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A NEW TWIST ON AN OLD STORY: LAWFARE AND THE MIXING OF PROPORTIONALITIES

Laurie R. Blank*

The claim that a just cause erases any wrongs committed in war is an old story, just like the opposite claim that an unjust cause renders all acts unlawful. International law has traditionally reinforced a strict separation between jus ad bellum—the law governing the resort to force—and jus in bello—the law governing the conduct of hostilities and protection of persons during conflict. Nonetheless, we see today a new twist on this old story that threatens the separation between jus ad bellum and jus in bello from the opposite perspective. In essence, there is an ever-louder claim that excessive civilian deaths under jus in bello proportionality render an entire military operation unjust under jus ad bellum.

Protection of civilians is a central purpose of international humanitarian law (IHL) and media coverage of conflict and civilian deaths is critical to efforts to minimize human suffering during war. However, insurgent groups and terrorists exploit this greater focus on civilian casualties to their own advantage through tactics often termed “lawfare,” such as human shields, perfidy, and other unlawful tactics. Not only do they seek greater protection for their fighters, but they also use the resulting civilian casualties as a tool of war. This article analyzes the growing use of alleged violations of jus in bello proportionality to make claims of disproportionate force under jus ad bellum. In doing so, it highlights the strategic and operational ramifications for combat operations and the impact on investigations and analyses of IHL compliance and accountability. Ultimately, this new twist on an old story has significant consequences for the application of IHL, for decisions to use force, and for the implementation of strategic, operational, and tactical goals during conflict. Most of all, it places civilians in increasing danger because it encourages tactics and strategies that directly harm them.

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I. INTRODUCTION

The claim that a just cause erases any wrongs committed in war is an old story, just like the opposite claim that an unjust cause renders all acts unlawful. Empires, countries, nation-states—for hundreds of years, all have argued that a rightful cause makes all acts just—even rape, pillage, murder of civilians, and other acts ordinarily considered criminal under domestic and international law.

Yet the law states otherwise. International humanitarian law (IHL), otherwise known as the law of armed conflict or the law of war, rests on the equal application of the law to all parties to an armed conflict. All parties must abide by the same obligations and all parties enjoy the same protections under the law, regardless of the reason they fight, the capabilities of their armies, or the likelihood of their success. With the protection of individuals at the heart of IHL, this cause-blind application of the law is a critical feature enabling the greatest measure of protection for the greatest number of persons—the law simply does not countenance diminished protection for individuals because of the supposed rightness or wrongness of their government's policies or decisions to go to war.

Two bodies of law apply to the use of armed force. *Jus ad bellum*, the law governing the resort to force, is based on the U.N. Charter framework and prohibits the use of force by one state against another, except in self-defense or in cases authorized by the U.N. Security Council.¹ *Jus in bello*, the law governing the conduct of hostilities and protection of persons during conflict, is codified in the Hague and Geneva Conventions and provides a clear framework for the treatment of civilians and combatants, the

¹ U.N. Charter art. 2, para. 4, art. 39, art. 51.

targeting of persons and objects, belligerent occupation, and the means and methods and warfare.² Since medieval times, international law has reinforced a strict separation between the two. This separation mandates that all parties have the same obligations and rights during armed conflict to ensure that all persons and property benefit from the protection of the laws of war. For example, the Nuremberg Tribunal repeatedly held that Germany's crime of aggression neither rendered all German acts unlawful, nor prevented German soldiers from benefitting from the protections of the *jus in bello*.³ More recently, the Special Court for Sierra Leone refused to reduce the sentences of Civil Defense Forces fighters because they fought in a "legitimate war" to protect the government against the rebels.⁴ The basic principle that the rights and obligations of *jus in bello* apply regardless of the justness or unjustness of the overall military operation thus remains firmly entrenched.

