hurdle to prosecution because the prosecutor “is not going to have all the information that the commander had because that information is of a qualified nature” (Clausen, 2024). In other words, a military is not likely to turn over to the ICC or the general public all of the information held by the commander when he or she made the decision as such is classified. A similar issue arises due to the length of time it takes for a case to make it through the ICC. On average, the overall length of proceedings per case, not including suspects at large or deceased as of July 15, 2021 is about 4.11 years (Gumbert & Nuzban, 2022). As a result of this timeline, “the information had at the time of the attack might not exist anymore” as militaries do not keep records for attacks indefinitely (Clausen, 2024). This further complicates attempts to prosecute individuals, as lacking access to the proportionality assessment makes it difficult to prove beyond a reasonable doubt that the commander knew the attack was going to be disproportionate. Despite these issues, it can still be possible to prosecute an individual without the cooperation of the military, albeit more difficult. This can be done by looking at the publicly available evidence and at patterns across the war. As Mr. Goldman points out, “you can have bad targeting intelligence, but after a while it seems to ring hollow. You can build a plausible and strong case without the cooperation of the military”

(Goldman, 2024). While the difficulties in obtaining information described above are still very relevant, it is not fatal to building a case.

A further challenge in prosecuting disproportionate strikes is that there is not a universally agreed upon set of conditions as to what should be considered as incidental harms. This is evident in the debate over what is to be considered a civilian under IHL. According to the *ICRC Interpretive Guidance on Direct Participation in Hostilities*, a combatant is someone who is either a member of a State's armed forces or an individual in an armed group who is continuously partaking in hostilities (Melzer, 2009). All other individuals, barring direct participation in hostilities, is considered a civilian per the ICRC. While this is widely accepted on the whole, there is significant disagreement when it comes to more nuanced situations such as the case of human shields, a relevant element to contemporary armed conflict. It is generally agreed upon that civilians who are used against their will as human shields should be included in proportionality assessments, although the weight of their consideration is a topic of debate (Gillard, 2018). The more controversial discussion is that of voluntary human shields, civilians who willingly locate themselves by military targets with the goal of discouraging attacks. While the *ICRC Interpretive Guidance* argues that abusing one's status as a civilian is not sufficient to be considered direct participation, this is a controversial view and those who object to this argue that by actively protecting military targets, the civilian is taking active part in hostilities and should not be considered in proportionally assessments (Gillard, 2018). The lack of consensus on an issue of such pressing importance in urban warfare makes it difficult for a commander to determine if a strike is legal, and thus, equally difficult to prosecute the commander for a strike for which there is a legal consensus on.

In addition to the debate over civilian determinations, reverberating harms is also a controversial element in proportionality calculations. Reverberating harms refers to the harms from a military strike that are not immediately caused from the force of the attack, but rather the harms that can be temporally or geographically distanced from the attack (Henderson & Reece, 2018). For example, a reverberating harm would be a cholera outbreak that resulted from a military strike that caused sewage to leak into a water supply. To some extent, a consensus has been reached on the inclusion of obvious reverberating harms in proportionally calculations insofar as they can be reasonably expected to occur, there is still a lack of consensus on the more remote reverberating harms (Henderson & Reece, 2018). The U.S. Department of Defense Law of War Manual provides a situation where the destruction of a power plant that provides energy to a hospital, and thus, would be expected to result in deaths at the hospital is a reverberating harm that should be considered (Henderson & Reece, 2018). This does not preclude an attack on the power plant, but rather requires the commander consider the impact on the hospital in the proportionality analysis. However, the more remote cholera outbreak described above exemplifies a controversial reverberating harm. For a commander to reasonably anticipate such, he “would need to have knowledge of under the ground, of the local infrastructure and engineers on his staff” explained Mr. Clausen when describing the immense difficulty associated with calculating the expected reverberating harms (Clausen, 2024). It is for this reason, in addition to the foreseeability issues associated with reverberating effects that reverberating harms are controversial (Noble & Robinson, 2017). The lack of clarity in reverberating harms prevents an obstacle to prosecution in a manner similar to the controversy over civilian designations, it is difficult to prove criminal intent of the strike if there is not a concrete legal principle available to the commander. Consequentially, it is clear how a strike that some view as disproportionate

because of the large reverberating effects, a common element of urban warfare, is legally controversial, and thus, hard to prosecute.

