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Puzzles of Proportion and the “Reasonable Military
Commander”: Reflections on the Law, Ethics, and
Geopolitics of Proportionality

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By American domestic law standards, the concept of proportionality [in the law of armed conflict] would be constitutionally void for vagueness.

—W. Hays Parks¹

Introduction

On July 8, 2014, for at least the third time in six years, a brutal armed conflict erupted in the Gaza Strip between the Israeli Defense Forces (IDF) and Hamas militants. The IDF dubbed it “Operation Protective Edge.” A general and indefinite ceasefire took effect about seven weeks later, on August 26. By that time, an estimated 2,200 Palestinians had been killed, of whom almost 1,500 were civilians and almost 500 children, many thousands more injured, 18,000 Palestinian homes destroyed, and hundreds of thousands internally displaced. During the same period, Hamas forces and Palestinian militias in Gaza fired more than 4,000 rockets at Israel, many indiscriminately or even directed at civilian targets, killing a handful of Israeli civilians and nearly 70 IDF soldiers.²

In part because of these statistics, which resemble those from previous Gaza conflicts since Israel’s unilateral withdrawal (or disengagement) in 2005, the lopsided death tolls and other evidence quickly led to allegations of disproportionate force. And regrettably, as in the past, journalists, scholars, and others bandied about the term proportionality, yet rarely defined it precisely and often misused it, rhetorically and otherwise.³ In part, this is because the legal and colloquial meanings of the terms differ. But in part, it is because the principle of proportionality in the law of armed conflict (LOAC), or *jus in bello*,⁴ is a singularly subjective and

¹ W. Hays Parks, *Air War and the Law of War*, 32 A. F. L. REV. 1, 173 (1990).

² Accurate statistics in the context of Israel-Palestinian hostilities remain hard to come by. These figures reflect rough estimates from several sources. B’TSELEM, THE ISRAELI INFORMATION CENTRE FOR HUMAN RIGHTS IN THE OCCUPIED TERRITORIES, THE LEGAL AND MORAL IMPLICATIONS OF THE POLICY OF ATTACKING RESIDENTIAL BUILDINGS IN THE GAZA STRIP, SUMMER 2014 at 5 (January 2015), <http://perma.cc/56NK-SC2T>; *Gaza Crisis: Toll of Operations in Gaza* (Sept. 1, 2014), <http://perma.cc/ZE47-FGWW>; U.N. OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS (OCHA), OCCUPIED PALESTINIAN TERRITORY: GAZA EMERGENCY, SITUATION REPORT (Aug. 28, 2014), at 1–2, <http://perma.cc/9F2V-59HR>; Lizzie Deardan, *Israel-Gaza Conflict: 50 Day War by Numbers*, THE INDEPENDENT (Aug. 27, 2014), <http://perma.cc/84KD-3US2>.

³ See, e.g., Michael Walzer, *The Gaza War and Proportionality*, DISSENT (Jan. 8, 2009), http://www.dissentmagazine.org/online_articles/the-gaza-war-and-proportionality.

⁴ In this Article, as in prior work, “law of war” refers to the entire corpus of international law on the use of force; “law of armed conflict,” “*jus in bello*,” and “international humanitarian law” (IHL) refer interchangeably to the law governing the conduct of hostilities; and “*jus ad bellum*” refers to the law governing resort to force. Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus Ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT’L L. 47, 50 n.15 (2009).

indeterminate legal standard. It subsumes many and diverse considerations, which have equally diverse and often related, though still distinct, legal, ethical, and political dimensions. All of these dimensions would ideally inform the operational judgments of commanders in the field but, realistically, of course, they seldom can or do.

Not only can these aspects of proportionality be difficult to distinguish in theory (and *a fortiori* in practice), the participants in conflicts, literal and figurative, often have propagandistic incentives to obscure or simply disregard the complexity of the actual legal analysis mandated by *in bello* proportionality. Such overly simplistic understandings and the unfortunate rhetorical abuse of the term “proportionality” contribute to a regrettably commonplace but mistaken—or, at a minimum, overstated—view: that proportionality as a legal constraint on war is *so* subjective and indeterminate as to be no real constraint at all.

While plainly hyperbolic, there is doubtless some truth to this view: *in bello* proportionality *is* subjective and indeterminate—ineluctably so. At best, its implementation in the field is guided by the nebulous standard of the good-faith and optimally informed “reasonable military commander.”⁵ But military elites perforce make judgments of proportionality under conditions of great stress in the midst of chaotic circumstances and unfamiliar terrain. At the same time, however, the view that *in bello* proportionality is too legally indeterminate to influence conduct in warfare is overstated and unfortunate. It fosters a misplaced cynicism about the degree to which *in bello* proportionality, for all its flaws, contributes to a chief objective of LOAC: reducing needless suffering.⁶

In the first place, to say that reasonableness is the barometer of *in bello* proportionality need not deprive it of meaningful force as a legal standard. Reasonableness is an especially elastic or flexible standard in law. But that is true to some extent of all standards. And elastic certainly does not mean limitless. Reasonableness, after all, is a ubiquitous standard in both international and domestic law. In U.S. law, for example, tort law insists that

⁵ See INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: FINAL REPORT BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA (June 8, 2000), *reprinted in* 39 I.L.M. 1257, 1271 (2000) [hereinafter Kosovo Report]; see also FRITS KALSHOVEN & LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR 109 (2001). *Cf. Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity*, 86 AM. SOC’Y INT’L L. PROC. 39, 44 (1992) (remarks of Fritz Kalshoven) (proportionality “may perhaps best be seen as an appeal to the good faith of the normal, responsible military man or woman.”).

⁶ Many regard reducing superfluous suffering as *the* paramount objective of modern IHL. Perhaps. But this essentially consequentialist view neglects deontological IHL constraints such as the categorical prohibitions on torture and denial of quarter. The Aristotelian tradition of virtue ethics also plays a seldom appreciated role in LOAC. See Sloane, *supra* note 4, at 75; cf. MICHAEL IGNATIEFF, THE WARRIOR’S HONOR: ETHNIC WAR AND THE MODERN CONSCIENCE 109–63 (1997).

actors take reasonable precautions.⁷ Criminal negligence “involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.”⁸ Under the Eighth Amendment, proportionality limits the type and degree of punishment that may constitutionally be imposed.⁹ It also limits the justifications for defenses such as necessity and self-defense in criminal law.¹⁰ Proportionality standards also permeate constitutional law: “rational basis” and “strict scrutiny” review, for example, call for an assessment of proportionality, in practice if not by that name. Many other examples from domestic law could be cited.

What, then, distinguishes LOAC? The answer is not unique to this field of international law or the general challenges faced by the international legal system. LOAC proportionality, like much of international law, suffers from the absence of regularly effective and authoritative legal institutions, the availability of which in domestic law makes it feasible to work out more detailed and clear guidelines over time, taking into account a variety of relevant factors and circumstances. That is generally how legal systems gradually invest legal standards like proportionality, reasonableness, and other facially vague concepts with more precise and detailed content. A bare handful of judicial decisions discuss or apply *in bello* proportionality, and international institutions seldom supply further guidance. The judicial decisions that exist emanate either from domestic courts applying *in bello* proportionality as incorporated into domestic law,¹¹ which is unlikely to be regarded as authoritative across international law; or from international criminal tribunals prosecuting war crimes,¹² which, while germane, do not offer the kind of precedential guidance that a reasonable, good-faith military commander would be likely to find helpful in hard cases. Consequently, guidance on what “reasonable” means in particular military contexts must be sought elsewhere.

The purpose of this article is to facilitate and clarify the reasonableness inquiry in LOAC proportionality, and ideally, to contribute some guidance. The article scrutinizes *in bello* proportionality along several dimensions: legal, ethical, and geopolitical. It tries to distinguish, isolate, and analyze the diverse sources of subjectivity and indeterminacy that inhere in *in bello* proportionality. This is a necessary, albeit far from sufficient, step

⁷ See, e.g., *Saiz v. Belen School Dist.*, 827 P.2d 102, 111 (N.M. 1992).

⁸ Model Penal Code § 2.02(d).

⁹ U.S. CONST. Amend. VIII; see, e.g., *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Ewing v. California*, 538 U.S. 11 (2003).

¹⁰ Model Penal Code § 3.02(a); *id.* at §§ 304(1), 309; see, e.g., *People v. Goetz*, 497 N.E.2d 41 (N.Y. 1986).

¹¹ See, e.g., *Public Comm. Against Torture in Israel v. State of Israel*, 46 I.L.M. 375 (2006).

¹² See, e.g., *Prosecutor v. Prlić et al.*, Case No. IT-04-74, Judgment (Int’l Crim. Trib. for the former Yugoslavia May 29, 2013). The case law on proportionality in international criminal tribunals is remarkably scarce. I am grateful to David Luban for calling my attention to *Prlić*. Cf. *Prosecutor v. Galić*, Case No. IT-98-29-T, Judgment, ¶ 58 (Int’l Crim. Trib. for the former Yugoslavia Dec. 5, 2003).

toward supplying more detailed operational guidance to the good-faith reasonable military commander seeking to adhere to LOAC. I will not defend a general theory of *in bello* proportionality. I doubt one exists. International lawyers, just war theorists, and others have struggled mightily to invest proportionality with greater determinacy and reduce its seemingly inexorable subjectivity. But today, as in the past, the only general standard on which international consensus exists and by which we can try to assess adherence to *in bello* proportionality is the idea of the good-faith reasonable military commander under the circumstances. The challenge, therefore, is to identify those factors that realistically can, and legally and ethically should, guide implementation of this standard.

Part I situates the analysis in the context of the contemporary law of war. Part II breaks down and analyzes the legal status and content of the canonical definition of proportionality supplied by Additional Protocol I of 1977 to the 1949 Geneva Conventions (API).¹³ It considers whether, as many believe, API's definition codifies customary international law. And it analyzes the API definition to bring out the specific ways in which its text and context compel subjective or indeterminate judgments along distinct dimensions—judgments that neither the definition itself nor the treaty's *travaux préparatoires* nor the International Committee of the Red Cross's (ICRC) official commentary supply (or could supply). Part II(C) contextualizes these judgments as part of the paradigmatic concept of the *in bello* proportionality calculation, which is frequently said to require weighing incommensurable interests, or in the words of one authority, “pondering dissimilar considerations — to wit, civilian losses and military advantage”¹⁴ Part III critiques perhaps the most prominent and popular effort to invest proportionality judgments with more precise substantive content: that proportionality requires military elites to treat all civilians *as if* they were nationals of the attacker's state. Part IV considers briefly how the demise of dyadic reciprocity and the rise of modern asymmetric warfare further complicate proportionality judgments in the field, leading some to call for reforms that would, contrary to the axiomatic analytic independence of *jus ad bellum* and *jus in bello*, “expand[] the *jus in bello* proportionality test to include aspects of the *ad bellum* conditions.”¹⁵

Part V suggests that the prospects for promoting the humanitarian implementation of proportionality within the broad spectrum of lawfulness authorized by its definition depend largely on factors exogenous to positive international law—but not, for that reason, necessarily beyond the influence of international lawyers. As a rule, “[e]ffective institutions would be

¹³ Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 51(5) 1125 U.N.T.S. 3 [hereinafter API]; *see also id.* at arts. 57(2)(a)(iii), 57(2)(b).

¹⁴ YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 122 (2004) (footnote omitted).

¹⁵ Eyal Benvenisti, *Rethinking the Divide Between Jus ad Bellum and Jus in Bello in Warfare Against Nonstate Actors*, 34 *YALE J. INT'L L.* 541, 543 (2009).

preferable in the international system Yet until international law reaches that point (and that day is surely not near), effective international lawyering requires crafting arrangements such that sufficient numbers of politically relevant participants see those arrangements as in their self-interest.”¹⁶ That is, of course, far easier said than done. But to focus on one example that reflects this approach to the implementation of proportionality, the empirical evidence suggests that the conceptual redefinition of “victory” in some counterinsurgency or asymmetric conflicts may at times encourage military elites to respect proportionality more conservatively as a matter of sound strategy. This is, to be sure, no more than a modest, hedged assertion. I would be the first to concede that we cannot substantiate even this limited proposition absent additional research. But the point of emphasis lies more in what I believe it confirms by illustration: to effectively operationalize proportionality, today as in the past, international lawyers, military elites, and other actors need to consider how to craft *in bello* legal arrangements that try to align military and humanitarian objectives within the increasingly common context of prolonged hostilities against nonstate actors.

I. Proportionality in Contemporary Context

In the modern law of war, perhaps no principle is at once so pervasive, puzzling, and controversial as proportionality—in both its *ad bellum* and *in bello* senses.¹⁷ For the *jus ad bellum*, the law governing recourse to force, the demise since World War II of so-called traditional wars between states has mirrored, first, the gradual rise in internecine warfare punctuated by periods of de facto armistice; second, reciprocal strikes between states limited in time, scope, and objective; and third, diverse, and arguably, at times, conceptually interminable¹⁸ conflicts with non-state belligerents (NSBs). These conflicts differ dramatically in nature from the paradigms that animated the Additional Protocols of 1977,¹⁹ namely, decolonization and proxy conflicts during the Cold War.²⁰ Today, in contrast, the NSBs of paramount concern tend to be diverse private armies:²¹

¹⁶ Robert D. Sloane, *More Than What Courts Do: Jurisprudence, Decision, and Dignity—In Brief Encounters and Global Affairs*, 34 YALE J. INT’L L. 517, 524 (2009) (emphasis deleted).

¹⁷ On the distinction between the *jus ad bellum* and the *jus in bello*, see generally Sloane, *supra* note 4. On the distinction with particular reference to proportionality, see *id.* at 72–76, 106–111; David Kretzmer, *The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum*, 24 EUR. J. INT’L L. 235, 278 (2013).

¹⁸ *Cf.* Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004). Stephen Griffin argues forcefully that this phenomenon began with states during the Cold War. See generally STEPHEN GRIFFIN, LONG WARS AND THE CONSTITUTION (2013).

¹⁹ API, *supra* note 13; Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 609.

²⁰ See generally Eyal Benvenisti, *The Law on Asymmetric Warfare*, in LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 931, 933–34 (2011).

²¹ For a conceptual analysis of private armies as a general phenomenon, see W. Michael

armed militias of narcotics organizations, arms dealers and other criminal enterprises,²² terrorist networks animated by apocalyptic religious ideologies,²³ and, as ever, those motivated by simple greed.²⁴

For the *jus in bello*, the law governing the conduct of hostilities, NSBs have contributed significantly to the growing importance of proportionality. Other influential developments shaping *in bello* proportionality include exponential advances in and the far more ready access by NSBs to destructive, at times catastrophic, weaponry;²⁵ the force of public opinion mobilized by new forms of media, including “embedded” military journalists, social media, and the Internet generally;²⁶ and the political and strategic imperatives of counterinsurgency campaigns.²⁷ But the paramount phenomenon that has catapulted *in bello* proportionality into the center of scholarly discourse on the law of war is so-called asymmetric warfare,²⁸ which, though often regarded as a distinctly modern development, has been around in one form or another for centuries, and today, too, should not be understood to describe a single, clear paradigm but rather to subsume a variety of contexts.