Nonetheless, we see today a new twist on this old story, one that threatens this historical and critical separation between *jus ad bellum* and *jus in bello* from the opposite perspective. This new story stems from the growing—but not new—tendency to conflate the requirement of a proportionate response under *jus ad bellum* with the principle of proportionality under *jus in bello*. As explained in greater detail below, the former man-

² See *War and International Humanitarian Law*, Int'l Comm. of the Red Cross (Oct. 29, 2009) <http://www.icrc.org/eng/war-and-law/overview-war-and-law.htm>. The law of armed conflict is set forth primarily in the four Geneva Conventions of August 14, 1949 and their Additional Protocols. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted by Conference June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted by Conference June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II]. The 1899 and 1907 Hague Conventions govern the means and methods of warfare. Hague Convention No. II with Respect to the Laws and Customs of War on Land, Jul. 29, 1899, 32 Stat. 1803, T.S. No. 403; Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. 539 [hereinafter Hague IV].

³ See Trial of Josef Altstötter et. al., 6 THE U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 2 (1948); United States v. List (Case 7), XI TRIALS OF WAR CRIMES BEFORE THE NUERNBERG MILITARY TRIBUNALS 1247 (1948) (citing OPPENHEIM, 2 INTERNATIONAL LAW 51–52 (Longman 1920)). See also section II.C. *infra*.

⁴ Prosecutor v. Fofana & Kondewa, Case No. SCSL-04-14-A, Judgement, ¶¶ 529–30 (May 28, 2008), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=9xsCbIVrMIY%3d&tabid=194> (holding that mitigation for political reasons would give legitimacy to conduct that violates the law).

dates that any use of force in self-defense be necessary and proportionate in defeating or deterring an attack by another state. The latter principle requires soldiers not to attack a target if the expected innocent casualties are excessive in relation to the anticipated military advantage gained. Mixing the two proportionalities leads to common but incorrect analyses: (1) civilian casualties become determinative of the proportionality of a state's response to an armed attack and (2) the lawfulness of the use of force plays a role in whether an attack on a particular target during a conflict results in legitimate collateral damage or a disproportionate attack on civilians in violation of the law of war. Neither of these arguments is an appropriate application of proportionality—whether under *jus ad bellum* or under *jus in bello*.

The burgeoning use of “lawfare”—defined here as the exploitation of the law of war for strategic and tactical purposes—as a tool of war compounds this effect. Insurgents co-mingle with the civilian population, launch attacks from protected buildings, and seek to exploit militaries' adherence to the law of war to gain advantages on the ground and in the public relations arena. Modern asymmetrical conflicts—exemplified by NATO operations in Afghanistan and by Operation Cast Lead in Gaza—are marked by extensive intermingling between civilians and fighters, fighting in civilian areas and tactics that tax the *jus in bello* principle of proportionality to the limits. In particular, the concurrence of counterinsurgency operations and tactical exploitation of the law of war produces consistent media coverage focused—reasonably so—on civilian casualties and collateral damage. We see this, for example, in Afghanistan, where coalition attacks resulting in civilian casualties gain comprehensive media attention but insurgent attacks with deadly effect among civilians receive significantly less glare from the spotlights.

At the same time, these developments have opened the door for this alternative take on the old tale of just war. Unlike the past, when *jus ad bellum* arguments were used to reach particular claims about *jus in bello*, we now see the use of *jus in bello* claims to make arguments about the validity of an operation under the *jus ad bellum*. In effect, there is an ever-louder claim that allegedly excessive civilian deaths under IHL, the law governing the conduct of hostilities, render an entire military operation unjust under *jus ad bellum*, the law governing the resort to force. However, just as the crime of aggression does not turn otherwise lawful acts into war crimes, so the finding that an attack on a particular target was disproportionate should not automatically render the use of force unlawful.

This article will examine how the mixing of proportionalities and the growing use of lawfare have led to this new twist on an old story. The first section will provide a foundation of applicable law and jurisprudence, examining the two proportionalities and analyzing how international jurisprudence has repeatedly and consistently affirmed the separation between

the two bodies of law. The second section will explore the concept of lawfare and how the technologically disadvantaged party in asymmetrical conflict often takes advantage of *jus in bello* legal obligations to hinder the military operations of the more advantaged party. In the third section, this article analyzes how these two components have now merged into a new story about proportionality in asymmetrical warfare. In particular, the impact of global media coverage of conflict exacerbates the inherent difficulties in assessing proportionality.