Proportionality Challenges in Contemporary Armed Conflicts

Contemporary armed conflicts do not raise any novel issues in regard to proportionality, but rather, they place emphasis on the least developed areas of proportionality, leading to challenges for both military commanders and prosecutors.

A notable element of fighting in cities is the unique structure and density of both people and infrastructure. This complicates information gathering by parties to a conflict, especially if the party is not native to the city. The multi-dimensional nature of cities in addition to city structures which can inhibit communication equipment and ISR systems make it far more difficult to collect information in cities as opposed to rural areas (Konaev, 2019). As a result, a commander is less informed about the presence of the enemy throughout the city both in terms of soldiers and military infrastructure. This lower intelligence decreases the ability of the commander to create an accurate proportionality assessment, and thus, provides the risk for greater harm to civilians.

This is compounded by the interconnected nature and density of cities, which can result in a domino effect in which the destruction of a small part of the city infrastructure can have an outsized impact on the rest of the city (Konaev, 2019). This in conjunction with the lack of intelligence regarding cities has clear implications for proportionality, especially in regard to reverberating effects. For example, a commander may not have the requisite intelligence regarding a water main under a military target, which if destroyed in an attack, will deprive a significant portion of the city of clean drinking water. While this attack could still be legal due to

the commander's lack of knowledge that the attack would be disproportionate, it could be disproportionate in its effects if, for example unknown power lines supplying energy to a hospital underneath the ground are irreparably damaged in the strike. In this, it is clear how contemporary armed conflicts, due to their emphasis on urban warfare, have greatly increased the salience of reverberating harms in proportionality analysis (Costi, 2022). As reverberating harms remain an underdeveloped and controversial topic in proportionality, the emphasis on it in contemporary armed conflicts decreases the ability of ICL to address proportionality issues in conflicts of this nature.

In addition to the difficulty in intelligence gathering, the tactics of insurgencies categorize the nature of contemporary warfare. Among the greatest advantages of insurgencies is their ability to blend into a civilian population, using hit and run attacks against militaries (Spencer, 2020). This is such an effective tool as it makes it very difficult for the state to discern who is a combatant and who is a civilian, greatly limiting the ability to engage in head-to-head combat. In a similar vein, it can be difficult to differentiate military targets from the civilian population as insurgencies often use civilian infrastructure, such as schools or hospitals for military purposes (Konaev, 2019). The use of civilian infrastructure such as schools and hospitals brings forth the controversial issue of dual-use objects in proportionality, an area of proportionality without consensus in that it is accepted that the damage to civilian populations should be taken into account, but the extent of which is contested (Bartels, 2024). A similar issue exists for discussions of human shields (Gillard, 2018). While not exactly a case of human shields, a Coalition 2005 airstrike in Afghanistan that killed 17 women and children during an attack on a terrorist base did not see prosecution for war crimes, as the Coalition defended the attack by stating that the deaths are the fault of enemy forces moving their families towards a

military objective and no criminal intent could be proven (Knoops, 2009). Here the lack of clarity on the consideration of the civilians being brought to a military target inhibited any attempt of prosecution. As is the case with reverberating harms, this exemplifies how contemporary armed conflicts deal with the more controversial and lesser developed areas of proportionality and the implications of such for prosecution.

Encapsulating the issue is the idea that proportionality is of greater salience in contemporary armed conflicts. By the very nature of attempting to attack an enemy that has imbedded themselves in a city there is a far greater risk of civilian harm, and thus, a greater risk for an inadvertent disproportionate attack (Gisel et al., 2021). This can be further complicated situations in which a strike “needs to be called in in the moment, as opposed to a planned bombing” (Goldman, 2024). For example, if an army is “taking fire from a sniper from a civilian object, it is no longer a civilian object, and the commander is going to have to make a quick decision about an air strike” (Goldman, 2024). This is a situation ripe for a disproportionate attack in that the commander has to make an immediate decision to protect his soldiers in conjunction with a lack of information and an enemy who embeds themselves in civilian infrastructure. This is evident in the context of the Iraqi war in 2003, where disproportionate attacks were more common in situations in which there was inadequate time to conduct an analysis of the attack (Clarke, 2012). For example, a 2002 Coalition airstrike of a wedding in Afghanistan killed 46 and injured 117 of the guests, yet no prosecution for a disproportionate strike ensued as the Coalition claimed the attack was justified due to a report of enemy fire coming from the area, and thus, the lack of criminal intent precluded prosecution (Knoops, 2009). As a result, the need for clear and effective legal infrastructure to ensure proportionality in contemporary armed conflicts is evident.