Legal scholars and just war theorists alike also increasingly question the viability, desirability, or both, of preserving the law’s traditional insistence on the analytic independence of the *jus ad bellum* and *jus in bello* generally—and *ad bellum* and *in bello* proportionality in particular.²⁹

Reisman, *Private Armies in a Global War System: Prologue to Decision*, 14 VA. J. INT’L L. 1 (1973).

²² See generally MOISES NAIM, *ILLCIT: HOW SMUGGLERS, TRAFFICKERS, AND COPYCATS ARE HIJACKING THE GLOBAL ECONOMY* (2006).

²³ One paradigm, but far from the sole example, would be al Qa’ida. More recently, the world’s focus has turned to another, the Islamic State of Iraq and the Levant (ISIL, also known as ISIS). See, e.g., Graeme Wood, *What ISIS Really Wants*, THE ATLANTIC (Mar. 2015), <http://www.theatlantic.com/features/archive/2015/02/what-isis-really-wants/384980/>.

²⁴ For example, the wars in Liberia, Sierra Leone, and elsewhere in East Africa over diamond wealth.

²⁵ W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 AM. J. INT’L L. 82, 86 (2003) (“As long as nonstate actors did not amass significant arsenals, their indifference or even hostility to world public order was inconsequential.”).

²⁶ Cf. IGNATIEFF, *supra* note 6, at 109–13 (discussing the effects and “ethics of television” in modern armed conflict, international human rights crises, and humanitarian disasters).

²⁷ See generally THE U.S. ARMY/MARINE CORPS COUNTERINSURGENCY FIELD MANUAL (2007); DAVID KILCULLEN, *COUNTERINSURGENCY* (2010); JOHN A. NAGL, *LEARNING TO EAT SOUP WITH A KNIFE: COUNTERINSURGENCY LESSONS FROM MALAYA AND VIETNAM* (2005).

²⁸ For thoughtful commentary, see, for example, Eyal Benvenisti, *The Legal Battle to Define the Law on Transnational Asymmetric Warfare*, 20 DUKE J. COMP. & INT’L L. 339 (2010); Michael N. Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, 62 A.F.L. REV. 1 (2008); Robin Geiss, *Asymmetrical Conflict Structures*, 88 INT’L REV. RED CROSS 757, 757–58 (2006); Toni Pfanner, *Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action*, 87 INT’L REV. RED CROSS 149 (2005).

²⁹ E.g., Benvenisti, *supra* note 15, at 543–44; Thomas Hurka, *Proportionality in the Morality of War*, 33 PHIL. & PUB. AFF. 34, 44–45 (2005). For the author’s partially contrary views, see Sloane, *supra* note 4, at 72–76, 106–11; see also Jasmine Moussa, *Can Jus ad*

Because many conflicts no longer “have obvious military goals, such as gaining control over territory,” what qualifies as victory will at times be unclear.³⁰ It is often unclear in modern warfare how to reply to what may once have been legal questions with straightforward answers, “first, how do we know who won? and second, what do you win by winning?”³¹ The recent Gaza War is a case in point.³² Neither side had a particularly clear vision of what would qualify as victory and why. As the objectives of war and the measures of victory become more elusive, so too do the standards against which *ad bellum* and *in bello* proportionality should be measured.

I have said in the past, and reiterate here, that it strikes me as a mistake to identify “victory,” however defined, or any other ultimate military objective, with the relevant military advantage against which considerations of the collateral damage authorized by *in bello* proportionality should be calculated. The prevailing definition of *in bello* proportionality, as codified in API, prohibits any 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.”³³ It is trivially true that victory, however it may be defined in context, is the ultimate military advantage sought by a belligerent. But to equate military *advantage* with ultimate military *objective* would render proportionality almost infinitely elastic and meaningless. That is why:

“the concrete and direct military advantage anticipated” should never be confused with, or allowed to collapse back into, the ultimate *casus belli* of a party. By specifying the relevant yardstick at a lower level of abstraction—one tied to the facts on the ground—[the law of armed conflict] tries to remove calculations of *in bello* proportionality from ultimate military objectives and oft politicized *ad bellum* judgments. It tries, that is, to halt the slippery slope from “concrete and direct military advantage” to “victory.” In law, even if not in

Bellum Override Jus in Bello? Reaffirming the Separation of the Two Bodies of Law, 90 INT'L REV. RED CROSS 963 (2008).

³⁰ Benvenisti, *supra* note 29, at 543.

³¹ JAMES Q. WHITMAN, THE VERDICT OF BATTLE 10 (2012) (emphasis deleted); see also Gabriella Blum, *The Fog of Victory*, 24 EUR. J. INT'L L. 391 (2013). For a brief review by the author of Whitman's erudite and provocative book, see Robert D. Sloane, 107 AM. J. INT'L L. 972 (2013) (book review).

³² See, e.g., Jeffrey Goldberg, *Why is Israel Losing a War it's Winning?*, THE ATLANTIC (July 27, 2014), <http://perma.cc/9B9B-FT3Q>.

³³ API, *supra* note 13, at art. 51(5). Article 85(3)(b) makes the violation of proportionality carried out with a *mens rea* of knowledge a war crime. Accord United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, June 15-July 17, 1998, Rome Statute of the International Criminal Court art. 8(2)(b)(iv), U.N. Doc. A/CONF.183/9* (July 17, 1998), 37 I.L.M. 999 (1998) [hereinafter Rome Statute].

the deep morality of war, it is therefore incorrect to regard *ad bellum* judgments as necessarily determinative of *in bello* proportionality judgments—still less as relevant to *in bello* duties of an absolute nature, for example, those that prohibit torture, extrajudicial killing, or denial of quarter.³⁴

I continue to believe, despite some recent suggestions to the contrary, that *in bello* proportionality can only be effective if it remains a discrete inquiry, meaning that it must be analytically independent of *jus ad bellum* considerations. But the inquiry cannot be constructively pursued as though law *itself* were independent of its context. The ethical and political dimensions of *in bello* proportionality neither can nor should be marginalized. Each offers a lens that seldom dictates, but almost always informs, the others. Because law is a means to sociopolitical objectives,³⁵ it should not be surprising that the major source of debate over *in bello* proportionality lies in debate about the nature and scope of those objectives.

II. API's Definition: Custom and Codification

Virtually all scholarship on LOAC or *jus in bello* stresses at the outset, in effect if not by a cognate expression, that the entire corpus of this field of international law rests on “a subtle equilibrium between two diametrically opposed impulses: military necessity and humanitarian considerations.”³⁶ For reasons to be made clear below, I believe this is a misguided foundational normative principle, so to speak, for LOAC. But descriptively there is considerable truth to it. And no LOAC principle more fully captures the tension implicit in this subtle and fragile equilibrium than proportionality—which, not coincidentally, also codifies it in microcosm.³⁷ Proportionality, under API, prohibits any attack “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof [collectively, ‘collateral damage’³⁸], which would be excessive in relation to the concrete and direct military advantage anticipated.”³⁹ The ICRC maintains that the API definition, verbatim, is now

³⁴ Sloane, *supra* note 4, at 75–76.

³⁵ See generally RUDOLF VON JHERING, *LAW AS A MEANS TO AN END* (1913); see also LOUIS HENKIN, *HOW NATIONS BEHAVE* 13–14 (1979).

³⁶ DINSTEIN, *supra* note 14, at 16–17 (2004); see, e.g., INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 683 ¶ 2206 (1987) (“The entire law of armed conflict is, of course, the result of an equitable balance between the necessities of war and humanitarian requirements.”) [hereinafter API COMMENTARY].

³⁷ See Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT’L L. 795, 837 (2010).

³⁸ Despite the euphemism, for brevity and convenience, I will refer to “incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof,” as collateral damage.

³⁹ API, *supra* note 13, at art. 51(5). The Rome Statute makes the violation of proportionality carried out with a *mens rea* of knowledge a war crime. Rome Statute, *supra* note 33, at art. 8(2)(b)(iv).

customary international law.⁴⁰ But as we will see, that is questionable for conceptual and textual reasons alike. I will suggest that the Rome Statute of the International Criminal Court offers a more accurate definition of the customary standard—even though, in principle, it is meant to apply only in a criminal context, that is, to judge whether the author of an allegedly disproportionate attack should be convicted of a war crime.⁴¹

Proportionality itself, like “collateral damage,” is a euphemism: for each attack, it supplies a standard, with the regrettable connotation of mathematical precision, which, within broad parameters, prescribes how many civilians may be killed and injured, and how much and what sort of civilian property destroyed, in the pursuit of a diverse military advantages. At the same time, because LOAC categorically prohibits comparatively few means and methods of warfare,⁴² it would be difficult to overstate the potential significance of proportionality to the *jus in bello*’s cardinal objectives: reducing superfluous suffering and protecting human dignity to the extent feasible in war. It should therefore trouble international lawyers, as W. Hays Parks caustically but accurately put it, that if the principle of proportionality were challenged under U.S. law, it “would be constitutionally void for vagueness.”⁴³

This hypothetical constitutional infirmity may be attributed chiefly to two factors: first, the “open texture”⁴⁴ of the key terms in API’s phraseology; and second, that proportionality requires an attack’s author, in theory, to weigh incommensurable interests or values, above all, anticipated military advantage against expected harm to civilian welfare. But as subsection (B), below, suggests, this formulation obscures the constituent sub-judgments of a similar nature that must also be made. In large part for these reasons, proportionality judgments tend in practice to be both highly subjective and internationally lawful within a broad “margin of appreciation.”⁴⁵ Yet the futility of reaching agreement on a uniform, determinate proportionality

⁴⁰ I INT’L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: VOLUME I: RULES 46, Rule 14 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter I CUSTOMARY IHL].

⁴¹ This may not matter, however, inasmuch as Article 85 of API now classifies violations of proportionality as grave breaches.

⁴² See, e.g., Declaration (IV, 3) Concerning Expanding Bullets, July 29, 1899, *reprinted in* 1 AM. J. INT’L L. 155 (Supp. 1907); Declaration (IV, 2) Concerning Asphyxiating Gases, July 29, 1899, *reprinted in* 1 AM. J. INT’L L. 157 (Supp. 1907); Convention (II) with Respect to the Laws and Customs of War on Land, Annex: Regulations Respecting the Laws and Customs of War on Land art. 23(d), July 29, 1899, 11 G.B.T.S. 800, 22 Stat. 1803, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 73, 77 (Adam Roberts & Richard Guelff eds., 2000) (prohibiting denial of quarter) [hereinafter ROBERTS & GUELFF]; API art. 40 (same).

⁴³ Parks, *supra* note 1 (footnote omitted).

⁴⁴ H. L. A. HART, THE CONCEPT OF LAW 128 (1961).

⁴⁵ Cf. *Isayeva v. Russia*, App. No. 57959/00, Eur. Ct. H.R. (2005); *Case Concerning Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161 (Nov. 6); *Handyside v. United Kingdom*, 1 Eur. Ct. H.R. (ser. A) 737 (1976).

calculus should not lead to cynical or apathetic conclusions. That would understate the extent to which, for all its flaws, the evidence suggests that good-faith efforts to respect proportionality indeed reduce superfluous suffering in war.⁴⁶ At any rate, short of abandoning the principle, “as long as wars are fought, and if there is to be compliance with the law of war, some such approximation must be made.”⁴⁷

The devil, of course, lies in the details. And as difficult as it is to reach “some such approximation” in interstate wars, it is exponentially more so in asymmetric conflicts against NSBs.⁴⁸ As a point of departure, and in conformity with general principles of treaty interpretation, it is worth closely analyzing the ordinary meaning of the definition’s terms, considered “in their context and in the light of [API’s] object and purpose.”⁴⁹ Yet before turning to treaty analysis, a preliminary word is in order about the customary status of API, in particular, whether its definition of proportionality may be confidently identified with the current standard under customary international law.

A. Proportionality as Custom

Today, proportionality is one of the “holy triad” of cardinal principles of the *jus in bello*: military necessity, distinction, and proportionality. Perhaps for that reason, lawyers and other theorists frequently assume that with regard to proportionality, API did no more than codify a principle that customary international law had long recognized. Not so. Unlike necessity and distinction, original and longstanding foundations of LOAC, proportionality did not emerge until (comparatively) recently—probably the 1970s.⁵⁰ Even today, the word proportionality is not found in

⁴⁶ See, e.g., *Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity*, 86 AM. SOC’Y INT’L L. PROC. 39, 62 (1992) (remarks of Fred Green, Counsel of the Joint Chiefs of Staff) (affirming that proportionality, among other rules and principles, is “well-understood and play[s] a very real role in decision making within our government generally and within the Department of Defense—the military establishment, specifically”) [hereinafter *Implementing Limitations*]. But cf. II INT’L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME II: PRACTICE (Jean-Mariet Henckaerts & Louise Doswald-Beck eds., 2005) (quoting Russia’s view that proportionality is the “weakest point of IHL” and that states do not, in fact, comply with it in any meaningful sense).

⁴⁷ 1 HOWARD S. LEVIE, *THE CODE OF INTERNATIONAL ARMED CONFLICT* 85 (1984).

⁴⁸ See Geiss, *supra* note 28, at 757–58 (2006).

⁴⁹ Vienna Convention on the Law of Treaties art. 31, May 22, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

⁵⁰ A.P.V. Rogers, *The Principle of Proportionality*, in *THE LEGITIMATE USE OF MILITARY FORCE* 189, 208–09 (Howard M. Hensen ed., 2008); see also *Implementing Limitations*, *supra* note 46, at 46–47 (1992) (remarks of Françoise J. Hamson) (suggesting that proportionality, as defined by API, became customary international law in about 1990); cf. Hersch Lauterpacht, *The Problem of the Revision of the Law of War*, 29 BRIT. Y.B. INT’L L. 360, 365 (1952) (observing that despite early declarations from the United Kingdom, France, and Germany committing to minimize civilian casualties, “[a]s the war progressed, the protection of the civilian population from aerial bombardment became largely

any LOAC treaty. One might argue that proportionality is best understood as an extension of the principle of distinction between combatants and civilians; this is indeed what API suggests by including it among other violations of the principle of distinction, which prohibits “indiscriminate” attacks. But the truth is that proportionality, as defined in API, imposes a more onerous, and qualitatively distinct, constraint: arguably, it *requires* military forces to subject their soldiers to greater risks of death and injury in an effort to reduce collateral damage.⁵¹ API indirectly defines proportionality by classifying, among indiscriminate and therefore unlawful attacks, those “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.”⁵² But attacks within this definition cannot be said to be indiscriminate in a literal sense; the author of the attack ordinarily does not deliberately target civilians or civilian objects.