Although the law is clear that proportionality is a prospective analysis that looks only at the expected civilian casualties and the anticipated military advantage, current conflicts see a steady erosion towards a retrospective analysis driven by media coverage of civilian casualties and, in certain cases, exploitation of that coverage. Lawfare thus now affects not only the conduct of hostilities, but investigations and analysis after the fact. These challenges produce several key questions, including: the impact of asymmetrical warfare on the application of both *jus in bello* and *jus ad bellum*; the interpretation of the *jus ad bellum* requirements of necessary and proportionate; the interpretation of Article 51 of Additional Protocol I; and the impact of these developments on the actual conduct of hostilities, media coverage of conflict, and public perception of military operations. Recent developments, including the revised International Security Assistance Force (ISAF) tactical doctrines in Afghanistan and the Goldstone Report, highlight the importance of these questions.

The *jus in bello* principle of proportionality—like the law of armed conflict itself—is based on a delicate balance between military necessity and humanity. The new trend in conflating the two proportionalities risks tearing the fabric of that delicate balance, perhaps in ways that cannot be repaired. To maintain the law's ability to protect civilians while still enabling effective military operations, it is essential to simultaneously preserve the separation between the *jus in bello* and the *jus ad bellum* principles of proportionality and not let one drive determinations about the other.

II. THE TWO PROPORTIONALITIES: THE NORMATIVE FRAMEWORK

Analyzing situations of armed conflict involves both *jus in bello* and *jus ad bellum*, as explained above. The modern foundations of *jus in bello*, which dates back hundreds, indeed thousands, of years,⁵ lie in the Hague Conventions of 1899 and 1907 and Geneva Conventions of 1949. International legal constraints on the resort to force, in contrast, are much more recent in origin. The U.N. Charter is the primary framework for mod-

⁵ See generally Gregory P. Noone, *The History and Evolution of the Law of War Prior to World War II*, 47 NAVAL L. REV. 176 (2000).

ern *jus ad bellum*, which dates back to the 1919 Covenant of the League of Nations and 1928 Kellogg-Briand Pact.⁶

Proportionality plays an important role in both legal regimes, which can be a common source of confusion and—at times—the trigger for problematic legal interpretations and applications. Regarding the conduct of hostilities, proportionality in the *jus in bello* balances military necessity and humanity by prohibiting attacks in which the expected civilian casualties would be excessive in relation to the anticipated military advantage gained. In analyzing the resort to force under the *jus ad bellum*, proportionality limits the power to use force in response to an armed attack, assessing whether a state's military operation exceeded what was necessary to defend the state. A key distinction, particularly for the strategic issues addressed in this article, is that *jus ad bellum* proportionality is unconcerned with the extent of civilian casualties, unlike *jus in bello* proportionality, in which civilian casualties play a central role.

A. *Proportionality in the Jus Ad Bellum*

The U.N. Charter prohibits the use of force by one state against another in Article 2(4): “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.”⁷ The Charter also provides two exceptions to that prohibition, such that force can be used in self-defense against an armed attack under Article 51 or as part of a U.N.-authorized operation under Chapter VII.⁸ Article 51 recognizes the “inherent right” of states to use force in self-defense in response to an armed attack: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations.”⁹ The central features of the right to self-defense are that force used is necessary and proportionate to the goal of repelling the attack or ending the grievance.¹⁰

⁶ Covenant of the League of Nations, Preamble, June 28, 1919, 225 Consol. T.S. 188 (“In order to promote international co-operation and to achieve international peace and security by the acceptance of obligations not to resort to war”); Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy art. 1, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 (“The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.”).

⁷ U.N. Charter, *supra* note 1, art. 2(4).

⁸ *Id.* art. 43, 51.

⁹ *Id.* art. 51.

¹⁰ Legality of the Threat and Use of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 226, 245 (July 8) [hereinafter Nuclear Weapons]; Case Concerning Military

The Caroline Incident provides the classic formulation of the parameters of self-defense. British troops crossed the Niagara River to the United States side and attacked the steamer *Caroline*, which had been running arms and materiel to insurgents on the Canadian side.¹¹ The attack set fire to the *Caroline* and killed one American. The British claimed that they were acting in self-defense in response to the insurgents' provocations.¹² In a letter to his British counterpart, Lord Ashburton, U.S. Secretary of State Daniel Webster declared that the use of force in self-defense should be limited to "cases in which the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."¹³ Furthermore, the force used must not be "unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it."¹⁴