The Efficacy of the International Legal System

IHL as a moral system is well equipped to ensure that proportionality is adhered to in armed conflicts with the condition that belligerents act in good faith. This is evident by the widespread adoption of the principle, as evidenced by a majority of states, including the U.S. who have incorporated the language of AP I into their military handbooks, showcasing their promotion of proportionality and recognition of its validity even if they have not signed onto AP I itself (Kilcup, 2017). Widespread acceptance of the moral principle of proportionality, as is the case here, guarantees it will be present in armed conflict to some degree. Despite the aforementioned challenges in regard to prosecution of proportionality and stuff of the like, this is not relevant to proportionality in IHL. As aforementioned, proportionality in IHL does not exist to provide clear cut solutions on the legality of every strike, but rather it mandates a commander act in a moral manner (Khen, 2016). This is unchanged by the nature of contemporary armed conflicts as the underlying moral principle is the same, a commander must act in good faith when weighing the relevant facts. In this sense, IHL is sufficiently developed as an element of the legal infrastructure to provide the necessary guidance regarding how a commander should go about a military strike.

Contemporary armed conflicts as they are described above do not raise novel legal issues, rather they place greater emphasis on previously less relevant aspects of proportionately. They put reverberating harms, distinction issues and debate over dual-use objects in proportionately front and center and increase the frequency by which these objects are relevant. This greatly increases the need to achieve a consensus on these issues so that prosecution is possible.

The weakness of proportionality in the international legal framework occurs when it comes to accountability for disproportionate strikes. In other words, while proportionality is solid as a moral concept in IHL, it is vague and difficult to enforce in ICL. This is evident by there only being a single case in ICL that was decided on proportionality, that of Martić by the ICTY (Bartels, 2013). Aside from that case, there are no trials at the ICC that dealt with proportionality (Bartels, 2013). When it comes to contemporary armed conflicts, the difficulties are exacerbated. The analysis above raised many prosecutorial issues raised above, such as issues obtaining evidence from non-cooperative militaries, lack of consensus over incidental harms and reverberating harms and the subjectivity associated with military advantage or incidental harms. While none of these issues are fatal and a prosecution could still conceivably occur as it did in the Martić case, they provide an immense obstacle to a successful prosecution. As aforementioned, there was only one case in front of the ICTY that dealt with proportionality, and no case law from the ICC dealing with the proportionality. While it would be intellectual malpractice to fully attribute the lack of prosecution to the prosecutorial challenges described above, there does appear to be a strong correlation between the two. The anonymous source discussed how it is easier to prove other elements such as lack of distinction or precaution, and how it “is a lot smarter for a prosecutor to focus on war crimes such as targeting and untargeted strikes” (Anonymous, 2024). From a pragmatic standpoint, this logic is solid; it is a far better use of resources and energy to prosecute crimes that are more likely to achieve a conviction. However, this underscores the way in which international criminal law is not effective in holding those who engage in disproportionate attacks accountable. If a law exists, yet is never prosecuted, relative impunity is offered to those who violate it.

Conclusion

Proportionality is undoubtedly one of the most important elements of armed conflicts. As such, the legal framework of proportionality is crucial to ensuring that the standard established is clear and complied with. As this study found, there is need for revision when it comes to the overall legal infrastructure. While the overall moral system is adequate, it lacks the necessary legal system from International Criminal Law to punish those who violate the law.

It is clear that as a moral system proportionality is a well-developed and comprehensive principle. While there are still elements in need of clarification such as reverberating harms, if commanders act in good faith in regard to proportionality and take the appropriate steps to ensure the military advantage is not in excess of civilian law as IHL requires, then Article 55(5)(b) of AP I with the accompanying literature can be viewed as an effective and appropriate measure of international law. In this respect, IHL is sufficiently developed to ensure proportionality is respected in armed conflicts.