At any rate, for the 174 states parties to API as of the date of this writing, its definition of proportionality is, of course, legally authoritative. Less clear is the ICRC assertion that API’s formulation is a verbatim codification of customary international law, which therefore binds non-states parties. The latter include, notably, the United States, which has declined to ratify API—although its principal objections lie elsewhere than in the Protocol’s proportionality formulation.⁵³ Nonetheless, at least one prominent scholar argues, with considerable force on the basis of a methodical analysis of state practice, that the more lax formulation adopted by states parties to the Rome Statute of the International Criminal Court more accurately reflects the current state of custom in this regard.⁵⁴ The Rome Statute technically defines proportionality exclusively for the purposes of prosecuting violations of it as a war crime. Applying something like the principle of lenity, it criminally proscribes only the subset of presumably disproportionate attacks that would be expected to cause collateral damage that is “*clearly* excessive in relation to the concrete and direct *overall* military advantage anticipated.”⁵⁵ Yet as the following textual analysis

nominal”).

⁵¹ For a sophisticated argument to this effect, see David Luban, *Risk Taking and Force Protection*, in *READING WALZER* 277 (Itzhak Benbaji & Naomi Sussman eds., 2013). *But see* Peter Margulies, *Valor’s Vices: Against a State Duty to Risk Forces in Armed Conflict*, 37 *VT. L. REV.* 271 (2012). *See also* MICHAEL WALZER, *JUST AND UNJUST WARS* 151–52 (1977).

⁵² API, *supra* note 13, at art. 51(5). Similar formulations appear elsewhere. *See id.* arts. 57(2)(a)(iii), 57(2)(b) (instructing forces, respectively, to “refrain from deciding to launch any attack,” or if such an attack has already be launched, to cancel or suspend it, if it “becomes apparent that . . . the attack may be expected to cause [collateral damage], which would be excessive in relation to the concrete and direct military advantage anticipated”).

⁵³ Nonetheless, the United States has not conceded that proportionality as defined in API is customary international law. *See* Parks, *supra* note 1, at 173 & n.526.

⁵⁴ Rogers, *supra* note 50, at 209.

⁵⁵ Rome Statute, *supra* note 33, at art. 8(2)(b)(iv) (emphasis added).

suggests, the stressed words above that appear in the Rome Statute formulation only marginally, if at all, influence the actual degree of discretion afforded to the authors of attacks—especially in view of the fact that API adds violations of proportionality to the list of grave breaches of the Geneva Conventions.⁵⁶

B. Text and Context

By common consensus, API's definition does little to reduce the highly subjective nature of proportionality judgments. Nominal widespread agreement on its definition obscures frequent practical disagreements about its interpretation and implementation in diverse geostrategic environments. To facilitate a methodical analysis, it may be helpful to disaggregate the definition into its terms or phrases: states may not launch an attack, or if it already has been launched, must cancel or suspend it, if it "may be expected to cause [collateral damage], which would be excessive in relation to the concrete and direct military advantage anticipated."⁵⁷ Literal textual analysis of this sort, while tedious, may be helpful here to bring to the surface the full extent to which API's standard necessarily immerses the law-applier in a morass of legal uncertainty and subjectivity—with clear borders only at the extremes.

1. Expecting and Anticipating

Begin with "expected." In context, the ordinary meaning of this word, which modifies collateral damage, is that proportionality must be judged *ex ante*, a point often lost on critics of particular strikes.⁵⁸ An attack that turns out to kill more civilians than the attacker expected—because of, say, a shelter that, despite reasonable precautions, the attacker had been unaware of at the time, or civilians hiding in a structure that would otherwise be a legitimate objective—does not become disproportionate in retrospect if those deaths or injuries eventuate.⁵⁹ API elsewhere requires states to take certain precautions in an effort to avoid such tragic mistakes,⁶⁰ and these provisions should inform the meaning of expected. But legal scholars have rightly bemoaned the failure of popular media and even scholarly accounts of proportionality to appreciate its prospective legal nature.

Notice, too, that beyond this common error, the term leaves unanswered several critical questions: for example, expected *by whom*? That is, at what level of the civilian or military hierarchy should judgments of

⁵⁶ API, *supra* note 13, at art. 85(3).

⁵⁷ *Id.* at arts. 51(5), 57(2)(a)(iii), 57(2)(b).

⁵⁸ *Cf.* Schmitt, *supra* note 37, at 824–25.

⁵⁹ *See Implementing Limitations*, *supra* note 46, at 47 (1992) (remarks of Françoise J. Hamson).

⁶⁰ *E.g.*, API, *supra* note 13, at arts. 57–58. The Vienna Convention makes clear that these provisions should inform the meaning of related terms elsewhere in the treaty. *See Vienna Convention*, *supra* note 49, at art. 31.

acceptable collateral damage be made? On the one hand, commanders in the field will generally be better situated to assess the likelihood and extent of collateral damage from a particular attack. On the other, civilian or high-level military elites further up the chain of command might be better situated to decide holistically whether the anticipated military advantage justifies that expected collateral damage—a *fortiori* if, following the Rome Statute formulation, the word “overall” qualifies “military advantage.”

Ideally, belligerents would possess perfect information, and it would be perfectly shared among the elites responsible for LOAC compliance and strategy. In reality, of course, that is seldom if ever so.⁶¹ In battle, responsibility for the judgment prescribed by API will rest on the shoulders of elites at different levels of the civilian and military chains of command. API does not say or suggest whose expectation counts.⁶² The referent of “expected” is unclear, and perhaps it must remain so.

Another unanswered but critical question is, expected to what degree of certainty? Does API, by analogy to criminal law, require the attack author’s expectation to be *reasonable*, such that an officer’s negligent expectation as to the risk or degree of collateral damage violates LOAC? Frits Kalshoven, a noted ICRC expert, suggests that it does: he argues that negligence in “tak[ing] into account all available information” renders a commander responsible for violating proportionality.⁶³ Because API requires reasonable precautions,⁶⁴ general, positive law on treaty interpretation seems to vindicate this position. The problem, which is hardly unique to this legal issue, is that the analysis nonetheless circles back to the question of what “reasonable” means in this context. The ICRC official commentary to API does not offer further clarification. Even if it did, the spectrum of what qualifies as reasonable would remain broad except at the extremes.

Kalshoven, for example, immediately before stating that commanders must consider all “available” information, illustrates this idea by reference to an attacker who “turn[s] a blind eye on the facts of the situation.”⁶⁵ Yet this does not imply negligence as the law conventionally understands it (a failure to act in conformity with some objective standard of

⁶¹ See, e.g., *Implementing Limitations*, *supra* note 46, at 66 (remarks of Fred Green, Counsel of the Joint Chiefs of Staff) (“[D]ecisions must be made with imperfect knowledge of the facts, to say the least, and under conditions of high levels of stress and severe time constraints.”).

⁶² Parks, *supra* note 1, at 175. I do not mean to suggest that this is a flaw in the formulation that should be remedied by amendment or otherwise. In fact, it seems unlikely that the drafters of API could have specified the level at which such a judgment should be made in view of the contingencies of combat and diverse hierarchical structures of military forces worldwide, among other factors. See, e.g., API COMMENTARY, *supra* note 36, at 684 ¶ 2212 (enumerating an illustrative list of factors relevant to the proportionality calculus set forth in Article 57(2)(a)(iii)).

⁶³ See *Implementing Limitations*, *supra* note 46, at 44 (remarks of Frits Kalshoven).

⁶⁴ API, *supra* note 13, at arts. 57–58.

⁶⁵ See *Implementing Limitations*, *supra* note 46, at 44 (remarks of Frits Kalshoven).

reasonableness under the circumstances); rather, it implies something more like willful blindness or perhaps even recklessness. Greater clarity might be sought by resort to ethics, but as we will see, ethical debates in just war theory may exacerbate rather than reduce legal uncertainty. This is not to denigrate the formal API definition as a statement of law, nor to dismiss the relevance or contribution of ethics to IHL. It is simply to suggest that, in this regard, the API formulation must be informed by norms and judgments that the text, *travaux préparatoires*, and API official commentary do not, and likely could not, supply.

Still another question is how to understand expectation. It seems logical to distinguish two dimensions: first, the risk that certain collateral damage will eventuate, and second, its nature and scope if it does. Expectation presumably refers to permutations of the two. Suppose, to take a contrived but illustrative example, that an attack clearly aims at a “concrete and direct military advantage.” That side of the proportionality equation is uncontroversial. Let us further suppose, however, that the attacker knows that the weapon he plans to deploy malfunctions 5% of the time. If it malfunctions, it will detonate before reaching its target. And under the circumstances prevailing at the time, that may well kill or injure numerous civilians. Yet if the attack will otherwise inflict no, or extremely minimal, collateral damage, and if the anticipated military advantage is very high, would the attack nonetheless be disproportionate because of a *low* risk of a *high* amount of collateral damage? Conversely, would a *high* risk of a *low* amount of collateral damage, which we can readily imagine in a different factual scenario, render the attack disproportionate? Perhaps it would. But in most instances (excluding, for example, exigent scenarios involving nuclear or other catastrophic weapons), the ordinary meaning of API’s definition suggests that there comes a point—3%, 1%, .1%?—where the risk of even very serious collateral damage is sufficiently low such that it is legally outweighed by the anticipated military advantage (or, again, vice versa), especially if the latter is sufficiently high.

“Anticipated,” at the tail end of the API formulation, functions as the converse of “expected.” So it predictably has a similarly determinate meaning in one respect and a similarly indeterminate meaning in others. It reinforces the vital point that proportionality is a prospective legal principle and must be assessed *ex ante*: if a commander reasonably anticipates a substantial military advantage, which, for some unforeseen or unforeseeable reason, does not materialize, although serious expected collateral damage does, the attack does not become retroactively disproportionate.⁶⁶ Consider another simple example: A commander orders an air raid on an enemy

⁶⁶ Schmitt, *supra* note 37, at 824–25 (“That the strikes [against Iraqi leaders in the 2003 war, which were critiqued as disproportionate by Human Rights Watch, among others] proved unsuccessful is irrelevant: the legal question is the relationship between expected harm and *anticipated* advantage in the operation as planned, not that which eventuated.”) (emphasis added).

military base in the reasonable belief that it will kill or disable thousands of enemy troops but will unavoidably kill or injure a few civilians living or working adjacent to the base.⁶⁷ It turns out that the troops have been redeployed recently and covertly. Only civilians die in the raid. Assuming the reasonableness of the commander's failure, despite due precautions, to learn of the redeployment, the raid would be proportionate notwithstanding the civilian casualties.

But "anticipated" also introduces uncertainty that mirrors that of "expected." First, the judgment of anticipated military advantage must be made at some unspecified level of the civilian or military hierarchy based on strategic and tactical considerations. API does not and probably could not specify the appropriate link in the chain of command at which the judgment of anticipated advantage should be made—for substantially the same reason it does not specify the level at which expected collateral damage should be assessed. Nor is it clear that the same level of the military hierarchy would be appropriate each time; the contrary is more likely, and in that event, another complex judgment must be made in practice because, here too, API requires a twofold judgment: the probability that the advantage will materialize and the nature and scope of the advantage if it does materialize. Nothing in the ordinary meaning or *travaux* of API specifies how to appraise an attack with, say, a very low probability of success but a potentially decisive military advantage.

Consider a hostage crisis. If the rescue mission were to succeed, the anticipated military advantage would be, in effect, 100%. But the likelihood that a rescue mission will succeed depends on many unpredictable factors. Contrast the successful rescue of Israeli nationals taken hostage and held by Palestinian terrorists at Entebbe airport in Uganda with the failed rescue mission of the United States during the Iran Hostage Crisis. As it happens, neither involved a high risk of serious collateral damage (although the civilian or military status of the Iranians in the latter example is debatable). Still, one could readily imagine plausible scenarios that risk considerable collateral damage in the service of the same military advantage. How should we appraise a hostage rescue operation of this sort, that is, one in which the anticipated military advantage is, in effect, *total* in terms of goal but low in terms of its likelihood of success?

With "anticipated," as with "expected," the point is not that API erred in its word choice. It is difficult to see how the formulation could in practice provide a standard that lends itself to greater objectivity and still be operationally feasible. The uncertainty rather inheres in the nature of the *in bello* proportionality inquiry. As a legal, and *a fortiori* a criminal standard,

⁶⁷ See DINSTEIN, *supra* note 14, at 123–25. Depending on the nature of their activity, this may not qualify as collateral damage. See Parks, *supra* note 1, at 174 (excluding from the definition of collateral damage, among other persons, "[c]ivilians injured or killed while working in or immediately adjacent to a lawful target").

proportionality cannot assign determinate values to each of the sheer number of diverse variables implicated in its determination in concrete cases.

2. Excessive In Relation To

Next consider “*excessive in relation to* the concrete and direct military advantage anticipated.”⁶⁸ This formulation is in one regard a virtue. It makes clear the critical point that proportionality consists in a relationship or ratio. Even international lawyers sometimes confuse “excessive,” a relational term, with the less elastic word “extensive,”⁶⁹ and journalists, politicians, and others often treat them interchangeably. Remarkably, the ICRC Commentary, too, errs in this regard: “The Protocol,” it says, “does not provide any justification for attacks which cause *extensive* civilian losses and damages. Incidental losses and damages should never be *extensive*.”⁷⁰ In fact, as Robert Barnidge aptly put it, “[w]hat may be ‘excessive’ need not be, though it may be, ‘extensive,’ and what may be ‘extensive’ may be, though it need not be, ‘excessive.’”⁷¹

Beyond clarifying the critical point that proportionality is a relational judgment, however, the word excessive—like expected and anticipated—introduces further indeterminacy. Textually, it requires a subjective judgment on the part of the attacker: it would be no surprise if what the attacker regards as proportional to a particular anticipated military advantage seems excessive to the attacked. Once again, this is not to suggest that API’s drafters should or could have used a more determinate word in lieu of excessive. To the contrary, proportionality only works if and insofar as it embodies a balance that accommodates the attacker’s perceived military advantage within the framework of LOAC’s humanitarian aspirations. The point of emphasis that legal analysts frequently overlook is the extent to which API’s formulation compels numerous, subjective judgments that must be made before and in addition to the recognized core problem of how to judge military advantage and collateral damage against each other.

Few would be surprised to learn that:

a human rights lawyer and an experienced combat commander would [be unlikely to] assign the same relative values to military advantage and to injury to noncombatants. Further, it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree

⁶⁸ API, *supra* note 13, at art. 51(5)(b).

⁶⁹ See DINSTEN, *supra* note 14, at 131 (footnote omitted).