The primary issue in analyzing *jus ad bellum* proportionality is whether the defensive use of force is appropriate in relation to the ends sought, measuring the extent of the use of force against the overall military goals, such as fending off an attack or subordinating the enemy. This proportionality focuses not on some measure of symmetry between the original *attack* and the use of force in response, but on whether the measure of counter-force used is proportionate to the needs and goals of *repelling* or *detering* the original attack.¹⁵ As a report to the International Law Commission explains:

[I]t would be mistaken . . . to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered. What matters

and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, Judgment, 1986 I.C.J. 14, ¶ 237 (June 27, 1986); *Jus ad Bellum* (Ethiopia v. Eritrea), Ethiopia's Claims 1–8, Partial Award (Dec. 19, 2005), available at <http://www.pca-cpa.org>.

¹¹ Hunter Miller, *British-American Diplomacy: The Caroline Case*, THE AVALON PROJECT, available at http://avalon.law.yale.edu/19th_century/br-1842d.asp (last visited Apr. 14, 2011).

¹² *Id.* ("[T]he destruction of the *Caroline* was an act of necessary self-defense." (quoting a letter from Mr. Fox, the British minister at Washington, to Mr. Forsyth, U.S. Secretary of State)).

¹³ *Id.* (reproducing a letter from Daniel Webster, U.S. Secretary of State, to Lord Ashburton, Special British Minister (Aug. 6, 1842) (quoting a former communication from this Department to the British Plenipotentiary here, that stated the exceptions to the "inviolable character of the territory of independent States.")).

¹⁴ *Id.*

¹⁵ YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 225 (2005); See also Michael N. Schmitt, "Change Direction" 2006: *Israeli Operations in Lebanon and the International Law of Self-Defense*, 29 MICH. J. INT'L L. 127, 129 (2007–2008).

in this respect is the result to be achieved by the “defensive” action, and not the forms, substance and strength of the action itself.¹⁶

In both *Nicaragua v. United States* and *Armed Activities on the Territory of the Congo*, the International Court of Justice reaffirmed that proportionality focuses on the degree of force needed to eliminate the danger or repel the attack.¹⁷ The Court declared in the latter case that the Ugandan operations capturing “airports and towns many hundreds of kilometres from Uganda’s border would not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defence.”¹⁸ Thus, a violation of *jus ad bellum* proportionality only occurs when “the defender [does] more than reasonably required in the circumstances to deter a threatened attack or defeat an ongoing one.”¹⁹

B. *Proportionality in the Jus in Bello*

The *jus in bello* principle of proportionality requires that parties refrain from attacks in which the expected civilian casualties will be excessive in relation to the anticipated military advantage gained. A balance of military necessity and humanity, this principle is at the foundation of two critical aspects of IHL. First, the means and methods of attacking the enemy are not unlimited. Rather, the only legitimate object of war is to weaken the military forces of the enemy. Second, the legal prohibition against targeting civilians does not correspondingly mean that all civilian deaths are violations of the law. Even though a “legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack,”²⁰ the law has always tolerated “[t]he incidence of some civilian casualties . . . as a consequence of military action.”²¹ Military

¹⁶ Roberto Ago, *Addendum to Eighth Report on State Responsibility*, U.N. Doc. A/CN.4/318/ADD.5–7, ¶ 121, *reprinted in* 2 Y.B. INT’L L. COMM’N 13, 69 (1980).

¹⁷ *Nicaragua v. U.S.*, 1986 I.C.J. 14, ¶ 237; *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, ¶ 147 (Dec. 19); *See also* JUDITH GAIL GARDAM, *NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES* 158 (2004) (explaining that in the *Nicaragua* case, the Court held that, “the approach is not to focus on the nature of the attack itself and ask what is a proportionate response but rather to determine what is proportionate to achieving the legitimate goal under the Charter, the repulsion of the attack.”).

¹⁸ *Dem. Rep. Congo v. Uganda*, 2005 I.C.J. 116, ¶ 147.

¹⁹ Schmitt, *supra* note 15, at 154 (emphasizing that assessments of the Israeli response to Hezbollah rocket attacks must be on the basis of the force needed to end the attacks, not on the relation between the attacks and the force used).