Proportionality in ICL is far less effective when it comes to its ability to hold those who violate proportionality to account. The numerous challenges that exist in traditional armed conflicts are compounded by contemporary armed conflicts, which greatly increase the difficulty by which disproportionate strikes can be prosecuted. As a result, it is extremely rare to see an individual prosecuted for an illegal disproportionate strike, representing a failure of international criminal law in holding individuals accountable. While the presence of international criminal law is still better than nothing as the combination of IHL and the threat of prosecution does serve as a reasonable deterrent to violating the law, it does appear as if international criminal law in regard to proportionality is in need of revision to address the conflicts of the 21st century.

This research could be extended to incorporate distinction and precaution, to see if legal framework for the three principles in conjunction is fully developed and more effective, or if it, like proportionality, is need of greater revision in certain extents. It could also be extended to discuss issues with prosecution in international law on the whole. An area for further inquiry is making recommendations for how the issues that contemporary armed conflicts raise should be addressed. Issues such as reverberating harms, dual-use objects, exploitation of civilians all are issues highlighted by proportionality and are in need of further clarification to permit effective prosecution. Further research could be conducted in order to determine if, at all, there is a way to reduce the number of strikes that are disproportionate in effect, but legal. This could take the form of tightening the proportionality restrictions, changing what is considered or a variety of other factors.

Abbreviations List

IHL – International Humanitarian Law

ICL – International Criminal Law

AP I – Additional Protocol I to the Geneva Convention

CIL – Customary International Law

NATO – North Atlantic Treaty Organization

ICC – International Criminal Court

ICJ – International Court of Justice

UN – United Nations

ICRC – International Committee of the Red Cross

NGO – Non-Governmental Organization

Bibliography

Primary Sources

Anonymous, Security Council at the Permanent Mission of Switzerland, April 10, 2024, Geneva, Switzerland.

Clausen Christopher, International Institute of Humanitarian Law, April 11, 2024, Geneva, Switzerland

Goldman Robert, International Commission of Jurists, April 11, 2024, Geneva, Switzerland

Secondary Sources

Article 51 - Protection of the Civilian Population. International Committee of the Red Cross. (n.d.-a). <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article-51>

Bartels, R. (2013). *Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: The Application of the Principle in International Criminal Trials*. Cambridge University Press.

Boogaard, J. van den. (2023). *Proportionality in international humanitarian law: Refocusing the balance in practice*. Cambridge University Press.

Brown, B. L. (1976, December). *The Proportionality Principle in the Humanitarian Law of Warfare: Recent Efforts at Codification*. Cornell International Law Journal. <https://core.ac.uk/download/pdf/216740878.pdf>

Clarke, B. (2012). *Proportionality in Armed Conflicts: A Principle in Need of Clarification?*. Journal of International Humanitarian Legal Studies. <https://eds-p-ebSCOhost-com.reference.sit.edu/eds/detail/detail?vid=6&sid=9889d7b9-b6bb-4bf7-836a-54ff24582622%40redis&bdata=JnNpdGU9ZWRzLWxpdmUmc2NvcGU9c2l0ZQ%3d%3d#AN=87088988&db=a9h>

Costi, A. (2022). *Reverberating Effects in Armed Conflict: An Environmental Analysis*. Arizona Journal of International & Comparative Law.

Cottier, T., Enchandi, R., Leal-Arcas, R., Liechti, R., Payosova, T., & Sieber-Gasser, C. (2012, December). *The Principle of Proportionality in International Law*. World Trade Institute. https://www.wti.org/media/filer_public/9f/1b/9f1bd3cf-dafd-4e14-b07d-8934a0c66b8f/proportionality_final_29102012_with_nccr_coversheet.pdf

Gillard, E.-C. (2018, December). *Proportionality in the Conduct of Hostilities: The Incidental Harm Side of the Assessment*. The Royal Institute of International Affairs. <https://www.chathamhouse.org/sites/default/files/publications/research/2018-12-10-proportionality-conduct-hostilities-incident-harm-gillard-final.pdf>