⁷⁰ API COMMENTARY, *supra* note 36, at 626 ¶ 1980 (emphasis added); see Schmitt, *supra* note 37, at 839 n.38 (“No basis exists in practice or law for this statement.”).

⁷¹ Robert P. Barnidge, Jr., *The Principle of Proportionality Under International Humanitarian Law and Operation Cast Lead*, in *NEW BATTLEFIELDS/OLD LAWS: FROM THE HAGUE CONVENTION TO ASYMMETRIC WARFARE* 181 (William C. Banks ed., 2010).

in close cases.⁷²

Yet journalists, statesmen, diplomats, and others who shape public opinion often simply observe what looks to them like “too much” collateral damage and, without further reflection, condemn it as disproportionate.⁷³ It is at a minimum premature to make this judgment in any meaningful legal sense without knowing the anticipated military advantage.⁷⁴

A related error encouraged by the confusion of extensive and excessive is for observers to compare the damage, collateral and military, suffered by each belligerent and—perhaps struck by the disparity—to condemn one side for using disproportionate force.⁷⁵ Many critics of the IDF’s conduct in the 2008-09 campaign Operation Cast Lead, including prominent international lawyers on the Goldstone Commission, seized upon the numerical disparity between people (civilians and combatants) killed by Hamas’s forces (13) and people killed by the IDF (estimates vary, but likely more than 1100),⁷⁶ as decisive evidence of disproportionate force—without considering the anticipated military objective or *ex ante* context. The IDF might well be culpable for using disproportionate force. But the foregoing would be an indefensible application of API’s definition. It cannot be said too often that *in bello* proportionality “has nothing to do with equality of arms, nor with comparing the number of casualties on each side.”⁷⁷

Because “excessive” unavoidably requires a relational value judgment, disagreement may well be inevitable. Yoram Dinstein argues that excessive means something like “clearly discernible” but cautions readers that “there is no reason to exaggerate: the view that ‘excessive’ applies ‘only when the disproportion is unbearably large’ goes too far.”⁷⁸ That seems sensible at first blush. Perhaps it is from an idealistic perspective. But realistically, in view of the number and degree of controversial or ambiguous judgments required by the API proportionality principle, if the bar is not quite so high as “unbearably large,” neither can it be that much lower.

To be sure, at the extremes, military elites appraising the same

⁷² KOSOVO REPORT, *supra* note 5, at 1271 ¶ 50.

⁷³ See, e.g., Walzer, *supra* note 3 (“Disproportionate is the favorite critical term in current discussions of the morality of war. But most people who use it don’t know what it means in international law or in just war theory.”); Barnidge, *supra* note 71, at 180–81 (noting that Special Rapporteur Falk faulted the “‘extensive’ civilian casualties and ‘extensive’ damage to . . . to private property’) (footnote omitted).

⁷⁴ See Schmitt, *supra* note 37, at 826 (critiquing the Goldstone Report for this reason).

⁷⁵ See Hurka, *supra* note 29, at 59.

⁷⁶ See Human Rights in Palestine and Other Occupied Arab Territories: Rep. of the U.N. Fact-Finding Mission on the Gaza Conflict, Human Rights Council, 12th Sess., ¶¶ 30–31, U.N. Doc A/HRC/12/48 (Sept. 25, 2009) [hereinafter Goldstone Report].

⁷⁷ Rogers, *supra* note 50, at 189 (citation omitted); see also *id.* at 210 n.2; GARY SOLIS, THE LAW OF ARMED CONFLICT 280 (2010).

⁷⁸ DINSTEIN, *supra* note 14, at 131 (citation omitted).

scenario in good faith would be likely to agree.⁷⁹ But that may, sadly, be all that API's formulation can accomplish by way of consensus. It should not have been surprising that the Kosovo Report, after a thorough analysis of NATO's compliance with LOAC proportionality in the course of its 1999 bombing of Serbia, fell back upon that old favorite of the law, the reasonable person.⁸⁰ After pages of admirably thoughtful analysis of the concrete situation, it could suggest as a general principle only "that the determination of relative values [in the appraisal of proportionality] must be that of the 'reasonable military commander.'"⁸¹ As every first-year law student learns, the number and variety of questions begged by the legal device of the reasonable person are legion, and there is a sense in which it restates rather than answers those questions. Again, none of this is to condemn API's standard; it is only to stress that reasonableness is probably the best, and perhaps the only, standard by which the law can assess *in bello* proportionality.

3. Concrete and Direct

API refers to "the *concrete and direct* military advantage anticipated." Elsewhere, I suggest that the most critical function of these words is to forestall the "slippery slope from 'concrete and direct military advantage' to 'victory.'"⁸² Without these adjectives, the relational word "excessive" could be construed as unduly elastic,⁸³ eviscerating proportionality as a real legal constraint. Assuming good faith, what expected but unavoidable collateral damage could be disproportionate to the anticipated advantage of victory or termination of the conflict in the attacker's favor?

Beyond supplying a critical backstop, however, the phrase "concrete and direct" offers scant guidance. Is concrete and direct to be contrasted with abstract and indirect, and if so, what could that mean? What military advantage is abstract and indirect? Barnidge inquires to the same effect:

⁷⁹ KOSOVO REPORT, *supra* note 5, at 1271 ¶ 50.

⁸⁰ Cf. Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT'L L. 715, 737 (2010) (concluding that one international criminal court applied proportionality using an "international version of the common law's reasonable man, who has carefully considered all the evidence available at the critical time and shaped a rational choice between available means").

⁸¹ KOSOVO REPORT, *supra* note 5, at 1271 ¶ 50; *see also* KALSHOVEN, *supra* note 5; *cf. Implementing Limitations*, *supra* note 46, at 44 (remarks of Frits Kalshoven) (proportionality "may perhaps best be seen as an appeal to the good faith of the normal, responsible military man or woman").

⁸² Sloane, *supra* note 4, at 76, 110; *see also Implementing Limitations*, *supra* note 46, at 47 ("The ultimate advantage—the end of war—appears to have too remote a connection with the attack. The alternative would be to deprive proportionality of all meaning, as it would appear to sanction a strategic nuclear strike, provided the strike was thought likely to bring the conflict to an end.").

⁸³ *See* SOLIS, *supra* note 77, at 274.

Does “concrete” mean definite? Tangible? Reasonably definite? Reasonably tangible? Should “direct” be understood in contradistinction to indirect? Is the fact that the Commentary to article 57 concludes that the phrase “concrete and direct” was “intended to show that the advantage concerned 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” a source of comfort, or is it redundant?⁸⁴

In answer to the last question here, the ICRC Commentary seems troubling. If its formulation is redundant, then of course that is unhelpful. But if it means, as the ordinary sense of the phrase in the Commentary suggests,⁸⁵ that military advantage must be both serious and perceptible in the short term, then it confers what is arguably a “manifestly absurd or unreasonable meaning” on “concrete and direct,” which should be excluded by ordinary rules of treaty interpretation.⁸⁶

The first principle of any norm of LOAC must be that a reasonable military commander, acting in good faith, can adhere to it and still effectively pursue the security objectives with which he has been charged by the state. And in a liberal democratic polity, the state is more than a legal abstraction; it is “the People” to whom every military commander is ultimately accountable. No responsible military commander would, nor should legally be required to, forego a particular strike if it is part of a sophisticated, long-term military strategy simply because the concrete and direct military advantage, interpreted as the ICRC suggests, is not obviously or fully perceptible in the short term, or seems comparatively minor to the *uninformed* observer.

Imagine, for example, an air raid that injures hundreds of civilians but appears to confer only a trivial military advantage, say, destroying a platoon of 25 soldiers. That initially looks manifestly disproportionate. But suppose the real objective of the raid is to lead the enemy to shift its troops to another sector of the battlefield, enabling the attacker to outmaneuver its opponent or capture terrain that confers a substantial military advantage in the long term. Should proportionality be understood to prohibit this raid? Perhaps, but we have good reason to doubt this interpretation. The issue is the referent against which expected collateral damage should be appraised: is it the clear and immediately perceptible advantage of an attack, or can it consist in the attack’s contribution to a long-term strategic objective?

⁸⁴ Barnidge, *supra* note 71, at 176 (citation omitted).

⁸⁵ API COMMENTARY, *supra* note 36, at 684 ¶ 2209 (“The expression ‘concrete and direct’ was intended to show that the advantage concerned 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.”).

⁸⁶ Vienna Convention, *supra* note 49, at art. 32.

Avoiding the former implication appears to have been among the principal reasons why states insisted on inserting the word “overall” into the Rome Statute’s formulation of proportionality. To interpret the words “concrete and direct” as a blanket prohibition on long-term, sophisticated strategies would also be “manifestly absurd or unreasonable” within the meaning of the Vienna Convention.⁸⁷

A continuum exists between the immediate effects of an attack and the “military advantage” of victory. What is proportional lies somewhere on that continuum but cannot exclude *all* longer-term strategies. To be sure, the principle of “[p]roportionality has to be calculated in relation to a given attack, rather than on an ongoing cumulative footing,” but the word “overall” implies that belligerents enjoy some leeway to open the aperture—to consider “the larger operational picture and not merely [a] particular point under attack.”⁸⁸ Commanders must enjoy some discretion to decide the extent to which the military advantage anticipated may include broader strategic objectives and not just the short-term advantage overtly achieved. Proportionality certainly imposes theoretically objective limits on the degree of discretion, but the principle cannot reasonably be understood to erase it.

4. Military Advantage

Military advantage arguably has a well-settled meaning compared to other terms in API’s definition of proportionality. The phrase “military object” dates back to 1923 in LOAC treaties,⁸⁹ and it has long been debated and to some extent worked out in the law.⁹⁰ But it would be a mistake to equate military *advantage* with military *object* (or objective). Article 52, which prohibits attacks on civilian objects, defines them as “objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”⁹¹ But to equate military advantage with military object would run contrary to the canon of treaty interpretation that privileges the ordinary meaning of the text.⁹² It is also foreclosed because the definition of a military object is parasitic on that of military advantage.

Often, of course, the two terms will overlap for that reason: a military *advantage* will consist in the “destruction, capture or neutralization” of one

⁸⁷ Vienna Convention, *supra* note 49, at art. 32(b).

⁸⁸ See DINSTEN, *supra* note 14, at 89 (citing 1923 Hague Rules of Aerial Warfare art. 24(1), Feb. 19, 1923, *reprinted in* ROBERTS & GUELF, *supra* note 42, at 141, 144).

⁸⁹ See *id.* at 82 (citing 1923 Hague Rules of Aerial Warfare art. 24(1), Feb. 19, 1923, *reprinted in* ROBERTS & GUELF, *supra* note 42, at 141, 144).

⁹⁰ See, e.g., *id.* at 87–99 and sources cited therein; see also WALZER, *supra* note 51, at 146.

⁹¹ API, *supra* note 13, at art. 52(2). Protocol I also creates a presumption that objects “normally dedicated to civilian purposes,” which might have been redeployed for military purposes, “shall be presumed not to be so used.” *Id.* at art. 52(3).

⁹² Vienna Convention, *supra* note 49, at art. 31(1).

or more military *objects*. But it need not. Quite apart from the interminable debates over the status of so-called dual-use objects and personnel, such as industrial plants, electricity grids, bridges, police, and media,⁹³ it is critical to appreciate that while the definition of military object is parasitic on that of military advantage, the converse is not necessarily so: military advantage may, but need not, be dependent on the “destruction, capture, or neutralization” of one or more military objects. One party to the conflict might achieve a major military advantage, for example, by intercepting and decoding the enemy’s communications. That does not require the destruction, capture or neutralization of any military object, at least not without putting strain on the ordinary meaning of “object.”

C. *Weighing Incommensurables*

In sum, each key term or phrase in the proportionality formulation is characterized by an “open texture”⁹⁴ and requires the exercise of, not total, but considerable, discretion.⁹⁵ I do not mean to suggest that API intentionally leaves this discretion to military elites rather than establishing a putatively objective standard, but in operation, the API standard nonetheless limits subjective discretion only at the extreme margins. Even if it were possible to arrive at greater consensus on the interpretation of API’s terms, however, the core of the principle is a directive to weigh incommensurables. As Dinstein puts it, in what strikes me as an understatement, “pondering dissimilar considerations — to wit, civilian losses and military advantage — is not an exact science.”⁹⁶ The report prepared for the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (ICTY) recommending whether to prosecute alleged war crimes carried out during the air campaign in Kosovo notes:

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. For example, bombing a refugee camp is obviously prohibited if its only military significance is that people in the camp are knitting socks for soldiers. Conversely, an air strike on an ammunition dump should not be prohibited merely because a farmer is plowing a field in the area. 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

⁹³ See DINSTEIN, *supra* note 14, at 94–99 (canvassing objects the military or civilian nature of which is often disputed).

⁹⁴ HART, *supra* note 44, at 128 (emphasis deleted).

⁹⁵ The general reference to discretion obscures that proportionality also calls for the exercise of distinct *types* of discretion. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 31–39 (1977).

⁹⁶ DINSTEIN, *supra* note 14, at 122 (footnote omitted).

general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective.⁹⁷

The Report aptly goes on to indicate the great extent to which the dichotomy between anticipated military advantage, on the one hand, and expected collateral damage, on the other, fails to capture the nuances raised by four sub-issues embedded in that figurative proportionality equation. In particular, the principle of proportionality, upon analysis, theoretically would require an attack's author, operating in far from ideal conditions, to consider these, among other, questions:

- a) What are the relative values to be assigned to the military advantage gained and the injury to non-combatants or the damage to civilian objects?
- b) What do you include or exclude in totaling your sums?
- c) What is the standard of measurement in time or space?
- d) To what extent is a military commander obligated to expose his own forces to danger in order to limit civilian casualties or damage to civilian objects?⁹⁸

Of course, it would be absurd to think this is operationally feasible. Just war theorists and moral philosophers have long debated questions of this sort,⁹⁹ and I do not suggest that these inquiries lack value, being "academic" in some pejorative sense. But for purposes of operational military law, we should acknowledge that "centuries of discussion by philosophers and jurists about the meanings of necessity and proportionality in human affairs do not seem to have produced general definitions capable of answering concrete issues."¹⁰⁰ And even in theory it seems doubtful that any of the diverse questions canvassed in the preceding section could be susceptible to an uncontroversial answer. How, then, should the hypothetical reasonable military commander, acting in good faith, go about making operational, concrete proportionality judgments in the field?

There is an unfortunate tendency, encouraged by the ordinary meaning and connotation of proportionality, to conceptualize the question in pseudo-mathematical terms, as though it were susceptible to determination by an algorithm or tit-for-tat calculation. This leads to exasperated (and misinformed) statements such as that of former U.S. Ambassador to the United Nations John Bolton, speaking to the press at the outset of the 2006

⁹⁷ KOSOVO REPORT, *supra* note 5, at 1271 ¶ 48.