²⁰ Nuclear Weapons, *supra* note 10, at 587, ¶ 20 (J. Higgins, dissenting).

²¹ *See* Judith Gardam, *Necessity and Proportionality in Jus Ad Bellum and Jus in Bello*, in *INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS* 275, 283–84 (Laurence Boisson de Chazournes & Philippe Sands eds., 1999).

commanders and decision makers must therefore assess the advantage to be gained from an attack in light of the likely civilian casualties.

The laws of war have incorporated these ideas since long before the Hague and Geneva Conventions, and the modern formulation of proportionality in Additional Protocol I.²² Indeed, *jus in bello* proportionality has long historical roots, stemming from St. Thomas Aquinas' "doctrine of double effect,"²³ essentially "a way of reconciling the absolute prohibition against attacking noncombatants with the legitimate conduct of military activity."²⁴ The principle of proportionality, which is well accepted as an element of customary international law applicable in all armed conflicts,²⁵ appears in three separate provisions in Additional Protocol I. In establishing the basic parameters of the obligation to protect civilians and the civilian population, Article 51 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."²⁶ This language demonstrates that Additional Protocol I contemplates incidental civilian casualties,

²² See generally Francis Lieber, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD, arts. 14, 15, 22 (1863), available at <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument> [hereinafter Lieber Code]. Although the Lieber Code does not include a specific statement of the principle of proportionality, the early underpinnings of the concept can be seen in the following three statements: in art. 14 "[m]ilitary necessity . . . consists in the necessity of those measures which are indispensable for securing the ends of the war"; in art. 15 "[m]ilitary necessity admits of all direct destruction of life or limb of 'armed' enemies, and of other persons whose destruction is incidentally 'unavoidable' in the armed contests of the war"; and in art. 22 "the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit."

²³ See Saint Thomas Aquinas, ON LAW, MORALITY, AND POLITICS 225–27 (Richard J. Regan & William P. Baumgarth, eds. 1988), available at <http://www.op.org/summa/summa-II-IIq64.html> (describing II-II, quatio 64, art.7 "[w]hether it is lawful to kill a man in self-defense?" as having "two effects").

²⁴ MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 153 (Basic Books 4th ed., 2006).

²⁵ See 1 Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law: Rules*, Rule 14, at 46, 48–49 (2009) ("Rule 14. Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.") [hereinafter CIHL]; see Michael N. Schmitt, *Fault Lines in the Law of Attack*, in TESTING THE BOUNDARIES OF INTERNATIONAL HUMANITARIAN LAW 277, 292 (Susan Breau & Agnieszka Jachec-Neale eds., 2006), available at http://www.estig.ipbeja.pt/~ac_direito/FaultLinesintheLawofTargeting.pdf; see also Christopher Greenwood, *Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflict*, in THE GULF WAR 1990-91 IN INTERNATIONAL AND ENGLISH LAW 63, 76–77 (Peter Rowe ed., 1993) (noting the application of the principle of proportionality in Protocol I during the first Gulf War as a part of customary international law).

²⁶ API, *supra* note 2, art. 51(5)(b).

and appears again in Articles 57(2)(a)(iii)²⁷ and 57(2)(b),²⁸ which specifically cover precautions in attack.

Although it may seem straightforward to declare that militaries should never attack when the loss of innocent life will outweigh any military benefit from the attack, in practice applying proportionality is rarely clear-cut because it compares civilian harm and military advantage, two dissimilar factors. As one commentator glibly explained, military commanders are not issued a “proportionometer” to help them make such calculations.²⁹ Comparing the destruction of a munitions factory—or, in Gaza, a storage facility for rockets—to the number of civilian deaths or serious injuries is difficult, perhaps impossible. Even though “balance” or “weighing” are the most common terms used when discussing proportionality, the actual test requires that we examine “excessiveness,” as stressed in Additional Protocol I. Therefore, that “proportionometer” cannot help determine precisely when one additional civilian death will “tip the scale” and make an otherwise lawful attack disproportionate. Instead, “focusing on excessiveness avoids the legal fiction that collateral damage, incidental injury, and military advantage can be precisely measured.”³⁰ Rather than a mathematical concept, therefore, proportionality is a guideline to help ensure that military commanders weigh the consequences of a particular attack and refrain from launching attacks that will cause excessive civilian deaths.