- Gisel, L., Hume, K., Sarciada, P. G., & Keith, A. (2021, April 27). *Urban warfare: An Age-Old Problem in Need of New Solutions*. Humanitarian Law & Policy. <https://blogs.icrc.org/law-and-policy/2021/04/27/urban-warfare/>
- Gumpert, B., & Nuzban, Y. (2022). Length of Proceedings at the International Criminal Court: Context, Latest Developments and Proposed Steps to Address the Issue. essay.
- Henderson, I., & Reece, K. (2018). *Proportionality under International Humanitarian Law: The “Reasonable Military Commander” Standard and Reverberating Effects*. Vanderbilt Journal of Transnational Law. https://cdn.vanderbilt.edu/vu-wp0/wp-content/uploads/sites/78/2018/06/07015455/11.-HendersonReece_Final-Review_Formatted.pdf
- Heyns, C., Casey-Maslen, S., & Probert, T. (2023, March 20). *The definition of an “attack” under the Law of Armed Conflict*. Lieber Institute West Point. <https://lieber.westpoint.edu/definition-attack-law-of-armed-conflict-protection/>
- Hoffman, F. (2011, March 6). *Neo-Classical Counter-Insurgency*. The US Army War College Quarterly. <https://press.armywarcollege.edu/cgi/viewcontent.cgi?article=2607&context=parameters>
- Kilcup, J. (2017). *Proportionality in Customary International Law: An Argument Against Aspirational Laws of War*. University of Chicago Journal of International Law. <https://cjil.uchicago.edu/print-archive/proportionality-customary-international-law-argument-against-aspirational-laws-war>
- Khen, M.-E. (2016, January). *International Humanitarian Law: Is IHL a Legal or a Moral System?*. Oxford University Press. <https://www.jstor.org/stable/44012732>
- Knoops, G.-J. A. (2009). *The Duality of the Proportionality Principle within Asymmetric Warfare and Ensuing Superior Criminal Responsibilities*. International Criminal Law Review. <https://eds-p-ebshost-com.reference.sit.edu/eds/pdfviewer/pdfviewer?vid=2&sid=adf7dd0d-4406-4c53-b9e0-1f069b272267%40redis>
- Konaev, M. (2019, March). *The Future of Urban Warfare in the Age of Megacities*. The French Institute of International Relations. https://www.ifri.org/sites/default/files/atoms/files/konaev_urban_warfare_megacities_2019.pdf
- Konaev, M., & Spencer, J. (2018, May 21). *The era of urban warfare is already here*. Foreign Policy Research Institute. <https://www.fpri.org/article/2018/03/the-era-of-urban-warfare-is-already-here/>
- Lovitky, J. (2024, January 23). *Application of the Principle of Military Advantage in Determining Proportionality*. Lieber Institute West Point.

<https://lieber.westpoint.edu/application-principle-military-advantage-determining-proportionality/>

Melzer, N. (2009). *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*. International Committee of the Red Cross. <https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf>

Noble, E., & Robinson, I. (2017, March 2). *War in Cities: The “Reverberating Effects” of Explosive Weapons*. Humanitarian Law & Policy. <https://blogs.icrc.org/law-and-policy/2017/03/02/war-in-cities-the-reverberating-effects-of-explosive-weapons/>

The Principle of Distinction. Diakonia International Humanitarian Law Centre. (n.d.). <https://www.diakonia.se/ihl/resources/international-humanitarian-law/principle-of-distinction-protection-of-people-and-objects/>

Rome Statute of the International Criminal Court. International Criminal Court. (1998). <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>

Rule 14. Principle of Precautions in Attack. International Committee of the Red Cross. (n.d.-b). <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule14#:~:text=precautions%20in%20attack-,Rule%2015.,and%20damage%20to%20civilian%20objects.>

Rule 15. Principle of Precautions in Attack. International Committee of the Red Cross. (n.d.-b). <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule15#:~:text=precautions%20in%20attack-,Rule%2015.,and%20damage%20to%20civilian%20objects.>

Spencer, J. (2020, March 4). *The City is Not Neutral: Why Urban Warfare is so Hard*. Modern War Institute. <https://mwi.westpoint.edu/city-not-neutral-urban-warfare-hard/>

Tétrault-Farber, G., & Farge, E. (2023, March 16). *Some Russian Abuses in Ukraine May be Crimes Against Humanity - UN Inquiry Finds*. Reuters. <https://www.reuters.com/world/europe/russia-has-committed-wide-range-war-crimes-ukraine-un-inquiry-finds-2023-03-16/>

Wahal, A. (2022, January 7). *On International Treaties, the United States refuses to Play Ball*. Council on Foreign Relations. <https://www.cfr.org/blog/international-treaties-united-states-refuses-play-ball>