⁹⁸ *Id.* at 1271 ¶ 49.

⁹⁹ See, e.g., Hurka, *supra* note 29; MICHAEL WALZER, *Two Kinds of Military Responsibility*, in ARGUING ABOUT WAR 23 (2004).

¹⁰⁰ Schachter, *Implementing Limitations*, *supra* note 46, at 39.

war between Israel and Hezbollah:

What Hezbollah has done is kidnap Israeli soldiers and rain rockets and mortar shells on innocent civilians. What Israel has done in response is [an] act of self-defense. And I don't quite understand what the argument about proportionate force means here. Is Israel entitled only to kidnap two Hezbollah operatives and fire a couple of rockets aimlessly at Lebanon?¹⁰¹

LOAC makes clear that proportionality is not a matter of *lex talionis*.¹⁰² Nor, of course, is there a "precise formula . . . such as that 2.7 enemy lives equal one of ours."¹⁰³ So what guidance can be supplied?

III. The "As If" Thesis

We need not throw up our hands in the face of this question. But neither is it susceptible to a formulaic answer. Perhaps the most prominent and popular answer to proportionality's manifold puzzles regrettably suggests just that. What we may call the as-if thesis tries to turn the ineluctably subjective nature of proportionality on itself, to make a virtue of a "vice." The idea is that morally, if not legally, all civilians—those of the attacker, the attacked, and neutral parties—must be treated identically. For purposes of proportionality, a civilian is a civilian, period. A military commander should therefore determine the acceptable level of expected collateral damage relative to the anticipated military advantage *as if* the civilians put at risk by a particular attack were citizens of his own state.

Michael Walzer and Avishai Margalit sparked a continuing debate about the as-if thesis by defending it in the context of the first (2008–2009) Gaza War.¹⁰⁴ They explained their view in an editorial in the *New York Review of Books* (NYRB).¹⁰⁵ Like *Just and Unjust Wars*,¹⁰⁶ Walzer's

¹⁰¹ Bolton *Defends Israel's Actions in Lebanon*, CNN, (July 24, 2006), <http://perma.cc/4XMA-HVVH>.

¹⁰² *Exodus* 21:24 (King James); see generally Jeremy Waldron, Essay, *Lex Talionis*, 34 ARIZ. L. REV. 25, 32 (1992).

¹⁰³ Hurka, *supra* note 29, at 57.

¹⁰⁴ For subsequent contributions to this debate, see, for example, Luban, *supra* note 51. *But see* Margulies, *supra* note 51 (arguing that the "duty to risk" argument defended by Luban and others is not only mistaken but counterproductive).

¹⁰⁵ Avishai Margalit & Michael Walzer, *Israel: Civilians and Combatants*, 56 N.Y. REV. BKS. (No. 8) (May 14, 2009); see also Asa Kasher & Major General Amos Yadlin, reply by Avishai Margalit & Michael Walzer, *'Israel & the Rules of War': An Exchange*, 56 N.Y. REV. BKS. (No. 10) (June 11, 2009); Shlomo Avineri & Zeev Sternhell, reply by Avishai Margalit & Michael Walzer, *'Israel: Civilians & Combatants': An Exchange*, 56 N.Y. REV. BKS. (No. 13) (Aug. 13, 2009); Shmuel Galai, reply by Michael Walzer and Avishai Margalit, *Israel At Wary (Cont'd)*, N.Y. REV. BKS. (No. 14) (Sept. 24, 2009); Menahem Yaari, reply by Avishai Margalit and Michael Walzer, *Israel: The Code of Combat*, 56 N.Y. REV. BKS. (No. 15) (Oct. 8, 2009).

celebrated work of just war theory prompted by his reflections on the Vietnam War, but on a more modest scale, the editorial spurred an extended debate, first played out in a *NYRB* exchange of replies and rejoinders with Asa Kasher and Amos Yadlin.

In the original editorial, Walzer and Margalit invite readers to imagine that before the 2006 conflict between Hezbollah and Israel, a Hezbollah militia captures Manara, a kibbutz “in northern Israel adjacent to the Lebanese border.”¹⁰⁷ The authors then posit four possible variations: In the first, Hezbollah holds the Israeli kibbutz citizens as hostages, “[mingling with them] so as to be shielded by them from any counterattack.”¹⁰⁸ In the second, noncombatant, non-Israeli-citizen volunteers occupy Manara at the moment of capture, and Hezbollah uses them as human shields. In the third, when Hezbollah captures Manara, the militia finds it occupied not by “well-wishing,” noncombatant volunteers but by a group of foreign protesters from abroad who came to the region to raise their voices against Israel’s policies toward Lebanon. In the final variation, Manara had been evacuated before capture, but Hezbollah forcibly brings in South Lebanese villagers to occupy the kibbutz and to use them as human shields.¹⁰⁹

With these variations in mind, the authors further assume that the IDF decides to retake Manara, which would be a legitimate, *ad bellum* proportionate, military response.¹¹⁰ How, they ask, should a military commander acting in good faith carry out this military operation consistent with *in bello* proportionality?¹¹¹ The authors deliberately avoid the diverse devils lurking in the details of this hypothetical, as set forth, for example, in the ICTY Kosovo report quoted earlier. Rather than wade into that morass, they propose a more intuitive and facially appealing approach: *Whatever* the

¹⁰⁶ WALZER, *supra* note 51.

¹⁰⁷ Avishai Margalit & Michael Walzer, *Israel: Civilians and Combatants*, 56 N.Y. REV. BKS. (No. 8) (May 14, 2009). It is understandable, but unfortunate, that the authors chose the IDF, Hezbollah, disputed land adjacent to Lebanon, and so forth to frame their argument—rather than relying on a conflict elsewhere or a fictional military scenario. In the first place, the conflict generally is not, of course, hypothetical for Israelis and Lebanese nationals, as well as for Palestinians and other neighboring peoples. For that reason, among others, this hypothetical almost surely loads the dice based on the likely partiality of the reader toward the broader Arab-Israeli conflict. Ironically, that is presumably what Walzer and Margalit seek to *avoid* in the interest of moral clarity. For only by abstracting from our *jus ad bellum* predispositions, viz., our perceptions of the justice of each side’s *casus belli*, can we impartially evaluate competing and putatively universal *jus in bello* principles, especially proportionality.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ On the distinction between *in bello* and *ad bellum* proportionality, see Sloane, *supra* note 4, at 52–53.

¹¹¹ It is not always clear whether Walzer and Margalit, or their critics (Kasher and Yadlin) mean to argue about the law of armed conflict or its ethics (just war theory). Because I believe the latter inevitably informs the former, the distinction does not strike me as significant here.

answers reached by a reasonable military commander acting in good faith about what *in bello* proportionality requires, those answers may not depend on either the nature of Hezbollah's conduct (for example, that it did or did not deliberately create a greater risk to civilians to exploit LOAC to its advantage), or the identity of the civilians risked by the IDF's effort to recapture Manara (for example, whether they are Israeli nationals or foreigners).

Rather, “[w]hatever Israel deems acceptable as ‘collateral damage’ when its own captured citizens are at risk—that should be the moral limit in the other cases too.”¹¹² A military commander may, of course, risk the lives or welfare of civilians in pursuit of an anticipated military advantage. Neither LOAC nor, according to the vast majority of just war theorists, the ethics of war forbids unintentionally killing or injuring innocent civilians.¹¹³ But the hypothetical good-faith commander may, on this view, impose only the degree and kind of risk that he would be equally prepared to impose on his nation's own civilians under the same circumstances. The authors conclude succinctly: “This is the guideline we advocate: Conduct your war in the presence of noncombatants on the other side *as if* your citizens were the noncombatants.”¹¹⁴

Walzer and Margalit ascribe to Kasher and Yadlin a view fundamentally at odds with this standard: that “the safety of ‘our’ soldiers takes precedence over the safety of ‘their’ civilians.”¹¹⁵ This is not, I think, a fair ascription.¹¹⁶ None of the latter's contributions to the *NYRB* exchange suggest this crude, and, so stated, clearly mistaken view. That qualification aside, Walzer and Margalit stress correctly that the view they ascribe to Kasher and Yadlin would “erode[] the distinction between combatants and noncombatants, which is critical to the theory of justice in war (*jus in bello*).”¹¹⁷ Indeed, I have suggested elsewhere that proportionality, in both its *in bello* and *ad bellum* senses, may well be the paramount area of the law of war in which, erosion of the dualistic axiom, which requires a strict analytic separation of the *jus ad bellum* and the *jus in bello*, is increasingly evident.¹¹⁸

The reason for this erosion is hardly recondite. To say that force must be proportionate naturally invites the question “proportionate to what?”

¹¹² Margalit & Walzer, *supra* note 107.

¹¹³ Two points of clarification: By “civilians,” I mean all noncombatants protected by LOAC, including, for example, not only civilians but combatants rendered *hors de combat*. Second, “innocent” is a term of art in this context. It means “currently harmless.” See, e.g., Jeff McMahan, *Ethics of Killing in War*, 114 *ETHICS* 693, 695 (2004). It does not imply anything about the culpability of the noncombatants for the conflict or otherwise.

¹¹⁴ Margalit & Walzer, *supra* note 107.

¹¹⁵ *Id.*

¹¹⁶ See Margulies, *supra* note 51, at 282.

¹¹⁷ Margalit & Walzer, *supra* note 107.

¹¹⁸ See Sloane, *supra* note 4, at 72–76, 108–111.

Were the answer pitched at an unduly high level of abstraction, that is, in terms of one side's ultimate *ad bellum* military objective ("victory"), then almost any attack, no matter how many civilians it would foreseeably harm, would be *in bello* proportionate.¹¹⁹ That is why *in bello* proportionality must refer to *atomized* rather than *ultimate* military advantage—although, just as clearly, that advantage "need not be limited to [neutralizing] an individual soldier, tank or aircraft."¹²⁰ The nebulous nature of victory in many modern wars¹²¹—of which the Gaza Wars have been tragic but paradigmatic examples¹²²—makes it even more vital to circumscribe "anticipated military advantage" in the law of *in bello* proportionality.

But does the as-if thesis help? Its apparent merit is twofold. First, by definition, it respects the dualistic axiom. If all civilians must be treated identically, there can be no danger of injecting perceptions of which party is the just or lawful belligerent into proportionality decisions. Second, the as-if thesis seems to offer a uniform way to handle the multiple subjectivities and indeterminacies that afflict the principle of proportionality. It does so by investing each subjective or indeterminate component of the proportionality definition (those canvassed in Part II(B)) with substantive content by relying on the attacker's *own* intuitions. It tells military elites to weigh the lives of civilians—whether their own nationals, enemy civilians, or those of a neutral party—equally to decide "what a reasonable military commander would [deem] an acceptable loss of civilian life for the military advantage sought."¹²³

The as-if thesis may well be laudable insofar as it supplies one means to inform practical judgments of *in bello* proportionality. Perhaps it also serves as a salutary "reality check" on operational proportionality judgments. I have argued previously that LOAC recognizes this to a certain extent.¹²⁴ Hence, at the outset, I stress that I do not mean to suggest below that the thesis lacks value; only that it does not suffice, and at times, it may affirmatively mislead. In particular, reflection on the as-if thesis suggests that it is misguided or problematic in three ways: first, as a matter of law, it begs the question or, at best, supplies an excessively variable standard; second, as a matter of ethics, it conflicts with broadly shared and defensible intuitions; and third, and most damningly, as a matter of practice, it is simply unrealistic: *no* military has ever conducted an armed conflict in compliance with the as-if standard—even aspirationally.

A. *Excessive Variability*

¹¹⁹ See Sloane, *supra* note 4, at 91–92 (interpreting the ICJ's *Nuclear Weapons* advisory opinion).

¹²⁰ DINSTEN, *supra* note 14, at 123.

¹²¹ WHITMAN, *supra* note 31, at 10; Benvenisti, *supra* note 28, 343–44 (2010).

¹²² Cf. Benvenisti, *supra* note 29, at 544–46.

¹²³ Goldstone Report, *supra* note 76, at ¶ 42; see Hurka, *supra* note 29, at 59.

¹²⁴ See Sloane, *supra* note 4, at 74.

The as-if thesis is question-begging—or, to state the objection less categorically given its potential value as one way to inform judgments of *in bello* proportionality—excessively variable. It makes the answers to *in bello* proportionality questions depend on intuitions that vary widely from state to state and commander to commander.¹²⁵ Doubtless some degree of variability in any legal standard, and especially that of *in bello* proportionality, is both inevitable and unobjectionable. But recall that one of the putative virtues of the as-if thesis is precisely that it purports to reduce (and ideally eliminate) the *degree* of that variability. It is far from clear that it does.

Consider a hyperbolic example, which nonetheless starkly illustrates the problem. In the 1990s, and to a lesser extent to date, North Korea adopted policies that privileged its political and military elite at the cost of starving its own civilians in a terrible famine.¹²⁶ One commentator characterized the elite's conduct, which directly caused mass starvation, as “famine crimes” on the order of crimes against humanity.¹²⁷ If war on the Korean Peninsula were to resume, North Korea's current regime would almost certainly not hesitate to impose very high risks of serious harm on its civilians in the service of the state's military objectives. Is the *in bello* proportionality constraint on North Korea's armed forces therefore substantially less demanding than the legal constraint for liberal states that place a much higher value on the welfare of their own civilians? Of course not. Yet, taken literally, the as-if standard—“[c]onduct your war in the presence of noncombatants on the other side *as if* your citizens were the noncombatants”¹²⁸—would imply that it is.

No one would seriously argue that North Korea respects proportionality just in case it imposes risks of the same nature and scope on the enemy's civilian population as it would be prepared to impose on its own noncombatants. (I do not doubt that Walzer and Margalit, too, would reject this proposition.) The risks themselves, that is, the expected collateral damage, presumably should be equally and illegally disproportionate even if North Korea's political or military elite were prepared to impose those same risks on their civilians. Again, this example is concededly hyperbolic. One might object that in some cases—in particular, in a conflict in which a LOAC-abiding state considers the as-if thesis in good faith relative to its own civilians—it produces a laudable result. But in the first place, while the “democratic peace” theory remains debatable, seldom do liberal states, those we might expect to adhere to LOAC, go to war with one another. More significantly, however, even such states do not take the as-if thesis seriously enough for it to supply much useful guidance. As explained below, the truth is that even the armed forces of states that strive to respect LOAC do not

¹²⁵ KOSOVO REPORT, *supra* note 5, at 1271 ¶¶ 48–52.

¹²⁶ STEPHAN HAGGARD & MARCUS NOLAND, HUNGER AND HUMAN RIGHTS: THE POLITICS OF FAMINE IN NORTH KOREA 12–14 (2005).

¹²⁷ David Marcus, *Famine Crimes in International Law*, 97 AM. J. INT'L L. 245, 247 (2003).