Critically, analyzing proportionality in any given situation also requires an understanding of the correct perspective. As the very language of Additional Protocol I shows, referring to “anticipated” military advantage and “expected” civilian casualties, proportionality must be viewed prospectively, not in hindsight. Instead, the information available and the circum-

²⁷ See AP I, *supra* note 2, art. 57(2)(a)(iii) (“With respect to attacks, the following precautions shall be taken: (a) [t]hose who plan or decide upon an attack shall: . . . (iii) refrain from deciding to launch 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.”).

²⁸ See AP I, *supra* note 2, art. 57(2)(b) (“[A]n attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack 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.”).

²⁹ See Joseph Holland, *Military Objective and Collateral Damage: Their Relationship and Dynamics*, 7 Y.B. OF INT'L HUMANITARIAN L. 35, 48 (2004), available at <http://journals.cambridge.org/action/displayFulltext?type=1&fid=671848&jid=YHL&volumeId=7&issueId=-1&aid=671844&bodyId=&membershipNumber=&societyETOCSession=> (the military member will have to make a “good faith, honest and competent decision as a ‘reasonable military commander’” when evaluating and balancing incidental civilian losses and anticipated military advantage).

³⁰ See generally Schmitt, *supra* note 25, at 293–301 (discussing qualifying military objectives and proportionality in attacks).

tances at the time of the military operation in question must govern how we approach the balance between military advantage and civilian casualties. Because combat, even a minor firefight, involves confusion and uncertainty—the “fog of war”—these “decisions cannot be judged on the basis of information which has subsequently come to light.”³¹ A second concern with a retrospective approach stems from the vastly different nature of military advantage and civilian casualties. The former is abstract, has little or no emotional impact, and is difficult to convey in pictures, while civilian casualties are dramatic and emotional and “lend themselves to powerful pictures and strong reactions.”³² Observers will often find it difficult to assess fairly whether collateral damage is excessive in practice because the military advantage from an attack may not be immediately apparent. The retrospective approach can therefore lead to departures from the accepted application of the principle of proportionality.

The “reasonable commander” forms the heart of this prospective analysis. Analogous to the “reasonable person” in domestic criminal law, the reasonable commander is “the reasonable man in the law of war . . . [and] is based upon the experience of military men in dealing with basic military problems.”³³ As numerous military manuals recognize:

It will not always be easy for a commander to evaluate [whether an attack will be disproportionate] with precision. On the one hand, he must take into account the elements *which are available to him*, related to the military necessity necessary to justify an attack, and on the other hand, he must

³¹ Canada, Reservations and Statements of Understanding made upon Ratification of AP I, § 7 (Nov. 20, 1990), cited in CIHL, *supra* note 25, ¶¶ 196–197, at 332. Belgium’s Interpretative Declarations Made Upon Ratification of Additional Protocol I, § 3 (May 20, 1986) also states that “the only information on which [proportionality determinations] can possibly be taken is such relevant information as is then available and that it has been feasible from him to obtain for that purpose.”)

³² Holland, *supra* note 29, at 47.

³³ William V. O’Brien, *The Conduct of Just and Limited War*, in CONTEMPORARY MORAL PROBLEMS: WAR, TERRORISM, AND TORTURE 21, 28 (James E. White ed., 2009); *see also* INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA OFFICE OF THE PROSECUTOR, FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA ¶ 50 (2000), available at http://www.icty.org/x/file/About/OTP/otp_report_nato_bombing_en.pdf [hereinafter NATO Bombing Report] (“[i]t is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to noncombatants, [nor would] military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories . . . always agree in close cases.”); William J. Fenrick, *Justice in Cataclysm: Criminal Trials in the Wake of Mass Violence: Attacking the Enemy Civilian as a Punishable Offense*, 7 DUKE J. COMP. & INT’L L. 539, 546 (1997).

take into account the elements *which are available to him*, related to the possible loss of human life and damage to civilian objects.³⁴

It may seem simpler to merely add up the resulting civilian casualties and injuries after an attack and assess the actual value gained from a military operation, because “the results of an attack are often tangible and measurable, whereas expectations are not.”³⁵ However, doing so fails to do justice to the complexities inherent in combat; the proportionality of any attack must thus be viewed from the perspective of the military commander on the ground, taking into account the information he or she had at the time. As Clausewitz wrote, “[t]he great uncertainty of all data in war is a peculiar difficulty, because all action must, to a certain extent, be planned in a mere twilight, which in addition not infrequently—like the effect of a fog or moonshine—gives to things exaggerated dimensions and unnatural appearance.”³⁶

C. *The Historical Separation between Jus in Bello and Jus Ad Bellum*

Common Article 2 to the Geneva Conventions is the first modern codification of the long-recognized distinction between *jus in bello* and *jus ad bellum*. The preamble to Additional Protocol I then reaffirms that the “provisions of the Geneva Conventions [and] this Protocol must be fully applied in all circumstances . . . without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.”³⁷ This principle of equal application

³⁴ BELGIUM, LAW OF WAR MANUAL 29 (1983), cited in CIHL, *supra* note 25, at 334; *see also* U.K. MINISTRY OF DEFENCE, MANUAL OF THE LAW OF ARMED CONFLICT ¶ 16.45.2 (JSP 383, 2004) (“the responsibility of the officer . . . would be assessed in light of the facts as he believed them to be, on the information reasonably available to him from all sources.”), *available at* <http://www.mod.uk/NR/rdonlyres/82702E75-9A14-4EF5-B414-49B0D7A27816/0/JSP3832004Edition.pdf>; CANADA OFFICE OF THE JUDGE ADVOCATE GENERAL, LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS ¶ 418(2) (2003) (explaining that “consideration must be paid to the honest judgement of responsible commanders, based on the information reasonably available to them at the relevant time, taking fully into account the urgent and difficult circumstances under which such judgements are usually made” and emphasizing that any analysis of the proportionality test must be based on “what a reasonable person would do” in the circumstances), *available at* http://www.forces.gc.ca/jag/publications/Training-formation/LOAC-DDCA_2004-eng.pdf.

³⁵ Schmitt, *supra* note 25, at 294.

³⁶ 2 CARL VON CLAUSEWITZ, ON WAR, ch. 2, ¶ 24 (1976).

³⁷ AP I, *supra* note 2, at preamble. Common Article 2 to the Geneva Conventions states that the conventions apply in “all cases of war.” Similarly, in a 1963 resolution, the Institut de Droit International declared that the rules restraining conduct in war must be equally applied to all belligerents. *Institut de Droit International*, Resolution, “Equality of Application of the Rules of the Law of War to Parties to an Armed Conflict,” 50 (II) *AIDI* 376 (Bruxelles, 1963).

can be found as far back as medieval writings on the laws of war. Major treatises emphasized that certain restraints in war must apply equally to all combatants; that “whatever is permitted to the one in virtue of the state of war, is also permitted to the other.”³⁸ The principle took on even greater importance as the notion of just war gave way—somewhat—to a more neutral conception of war with the rise of the nation-state in the eighteenth and nineteenth centuries. “This view of violence as a process to be regulated in and of itself is what set the stage for the development of the modern laws of war, by severing their ‘historical dependence on the *jus ad bellum*.’”³⁹ As Theodor Meron writes, “[i]n contrast to medieval law, most modern rules of warfare (e.g., on requisitioning property and the treatment of prisoners of war and civilians, that is *jus in bello*) apply equally to a state fighting a war of aggression and to one involved in lawful self-defense.”⁴⁰ While international law applies both *jus ad bellum* and *jus in bello* to all situations of armed conflict, therefore, the two legal frameworks serve different purposes and produce different results. Violation of the *jus ad bellum*—an unlawful use of force—constitutes the crime of aggression; a violation of the *jus in bello*, depending on the seriousness of the violation, is a war crime.