¹²⁸ Margalit & Walzer, *supra* note 107.

treat enemy civilians and their own equally. What the example of North Korea shows hyperbolically is true of all states to some extent. Outer-boundary cardinal constraints on collateral damage, even if they cannot be specified with precision, must be part of the proportionality standard. Yet the as-if thesis cannot supply them. It only seems to do so initially because we tend to assume that other peoples and military cultures would make the relevant judgments roughly as we (think we) would.

B. Ethical Associations

Second, as a matter of ethics, the as-if thesis is in considerable tension with broadly shared intuitions. The utilitarian ideal of giving equal concern to the welfare of “our” and “their” civilians, which the as-if thesis cleverly polices, conflicts with the common conviction that states, like people, may—and perhaps should—assign greater weight to the welfare of those with whom they have a morally, socially, or politically salient relationship.¹²⁹ Thomas Hurka advances this argument clearly by analogy to interpersonal relations. It is surely not unethical for a father, faced with the tragic choice, to save his daughter’s life at the cost of the lives of several strangers—and while “relations among citizens of a nation are not as close as between parents and children,” normative ethics similarly authorize “some partiality toward fellow citizens.”¹³⁰ The same goes for governments and their militaries relative to civilians.¹³¹ A state may value the welfare of

¹²⁹ Hurka, *supra* note 29, at 59–60.

¹³⁰ *Id.*

¹³¹ *But see* Luban, *supra* note 51, at 288. Luban’s equation of “associative obligations” with subjective partiality toward or fondness for one’s fellow-citizens seems to me to misconceive the rationale for and nature of associative obligations, *a fortiori* in the context of war, which involves legally killing other people precisely *because* of their association or group rather than in their capacity as individuals. The moral philosophy debate over associative obligations would require a lengthy digression beyond the scope of this piece. But I should note here that I do not agree that it is indisputable, as Luban says, that the laws of war protecting civilians exclude the relevance of associative obligations. *See id.* at 280. It is true that API does not distinguish civilians in terms of their side or group; and in this regard, it clearly establishes a level of treatment and care to be taken on behalf of all civilians that cannot differ as between them based on nationality or otherwise. It would indeed be implausible to read the API formulation of proportionality “to give the same legal words different meanings.” *Id.* But API’s textual analysis does not, of course, exhaust the laws of war or even the sources and norms of potential relevance to *in bello* proportionality; in other words, the positive, textual law supplied by API is only one factor in legal analysis of the concept. For one thing, as noted in Part II, the textual formulation itself requires answers to a host of constituent questions that cannot be found within the four corners of the document. It is also true that “[t]he laws of war provide no *direct* answer to . . . the question of how much risk attackers must assume to minimize ‘collateral’ civilian casualties.” *Id.* at 279 (emphasis added). But “direct” is a crucial qualification. The laws of war must be analyzed more holistically, taking into account, not only treaties and other positive legal instruments, but state practice and normative expectations. That API’s text does not, in isolation, recognize associative obligations does not logically compel the same conclusion about the laws of war generally or the concept of *in bello* proportionality in particular. *See id.* at 280. LOAC might, for example, tolerate associative obligations in the application of proportionality as lawful, provided the “floor” degree of risk that soldiers must assume on

its own civilians to some degree over the welfare of enemy, or third-party, civilians.

The typical response to this argument is to stress the distinction between attacking and defending: hence a father “may and even should prefer saving his daughter’s life to saving five strangers, but he may not *kill* those strangers in order to save his daughter.”¹³² A soldier, so the argument runs, occupies a moral position comparable to that of the father, who, in the course of defending his daughter, unintentionally harms some number of innocent bystanders: like the father, who would be equally responsible for the unintentional but collateral injuries or deaths he thereby causes, whatever his relationship or lack thereof to those victims, the soldier, on this view, may not distinguish between civilians and expected collateral damage to them based on nationality—at least, not insofar as he is attacking. All civilians, after all, are equally innocent in the relevant ethical and legal sense of being “currently harmless.”¹³³ Not surprisingly, Margalit and Walzer adopt this view.¹³⁴

But, as often, the superficially appealing analogy between war and crime turns out to be misguided.¹³⁵ A thug’s attack in peacetime is a crime, and, depending on the facts, he would likely be liable for any bystanders he harms or kills in the course of his attack. A soldier’s attack in wartime, assuming it otherwise respects LOAC, is not a crime—even if that soldier fights for an unjust belligerent. The dualistic axiom prohibits distinctions in the conduct of war based on the justice or legality of each side’s *casus belli*. A soldier must take precautions to minimize harm to enemy civilians.¹³⁶ Ethically, however, there is considerable force to the argument that he may nonetheless prefer the welfare of the civilians of the state on behalf of which he fights to the welfare of both enemy and third-party civilians—at least to a certain extent. “The fact that [a soldier] is killing rather than failing to save is not *irrelevant*: it still plays a significant moral role and in particular reduces the degree of partiality he may show below what would be permitted if he were merely distributing benefits.”¹³⁷ But the identity of the civilians placed at collateral risk by a military attack is *also* not morally irrelevant. Insofar as the as-if thesis suggests otherwise, it is dubious in theory and, in

behalf of all civilians under API is not thereby lowered for states parties. Whether we denominate these associative obligations “supererogatory” or otherwise is no more than a nominal issue if the law indeed, as I believe, tolerates such disparities.

¹³² Hurka, *supra* note 29, at 60 (emphasis added).

¹³³ McMahan, *supra* note 113, at 695; see also Thomas Nagel, *War and Massacre*, in *INTERNATIONAL ETHICS* 53, 69 (Charles R. Beitz et al. eds., 1985).

¹³⁴ Avishai Margalit & Michael Walzer, Reply, in 56 *N.Y. REV. BKS.* (No. 13) (Aug. 13, 2009).

¹³⁵ For one extended critique, see Patrick Emerton & Toby Handfield, *Order and Affray: Defensive Privileges in Wartime*, 37 *PHIL. & PUB. AFF.* 382 (2009) (defending an account of warfare as most analogous to participation in an affray).

¹³⁶ See API, *supra* note 13, at arts. 57-58.

¹³⁷ Hurka, *supra* note 29, at 61.

practice, unlikely to be accepted by states or their citizens as a means to give legal content to *in bello* proportionality. And, indeed, it has not been.

C. *State Practice*

The as-if thesis, as a legal standard rather than only an ethical ideal, is dramatically at odds with state practice. Even belligerents that have made a serious effort to respect the law of war have historically, and unsurprisingly, privileged the lives of their own civilians over enemy civilians.¹³⁸ No state military force that is or has ever been treats enemy civilians and its own civilians equally. So whatever may be said for the as-if thesis as a moral ideal, it is implausible as law. It would render disproportionate the vast majority of strikes that cause collateral damage, even in circumstances in which the attacker sought in good faith to respect LOAC.

In Kosovo, for example, NATO decided it would not introduce ground troops because its constituent states, including the United States, believed (with good reason) that, given the avowed military objective (to prevent atrocities against Albanian Kosovars), their domestic political constituencies would not tolerate *combatant*, let alone civilian, casualties. Of course, the perceived political acceptability of a tactic is not the measure of its legality. Yet had the relevant risk of collateral damage been to the citizens of the United States and other western European states that contributed to the NATO force, rather than to Serb and Albanian civilians who were in fact placed at risk by the aerial assault, it is nearly impossible to imagine that NATO's generals would have been authorized to undertake the campaign. Assuming a comparable campaign would have gone forward at all in that event, NATO's generals would surely have sought to minimize the risks to their civilians, perhaps by an assault with ground troops,¹³⁹ an alternative that many analysts suggest would have posed a lesser risk to Serb and Albanian civilians.¹⁴⁰

At any rate, the relevant question is whether this counterfactual

¹³⁸ Cf. W. Michael Reisman, *The Lessons of Qana*, 22 YALE J. INT'L L. 381, 396 (1997).

¹³⁹ See, e.g., Sloane, *supra* note 4, at 94 & n.292.

¹⁴⁰ This is not entirely clear as a factual matter. Some argue that criticism of NATO's strategy of high-altitude bombing is based on a misconception. See Charles J. Dunlap, Jr., *Foreword*, to GEOFFREY S. CORN ET AL., *THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE* viii–ix (2009) (stating that “lower altitude strikes [would have been] *less* precise than those conducted at [higher] altitudes that optimized sophisticated targeting equipment” and that “lower altitudes not only unnecessarily increased risk to the pilot, but also those on the ground”); Schmitt, *supra* note 37, at 823 (criticizing Amnesty International's criticism of NATO's high-altitude aerial bombing campaign for “ignoring the fact that precision guided weapons operate optimally at certain altitudes which allow them sufficient time to fix onto a target and ‘zero in’ on their aim points,” such that “[u]nder certain circumstances, flying at lower altitudes may actually *decrease* accuracy,” and furthermore, noting that “a pilot flying within a threat envelope is often distracted by enemy defenses, thereby rendering weapons delivery *less* controlled”) (emphasis added).

shows that NATO carried out its air campaign in violation of *in bello* proportionality. According to the ICTY Prosecutor's Office, at least, it does not. The ICTY Kosovo Report prepared by the Office of the Prosecutor found that military elites could reasonably disagree about the proportionality of the aerial strikes in 1999. No clear violations of proportionality, still less violations at the level of war crimes, could be established. Yet application of the as-if standard would yield the contrary conclusion. A similar analysis applies to the first Persian Gulf War. It is generally regarded as one of the most legally sanitized armed conflicts in history; figurative armies of lawyers advised literal armies before almost every strike.¹⁴¹ But despite the coalition's efforts, the U.S.-led forces did not meet (nor did they try to meet) the as-if standard.¹⁴² Did the 1991 coalition therefore systematically violate *in bello* proportionality?

D. Concluding Observations on the "As-If" Thesis

All of this is to say that the as-if thesis contributes little to our understanding of *in bello* proportionality, and at times its application may well be misguided. This is not to deny the specific point that, as Margalit and Walzer suggest, if "soldiers . . . take fire from the rooftop of a building, they should not pull back and call for artillery or air strikes that may destroy most or all of the people in or near the building; they should try to get close enough to the building to find out who is inside or to aim directly at the fighters on the roof."¹⁴³ Subject to further information, I would certainly agree. *In bello* proportionality logically requires, as Walzer has argued at length elsewhere,¹⁴⁴ that soldiers assume *some* degree of additional risk in the interest of minimizing collateral damage.¹⁴⁵ The problem is that the as-if

¹⁴¹ See, e.g., *Implementing Limitations*, *supra* note 46, at 66 (remarks of Fred Green, Counsel of the Joint Chiefs of Staff) (describing the 1991 Persian Gulf War as "the most carefully coordinated and most discriminate air campaign in the history of aerial warfare"); see also JUDITH GARDAM, *NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES* 21 (2004) (noting that the air campaign by the United States during the Gulf War required detailed planning); Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 452, 466 (1991).

¹⁴² MIDDLE EAST WATCH, *NEEDLESS DEATHS IN THE GULF WAR: CIVILIAN CASUALTIES DURING THE AIR CAMPAIGN AND VIOLATIONS OF THE LAWS OF WAR* 90 (1991) ("Middle East Watch found that in some cases during the war, allied forces fell short of their duty to utilize means and methods of attack to minimize the likelihood of civilian casualties. This failure was particularly evident in decisions to executive daytime attacks on bridges in cities used by civilian pedestrians and motorists and on targets located near crowded urban markets."). This human rights report also describes specific incidents where civilians died as a result of the attacks and corroborates that military personnel were aware of the presence of civilians prior to the attacks.

¹⁴³ Margalit & Walzer, *supra* note 107.

¹⁴⁴ Michael Walzer, *Two Kinds of Military Responsibility*, in *ARGUING ABOUT WAR* 23 (2004).

¹⁴⁵ See Luban, *supra* note 51, at 279–80. ("Force protection [minimizing casualties to one's own troops] cannot have absolute weight [under the API formulation], and attackers cannot do anything it takes to minimize risks to themselves. If force protection had absolute weight, what would be the point of a proportionality requirement? In Gary Solis's words, 'an

thesis tends to overstate that degree, proves excessively variable, and does not conform to state practice. The as-if thesis proves especially unhelpful in modern conflicts characterized as “asymmetric.” In an interstate war, a sniper scenario of the sort posited by Walzer and Margalit, which yields the relatively uncontroversial conclusion at which they arrive, is the *exception*. But in asymmetric warfare against an NSB, it may be, not only the *rule*, but the *modus operandi* of the latter.¹⁴⁶ If an NSB knows that it will be outgunned on the battlefield, it will naturally seek to shift the literal and figurative terrain in an effort to neutralize the enemy’s technological, geographic, and other advantages.

This is not a new phenomenon: it characterized the Vietnam War, for example. But because of technological advances and other developments in warfare, it is much more widespread than it was a century—or even a few decades—ago. It characterizes, among other contemporary armed conflicts, recent U.S. counterinsurgency and counterterrorist operations in Iraq, Afghanistan, and Somalia; Israeli conflicts, including the most recent, with Hamas in the Gaza Strip or with Hezbollah in southern Lebanon; and battles between the Sinhalese government and Tamil rebels in Sri Lanka. Bearing in mind that the only consensus on *in bello* proportionality’s application to date is the nebulous “reasonable military commander” standard, one of the most difficult questions for the emerging law of war in the twenty-first century is, to what extent is it reasonable and realistic to demand that state forces committed to LOAC *systematically*, not just in periodic incidents, risk their soldiers’ lives in this way in the pursuit of minimizing collateral damage? That is a question for another article, but how we answer it will undoubtedly exert a tremendous influence on the resilience and efficacy of the principle of proportionality in future conflicts.

IV. Reasonableness and Asymmetry

A. First Principles

The preceding question is one with which legal and other commentators continue to struggle. The law remains unclear and, in all likelihood, continues to undergo a process of evolution and adaptation today. As we saw earlier, each term in the proportionality formulation is open-textured, and the API formulation itself requires the weighing of incommensurables. To be clear, that does not render it objectionable *per se*.

attacker with superior arms would be free to annihilate all opposition with overwhelming firepower and call any civilian casualties collateral.”) (quoting GARY SOLIS, *supra* note 77, at 287).

¹⁴⁶ See, e.g., Geiss, *supra* note 28, at 758 (“Indeed, direct attacks against civilians, hostage-taking and the use of human shields—practices that have long been outlawed in armed conflicts—have seen a revival in recent conflicts in which the far weaker party has often sought to gain a comparative advantage over the militarily superior enemy by resorting to such practices as a matter of strategy.”).

The point of emphasis is rather that the interpretation of API's canonical standard—especially once we descend from the level of abstract conceptual analysis to consider its operational implementation in concrete military contexts—leaves considerable room for, as the ICRC Commentary concedes, “a fairly broad margin of judgment.”¹⁴⁷ The drafters of API were understandably resigned to the inexorable subjectivity and indeterminacy implicit in the API proportionality formulation, but at the same time they remained confident that, on balance, codifying the principle would contribute to LOAC.¹⁴⁸ “Even if this system is based to some extent on a subjective evaluation,” the Commentary reads, “the interpretation must above all be a question of common sense and good faith for military commanders”¹⁴⁹ simply because “there is no serious alternative.”¹⁵⁰

Yet having conceded this much, it seems that LOAC may often fail to influence the implementation of proportionality except at the extremes. If it all boils down to good faith and the reasonable military commander, and if we acknowledge, as we must, that “commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would not always agree in close cases,”¹⁵¹ the spectrum of reasonableness begins to look very broad indeed. Only in unusually extreme cases is it feasible to say *ex ante* and with confidence that a particular attack would clearly violate the principle of proportionality. But commentators continue to draw snap judgments *ex post*, which probably harms the incentives for compliance by the very good-faith reasonable commander presupposed by API's formulation and, in the long term, it damages the principle itself.¹⁵²

Needless to say, that does not inhibit the use of “disproportionate” as the critique of choice in political rhetoric (and at times poor legal analysis) of armed conflicts.¹⁵³ It is precisely because of the indeterminacy, subjectivity, and confusion surrounding the principle of proportionality that charges of “disproportionate force” have such easy rhetorical appeal. In the court of public opinion, disproportionate force is as easy to allege as it is difficult to disprove. In fact, regardless of whether the Rome Statute's definition or the arguably more conservative formulation of API better reflects the current legal standard, only extreme cases clearly run afoul of it.

¹⁴⁷ API COMMENTARY, *supra* note 36, at 684 ¶ 2210.

¹⁴⁸ See API COMMENTARY, *supra* note 36, at 683 ¶¶ 2206–07.

¹⁴⁹ *Id.* at 683–84 ¶ 2208; see also *id.* at 625 ¶ 1977–78 (noting criticism of the formulation and conceding that “[s]uch criticisms are justified, at least to some extent,” while at the same time affirming that proportionality “will require complete good faith on the part of the belligerents, as well as the desire to conform with the general principle of respect for the civilian population”).

¹⁵⁰ DINSTEIN, *supra* note 14, at 122.

¹⁵¹ KOSOVO REPORT, *supra* note 5, at 1271.

¹⁵² See Kenneth Anderson, *Laurie Blank on asymmetries on proportionality in the international law of targeting*, WASH. POST (July 31, 2014) <http://perma.cc/8WJA-6Y7V>.

¹⁵³ See Walzer, *supra* note 3.

Can more be said? I believe so—but depending on one’s view of jurisprudence, it may require a shift from the realm of law to that of politics or, more likely, show the limits of that familiar dichotomy.

One problem with the commonplace that LOAC calls for a balance between military necessity and humanitarian injunctions is that it is little more than a truism—and for legal purposes, not an especially helpful one. It offers no guidance on how to balance these objectives. One may, consistent with this principle, propose, as Clausewitz famously did,¹⁵⁴ that if the law truly seeks to accommodate military necessity and humanitarian ideals, then it commends brief, brutal wars: however terrible they may be, a rapid return to peace is the best way to minimize loss of life, injury, needless suffering, and destruction. That is why, in my view, a better first principle or foundation for LOAC takes the geopolitical context of law seriously. Any proposed LOAC rule or principle must enable the reasonable military commander to observe the law’s posited limits in good faith and simultaneously be confident of his ability to pursue effectively the military goals with which, in a liberal polity committed to the rule of law, he has been charged by those on whose behalf the military acts. Proposed answers to the questions *in bello* proportionality poses, especially in the increasingly common context of modern asymmetric warfare, should be viewed against the background of this standard. Only then can they hope to influence the conduct of modern armies for the better.

B. Dyadic Reciprocity

Because of the indeterminacy and subjectivity embedded in the principle of proportionality, its implementation, like so much else in the traditional law of armed conflict, generally depends on dyadic reciprocity, that is, “the assumption of symmetric conflicts taking place between armies of roughly equal military strength or at least comparable organizational structures.”¹⁵⁵ Given that assumption, past conflicts were characterized—to oversimplify a bit—by one of two general dynamics: either (1) one force would be overwhelmingly superior to the other in terms of technology, weaponry, training, or some combination of other factors that determines the conventional strength of a military force; or (2) the two forces would be *sufficiently*, even if roughly, equal in terms of the conventional determinants of military strength, facilitating the emergence of a continuing dynamic of dyadic reciprocity in the conflict.

¹⁵⁴ CARL VON CLAUSEWITZ, *ON WAR* (Colonel J.J. Graham trans., 2004) (1832); see also Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT’L L.J. 49 (1994).

¹⁵⁵ Geiss, *supra* note 28, at 760. “Traditional” is something of a misnomer: it would be difficult to sustain the empirical contention that symmetrical conflicts between states ever predominated in warfare, let alone for long enough to merit the adjective “traditional”; and asymmetric conflicts have existed since the dawn of IHL. See Pfanner, *supra* note 28 at 150. So traditional refers more to a dynamic of warfare, or a paradigm of armed conflict, than to any period in the history of war.

Note that in either case, assuming a good-faith military commander on the superior force's side, one would expect the principle of proportionality to be, by and large, respected by that force. The superior force can "afford," so to speak—assuming it were so inclined—to take precautionary measures consistent with its anticipated military advantage that substantially mitigate collateral damage. Consider the Persian Gulf War of 1991 between the U.S.-led coalition and Iraq. The vast superiority of the coalition in terms of the conventional determinants of military strength—manpower, weapons, training, and so forth—meant that the price of deploying precision-guided munitions (PGMs),¹⁵⁶ for example, in order to avoid excessive civilian casualties could be kept low enough to incentivize compliance by the coalition as a matter of reputational, even if not genuine humanitarian or altruistic, interest. If the cost to the stronger belligerent is minimal, and that party acts in good faith, the degree of expected collateral damage relative to anticipated military advantage will fall well within the spectrum authorized by *in bello* proportionality.

In the latter scenario, belligerents respected proportionality, if they did, because dyadic reciprocity operated as an exogenous enforcement dynamic. Provided a rough parity existed between state belligerents, their military forces would be "susceptible to the ongoing dynamic of reciprocity and retaliation."¹⁵⁷ The difficult and subjective value judgments embedded in proportionality and canvassed above would effectively be "resolved" in battlefield practice by a claim-and-response pattern. In time, belligerents would establish a rough, but still meaningful, understanding of the level of expected collateral damage relative to anticipated military advantage. The cynical perspective here would be that states in these circumstances act according to the law of war precisely as they would anyway, absent the law, purely based on the practical dynamics of dyadic reciprocity and self-interest. Be that as it may, in a bygone era in which attacks perceived as disproportionate—or, more accurately for pre-WWII conflicts, recklessly or deliberately indiscriminate—could lawfully be responded to with reprisals, reciprocity served as a powerful dynamic policing the rough boundaries of LOAC. It "enabled adversaries to communicate and monitor one another's extent of compliance with the law to avoid misunderstandings that could

¹⁵⁶ Whether the mere *possession* of precision guided munitions (PGMs) or the like imports a legal obligation to use them to minimize collateral damage is a distinct question. Geiss suggests that state parties to API that possess such technologically advanced weapons have bound themselves to higher *in bello* proportionality standards by dint of the language of Article 57 on precautionary measures. Geiss, *supra* note 28, at 761 n.11. I doubt that but express no considered view on the issue here.

¹⁵⁷ W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 AM. J. INT'L L. 82, 83 (2003). This dynamic, however, does not always work to discourage civilian harms and, at times, may even exacerbate them. See Lauterpacht, *supra* note 50, at 365 (observing that protection of civilians diminished as World War II progressed because of both "the reciprocal adoption of the practice of reprisals" and "general acceptance of a notion of military objective so vast as to lose in fact any legally relevant content").

escalate into an endless cycle of reprisals.”¹⁵⁸

C. Belligerent Asymmetry: Factual and Legal

Today, it has become common to refer colloquially to armed conflicts between a state or coalition of states (such as NATO), on one side, and a non-state belligerent, on the other, as “asymmetric.” But what does that mean? The literature—once virtually non-existent even though asymmetric conflicts have been around for as long as warfare—is now legion. Robin Geiss defines asymmetric armed conflicts as characterized by “[s]ignificant inequality in arms, that is, a disparate distribution of military strength and technological capability in a given conflict.”¹⁵⁹ That definition is helpful but incomplete, for factual asymmetries do not fully explain the dynamics of contemporary asymmetric warfare.

In most modern asymmetric conflicts, factual asymmetry in quantity and quality of arms, technology, training, manpower, and so forth is augmented by a legal asymmetry: one belligerent enjoys less—or, more commonly, *no*—formal legal status under the laws of war. That belligerent lacks the legal right to participate in a system of armed conflict designed by and for states.¹⁶⁰ Analysis of *in bello* proportionality in asymmetric conflicts must take into account both its factual and legal dimensions.¹⁶¹

We must recognize that it is quixotic to expect NSBs, which LOAC deliberately excludes from lawful participation in war, to adhere to the law of war—except, perhaps, in circumstances in which adherence manifestly serves their strategic interests.¹⁶² In general, what Hersch Lauterpacht wrote

¹⁵⁸ Benvenisti, *supra* note 20, at 935.

¹⁵⁹ Geiss, *supra* note 28, at 758.

¹⁶⁰ See Reisman, *supra* note 21, at 14.

¹⁶¹ This dichotomy alone is a vast oversimplification of the literature on asymmetric warfare. The literature in fact identifies some eight distinct asymmetries to which asymmetric warfare may refer: disparities in power, technology, organization and structure, legal status, legitimacy and morality, cultural norms, “will” (patience or morale) based on the perception of the interests at stake, and the means and methods of warfare. While the literature on asymmetric warfare is legion, five works stand out for their influence. See Andrew Mack, *Why Big Nations Lose Small Wars: The Politics of Asymmetric Conflict*, 27 *WORLD POLITICS* 175 (1975); Ivan Arreguin-Toft, *How the Weak Win Wars: A Theory of Asymmetric Conflict*, 26 *INT’L SECURITY* 93 (2001); Steven Metz & Douglas V. Johnson II, *Asymmetry and U.S. Military Strategy: Definition, Background, and Strategic Concepts* STRATEGIC STUDIES INSTITUTE AND U.S. ARMY WAR COLLEGE 2001; Pfanner, *supra* note 28; Geiss, *supra* note 28. See also MICHAEL L. GROSS, *MORAL DILEMMAS OF MODERN WAR: TORTURE, ASSASSINATION, AND BLACKMAIL IN AN AGE OF ASYMMETRY*; Schmitt, *supra* note 28.

¹⁶² Exceptions exist in theory, though seldom in practice. Most significantly, API contemplated the integration of certain non-state belligerents into the global war system, viz., “peoples . . . fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the

sixty years ago applies, *mutatis mutandis*, today: “it is impossible to visualize the conduct of hostilities in which one side would be bound by rules of warfare without benefiting from them and the other side would benefit from the rules of warfare without being bound by them.”¹⁶³ That is roughly descriptive of modern asymmetric conflicts.¹⁶⁴

Legal, like factual, asymmetries discourage LOAC compliance; indeed, they render it suicidal for NSBs. Of course, it is doubtless true the some NSBs would not comply with LOAC regardless. Before his death, Osama bin Laden said repeatedly, for example, that al Qaeda need not distinguish between combatants and civilians because both bear culpability for the grievances that, he said, motivated al Qaeda’s attacks on civilians.¹⁶⁵ The point of emphasis, however, is that, regardless of an NSB’s avowed objectives or motivation, LOAC, because of its pedigree, supplies the conventionally weaker belligerent, especially one that lacks recognition as a lawful participant in armed conflict, with scant, if any, incentive to adhere to it. The consequences are familiar.

First, for the stronger party, it becomes much more difficult to isolate the battlefield and restrict its operations to the battlefield’s boundaries in time and space, which, in the extreme, eviscerates the concept of a battlefield altogether.¹⁶⁶ It is not coincidental that the United States has and continues to promulgate military doctrines that imply, or state expressly, that the entire world is a battlefield in its struggle with transnational or

United Nations,” API art. 1(4), if the private army representing such a people made a unilateral declaration representing that it would assume “the same rights and obligations” as “a High Contracting Party” to the Geneva Conventions of 1949 and Protocol I. *See* AP I art. 96(3). To date, however, no non-state belligerent has made such a unilateral declaration. *See* Robert D. Sloane, *Prologue to a Voluntarist War Convention*, 106 MICH. L. REV. 443, 467 (2007) [hereinafter *Prologue*]. Some national liberation movements, however, such as the Umkhonto we Sizwe, the African National Congress’s military wing during the apartheid era in South Africa, and the Irish Republican Army, have at times sought to minimize collateral damage during periodic assaults on their respective opponent regimes.

¹⁶³ Hersch Lauterpacht, *The Limits of the Operation of the Law of War*, 30 BRIT. Y.B. INT’L L. 206, 212 (1953).

¹⁶⁴ I say “roughly” because states remain bound to apply certain fundamental rules and principles, such as Common Article 3 of the Geneva Conventions, even in non-international armed conflicts with non-state belligerents. *See* Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Kund Dormann, *The Geneva Conventions Today*, INTERNATIONAL COMMITTEE OF THE RED CROSS (July 9, 2009), <http://www.icrc.org/eng/resources/documents/statement/geneva-conventions-statement-090709.htm>.

¹⁶⁵ *See* OSAMA BIN LADEN, MESSAGES TO THE WORLD: THE STATEMENTS OF OSAMA BIN LADEN 16–72 (Bruce Lawrence ed., James Howarth trans., 2005); Osama bin Laden, *Statement to America* (Oct. 26, 2002), reproduced in OSAMA BIN LADEN: AMERICA’S ENEMY IN HIS OWN WORDS 94–103 (Randall B. Hamud ed., 2005); NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 363–64 (2004); Daniel L. Byman, *Al-Qaeda as an Adversary: Do We Understand Our Enemy?* 56 World Pol. 139, 144–45 (2003); Michael Moss & Souad Mekhennet, *The Guidebook For Taking A Life*, N.Y. TIMES (June 10, 2007), § 4, at 1.

¹⁶⁶ *See* Benvenisti, *supra* note 20, at 931; Geiss, *supra* note 28, at 769.

apocalyptic terrorist networks.¹⁶⁷ The drone strikes and other targeted killings in states with which the United States is not at war—indeed, often in the territory of formal allies such as Yemen, Pakistan, and Afghanistan—likewise imply that the conflict knows no national boundaries. No longer is it possible “to compartmentalize the battlefield and single out with sufficient clarity military from civilian targets.”¹⁶⁸ Needless to say, this further complicates the ability to conduct hostilities in conformity with *in bello* proportionality, and it may also affect the viability of the standard generally.

Second, asymmetric warfare blurs the distinction between civilian and military objects.¹⁶⁹ It encourages the conventionally weaker party either to disregard or intentionally manipulate LOAC, including the principle of distinction, the central pillar upon which so much of the law rests.¹⁷⁰ In Afghanistan, in 2010, as the U.S. counterinsurgency picked up steam, more and more civilian casualties (about one-third) were attributed to the Taliban and other insurgents who routinely disregarded the principle of distinction.¹⁷¹ NSBs have also, among other tactics, adopted civilian garb to render themselves temporarily illegitimate targets; misappropriated “protective emblems for the concealment of military objects;”¹⁷² and concealed arms in *prima facie* civilian structures (and therefore illegitimate targets). The principle of distinction naturally breaks down if, as often, the conventionally weaker belligerent obfuscates the distinction between civilians and combatants. In the first (2008-09) Gaza conflict, Hamas claimed protection for its supposedly civilian police. The law indeed stipulates that regular police officers qualify as civilians entitled to civilian immunity from attack. This led the Human Rights Council to condemn IDF attacks on Hamas police as presumptively illegal. It later emerged that more than 90% of these civilian police were once or remained members of groups like the Al-Aqsa Martyrs Brigade—hardly “traffic cops,” as one critic of the Goldstone Report noted.¹⁷³ The point here is not meant to be tendentious relative to the Israeli-Palestinian conflict; I do not have any privileged knowledge of whether the Report itself or its critics accurately state the facts. The point is rather that the law incentivizes the erosion of distinction and tactics comparable to those in this example.

¹⁶⁷ Laurie R. Blank, *Defining the Battlefield in Contemporary Conflict and Counterterrorism: Understanding the Parameters of the Zone of Combat*, 39 GA. J. INT’L & COMP. L. 1, 20 (2010); see also JEREMY SCAHILL, *DIRTY WARS: THE WORLD IS A BATTLEFIELD* (2013).

¹⁶⁸ Benvenisti, *supra* note 29, at 543; Pfanner, *supra* note 28, at 151.

¹⁶⁹ Geiss, *supra* note 28, at 769.

¹⁷⁰ See *id.* at 764–65 & n.24; see also Ivan Arreguín-Toft, *How the Weak Win Wars: A Theory of Asymmetric Conflict*, 26 INT’L SECURITY 93 (2001). Cf. Andrew Mack, *Why Big Nations Lose Small Wars: The Politics of Asymmetric Conflict*, 27 WORLD POL. 175 (1975).

¹⁷¹ Rod Nordland, *U.N. Reports Rising Afghan Casualties*, Aug. 10, 2010; see U.N. ASSISTANCE MISSION IN AFGHANISTAN, *MID-YEAR REPORT 2010, PROTECTION OF CIVILIANS IN ARMED CONFLICT* (Aug. 2010).

¹⁷² Geiss, *supra* note 28, at 764–65.

¹⁷³ See Goldstone Report, *supra* note 76, at ¶ 34.

Third, and perhaps most significantly, in asymmetric warfare, it is often unclear what qualifies as military advantage. Increasingly, scholars observe that “[t]he very notions of ‘victory’ or ‘defeat’ . . . become more and more indistinct.”¹⁷⁴ No longer are there “obvious military goals, such as gaining control over territory, that can reliably tell us whether the collateral civilian damage was or was not excessive relative to the effort made to achieve these goals.”¹⁷⁵ Absent a relatively clear conception of military goals, it is difficult to understand what qualifies as a legitimate military advantage, which *in bello* proportionality’s formulation presupposes. Its absence leads to a break down in the structure of the API proportionality standard.

V. Toward Aligning Dynamics, Ideals, and Incentives

Asymmetric conflicts, by whatever name, increasingly predominate today. As they become the norm, they will, as they already have, modify and perhaps vitiate altogether some traditional enforcement dynamics (reciprocity above all) that formerly encouraged compliance with much of the law of war. From this perspective, proportionality is one manifestation of a more general problem. There are no easy answers, such as the as-if thesis, to the interrelated questions of law, geopolitics, and ethics that proportionality raises, *a fortiori* in modern asymmetric conflicts. The complexity of the judgments ideally required by API proportionality formulation is legion—yielding, to date, little more than the unobjectionable, but often equally uninformative, standard of the reasonable military commander acting in good faith.

As stressed earlier, however, reasonableness is not inherently problematic or unworkable; if it were, it would not continue to be so pervasive in diverse areas of law, national and international. It raises a special problem for *in bello* proportionality because of the absence in international law, and especially in LOAC, of regularly effective, authoritative legal institutions. In national legal systems, such institutions might be able to work out concrete operational guidance through an empirical process combined with good faith analysis of the factors canvassed earlier. Absent such institutions, international law must rely on other cultivated or exogenous incentives. It is therefore worth stressing one emerging dynamic that may illustrate, or at least point the way toward, what the evolving law of proportionality needs: new incentives that can contribute to aligning humanitarian objectives with the dynamics of asymmetric warfare—incentives that can potentially reduce collateral damage even in the absence of dyadic reciprocity and in the presence of the factual and legal asymmetries that erode traditional conflict dynamics.

From one perspective, the lack of dyadic reciprocity, for

¹⁷⁴ Geiss, *supra* note 28, at 770; see generally WHITMAN, *supra* note 31.

¹⁷⁵ Benvenisti, *supra* note 29, at 543.

proportionality as elsewhere in the corpus of LOAC,¹⁷⁶ detrimentally affects the principle and degree of compliance with it; or more modestly, given the broad discretion we have seen the law presently affords, reduces the extent of a good-faith, reasonable military commander's effort to reduce collateral damage beyond what current law strictly requires. From another perspective, however, the political and strategic objectives of liberal states in *certain* asymmetric conflicts create incentives for greater attention to proportionality on the battlefield. At times, the strategic objectives of liberal states in fourth-generation warfare¹⁷⁷ redefine the nature of victory and, by extension, military advantage, affecting proportionality commensurately.

Even if the letter of API's positive law affords military elites considerable discretion to determine what qualifies as proportional within a relatively broad spectrum, sound strategy often counsels conservative practice: that is, in some circumstances of asymmetry, the reasonable military commander may find it in his interest to adopt policies that operationalize proportionality in a way that errs on the side of further reducing collateral damage—even at greater risk to his troops. Adherence to a proportionality standard that is more demanding than legally required—certainly not always but also not infrequently—serves the objectives of state belligerents in certain asymmetric conflicts. Unlike in the eighteenth and nineteenth centuries, those objectives no longer (at least not legally, i.e., Crimea aside) include territorial annexation or the vindication of perceived slights at the level of monarchical politics. More often, long-term national security is the main perceived objective, even if the best way to secure it is often unclear.

The manifold puzzles proportionality raises remain as intractable as ever in principle. But the dynamics of certain forms of asymmetric warfare sometimes provide new incentives for state armies to avoid excessive civilian casualties, keeping state practice well within the spectrum of collateral damage authorized by current law. This may be so even in contexts in which one side not only repudiates LOAC¹⁷⁸ but seeks to subvert and manipulate it in the service of its own strategic military or political goals. For in many counterinsurgencies, the nature of the conflict redefines military advantage in a way that redounds to the potential benefit of LOAC's humanitarian aspirations.¹⁷⁹

This is not the place for a comprehensive analysis of the literature on point. But consider two studies that reflect those that have informed U.S.

¹⁷⁶ See generally MARK OSIEL, *THE END OF RECIPROCITY: TERROR, TORTURE, AND THE LAW OF WAR* (2009); Sean Watts, *Reciprocity and the Law of War*, 50 HARV. INT'L L.J. 365 (2009).

¹⁷⁷ See generally THOMAS X. HAMMES, *THE SLING AND THE STONE* (2006).

¹⁷⁸ See, e.g., Sloane, *supra* note 162, at 452–53, 468–69.

¹⁷⁹ See, e.g., Matthew L. Beran, *The Proportionality Balancing Test Revisited: How Counterinsurgency Changes "Military Advantage"*, ARMY LAWYER (Aug. 1, 2010), <http://perma.cc/8MCH-ZU4Q>.

counterinsurgency strategy recently: first, examining the effect of civilian casualties in Afghanistan in the years preceding 2008, the authors of one study found “strong evidence that local exposure to civilian casualties caused by international forces leads to increased insurgent violence over the long run, what we term the ‘revenge’ effect. Matching districts with similar past trends in violence shows that counterinsurgent-generated civilian casualties from a typical incident are responsible for 1 additional violent incident in an average sized district in the following 6 weeks and lead to increased violence over the next 6 months.”¹⁸⁰ Second, in the IDF-Hezbollah War in Lebanon in 2006, another author concluded that “the IDF’s attempt to use long-range bombs and artillery to disarm and defeat Hizballah was intractable, the operational equivalent of finding needles in haystacks. . . . In trying to target the elusive leaders and katyushas, the IDF inevitably contributed to the number of Lebanese civilian casualties. Rather than mobilizing the population against Hizbullah, the collateral damage seemed to have the opposite effect, rallying and recruiting sympathizers to its side in the fight against Israel.”¹⁸¹

Findings of this sort must, of course, be scrutinized carefully and taken with a grain or more of salt. Researchers hasten to point to alternative and additional factors that may have affected the results of their studies, as well as the need for careful attention to cultural context, the critical distinction between correlation and causality, and other qualifications. Generalization would be unjustified.

That (significant) qualification aside, considerable evidence suggests that collateral damage variously aids insurgency recruitment, draws media coverage that promotes enemy propaganda efforts, leads to increased popular violence, or diminishes potential friendly civilian cooperation in supplying intelligence vital to the campaign. Evidence of this sort has indeed influenced the policies and statements embodied in counterinsurgency manuals. The U.S. Army and Marine Corp Field Manual emphasizes, for example, that “[a]ny use of force produces many effects, not all of which can be foreseen. The more force applied, the greater the chance of collateral damage and mistakes. Using substantial force also increases the opportunity for insurgent propaganda to portray lethal military activities as brutal.”¹⁸² To similar effect, it notes, “an air strike can cause collateral damage that turns people against the host-nation (HN) government and provides insurgents

¹⁸⁰ Joseph H. Felter et al., *The Effect of Civilian Casualties in Afghanistan and Iraq*, NAT’L BUREAU OF ECONOMIC RESEARCH WORKING PAPER 16152, <http://perma.cc/JMB6-C479>; see also Raja G. Hussain, *A Culture of Revenge — The Impact of Collateral Damage on Taliban Insurgency*, M.A. Thesis, Monterey, CA: Naval Postgraduate School, 2008, http://calhoun.nps.edu/bitstream/handle/10945/4222/08Mar_Hussain.pdf?sequence=1; Cf. Michael G. Findley & Joseph K. Young, *Fighting Fire with Fire? How (Not) to Neutralize an Insurgency*, 9 CIVIL WARS 378 (2007)

¹⁸¹ Sarah E. Kreps, *The 2006 Lebanon War: Lessons Learned*, PARAMETERS 72 (Spring 2007), <http://strategicstudiesinstitute.army.mil/pubs/parameters/articles/07spring/kreps.pdf>

¹⁸² THE U.S. ARMY/MARINE CORPS, *supra* note 27, at 40.

with a major propaganda victory. Even when justified under the law of war, bombings that result in civilian casualties can bring media coverage that works to the insurgents' benefit."¹⁸³

One might see reliance on dynamics of this sort as a political rather than legal response to the contemporary difficulties with *in bello* proportionality—and, of course, this example is limited by the context of counterinsurgency, among other factors (such as cultural norms). But we should not say “merely” political. The dichotomy between law and politics is not especially helpful in the context of operationalizing proportionality, as distinct from, for example, its utility in the context of criminal prosecutions for violation of the principle as a war crime. After all, dyadic reciprocity served as the chief “enforcement” dynamic for proportionality in the past. It could equally be described as political or exogenous to law. But it is in the nature of international law that it must impress into its service enforcement dynamics other than those that exist in well-functioning states. I certainly do not suggest that a simple or uniformly applicable solution to the challenges facing *in bello* proportionality, especially in asymmetric warfare, exists; only that international law would benefit from the consideration of how the same geopolitical dynamics that complicate modern warfare might contribute, however imperfectly, to filling the gap left by the absence of dyadic reciprocity.

Conclusion

General McChrystal, speaking of the Afghan counterinsurgency effort, suggested that killing two insurgents in a group of ten does not necessarily leave eight, for if killing two leads to collateral damage, which has collateral consequences of its own, then ten minus two might not equal eight; it might equal twenty.¹⁸⁴ General Patraeus wrote to similar effect, “Any use of force generates a series of reactions. There may be times when an overwhelming effort is necessary to destroy or intimidate an opponent and reassure the populace. Extremist insurgent combatants often have to be killed. In any case, however, counterinsurgents should calculate carefully the type and amount of force to be applied and who wields it for any operation. An operation that kills five insurgents is counterproductive if collateral damage leads to the recruitment of fifty more insurgents.”¹⁸⁵

At a minimum, it would be worthwhile to reconsider such figurative proportionality algorithms in the context of counterinsurgency—and, by

¹⁸³ *Id.* at 222.

¹⁸⁴ MICHAEL T. HALL & STANLEY A. MCCHRISTAL, ISAF COMMANDER'S COUNTERINSURGENCY GUIDANCE 2 (2009), <http://perma.cc/JNE4-U2P3>; see also Srinjoy Bose, *Collateral Damage to Afghanistan: A Blow to the Battle for Hearts and Minds*, Institute of Peace and Conflict Studies (Mar. 8, 2007), <http://perma.cc/W8FW-5KBB> (“The . . . Center for Strategic and International Studies posits that ensuing collateral damage has created ten enemies out of one and has disillusioned most Afghans.”).

¹⁸⁵ THE U.S. ARMY/MARINE CORPS, *supra* note 27, at 39.

extension, asymmetric warfare in general. It may be both strategically advisable *and* humanitarian to refocus military operations in which proportionality plays a role from an enemy-combatant-centric to an “enemy”-civilian-centric perspective.¹⁸⁶ Again, however, and to conclude, the point of emphasis lies less in this brief example than in what it suggests: the viability of *in bello* proportionality in modern wars depends on the capacity of international lawyers to align better the interests of states predisposed to respect LOAC with conduct that at least realistically enables, and ideally encourages, good-faith compliance by the reasonable military commander. For now and the foreseeable future, that is the only standard we have.

¹⁸⁶ Compare Hussain, *supra* note 180 (arguing that “[r]efocusing military operations from an enemy-centric to a population-centric center of gravity compels a rebalancing of the proportionality test in lethal targeting that has been used in the field by U.S. commanders for decades”).