For decades, international courts have upheld this essential separation and reinforced its importance for the fair and effective implementation of IHL. The most recent such case is *Prosecutor v. Fofana & Kondewa*, before the Special Court for Sierra Leone. The Trial Chamber originally convicted two leaders of the Civil Defence Forces, a militia fighting to restore the legitimate government, of mutilation, amputation, hacking civilians to death, and other brutal crimes.⁴¹ At sentencing, the Trial Chamber reduced their sentences because, although they committed grievous atrocities, they fought for “a cause that is palpably just and defensible.”⁴² The Trial Chamber thus directly conflated *jus in bello* and *jus ad bellum*, explicitly accepting that those who fight in a just war bear lesser obligations under the law of armed conflict. Were its decision to stand, it would have sent a clear message that IHL does not apply equally to all parties, a problematic result. On appeal, however, the Appeals Chamber flatly rejected this ap-

³⁸ Emmerich de Vattel, *Le Droit des Gens*, in DOCUMENTS ON THE LAWS OF WAR 938 (Adam Roberts & Richard Guelff eds., 2000) (1773). See also 3 HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 1420–01 (Richard Tuck ed., 2005).

³⁹ Jasmine Moussa, *Can Jus ad Bellum Override Jus in Bello? Reaffirming the Separation of the Two Bodies of Law*, 90 INT’L REV. RED CROSS 963, 966 (2008) (citing Judith Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT’L L. 391, 397 (1993)).

⁴⁰ Theodor Meron, *Shakespeare’s Henry the Fifth and the Law of War*, 86 AM. J. INT’L L. 1, 12 (1992).

⁴¹ *Prosecutor v. Fofana & Kondewa*, Case No. SCSL-04-14-T, Sentencing Judgement ¶ 46, (Oct. 9, 2007), <http://www.unhcr.org/refworld/pdfid/470dd5a02.pdf>.

⁴² *Id.* ¶¶ 86–88.

proach, finding that it violated the “basic distinction and historical separation between *jus ad bellum* and *jus in bello*, . . . a bedrock principle” of IHL.⁴³ In particular, the court emphasized that “[a]llowing mitigation for a convicted person’s political motives, even where they are considered . . . meritorious . . . provides implicit legitimacy to conduct that unequivocally violates the law—the precise conduct this Special Court was established to punish.”⁴⁴ In a similar vein, the South African Truth and Reconciliation Commission rejected the African National Congress’ claim “that it should be judged differently than the apartheid government because it was engaged in a just war against apartheid.”⁴⁵

The International Criminal Tribunal for the former Yugoslavia (ICTY) has also emphasized the distinction between the two bodies of law, lamenting that “[t]he unfortunate legacy of wars shows that until today many perpetrators believe that violations of binding international norms can be lawfully committed, because they are fighting for a ‘just cause.’”⁴⁶ The Tribunal’s response to such claims: “[t]hose people have to understand that international law is applicable to everybody, in particular during times of war.”⁴⁷ The Tribunal’s statement was a clear link to the Nuremberg Tribunal’s similar rejection of *jus ad bellum*-based claims in *jus in bello* cases. In separating crimes under *jus ad bellum* from crimes under *jus in bello*, even though both often arose, the Nuremberg Tribunal consistently refused to accept the Prosecution’s argument that Germany, as the aggressor, was not entitled to invoke rights and protections under IHL.⁴⁸ For example, in the *Justice Trial*, the Tribunal declared:

If we should adopt the view that by reason of the fact that the war was a criminal war of aggression every act which would have been legal in a defensive war was illegal in this one, we would be forced to the conclusion

⁴³ Prosecutor v. Fofana & Kondewa, Case No. SCSL-04-14-A, Judgement, ¶¶ 529–30 (May 28, 2008), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=9xsCbIVrMIY%3d&tabid=194>.

⁴⁴ *Id.* ¶ 534.

⁴⁵ BETH VAN SCHAACK & RONALD C. SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT 214 (2010).

⁴⁶ Prosecutor v. Kordić & Cerkez, Case No. IT-95-14/2-A, Judgment, ¶ 1082 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004), available at <http://www.unhcr.org/refworld/docid/47fdfb53d.html>.

⁴⁷ *Id.* See also Abella v. Argentina, Case 11.137, Inter-Am. Comm’n H.R., Report No. 55/97, OEA/Ser.L/V/II.98, doc. 6 rev. ¶ 173 (1997) (“application of the law is not conditioned by the causes of the conflict.”).

⁴⁸ Moussa, *supra* note 39, at 985.

that every soldier who marched under orders into occupied territory or who fought in the homeland was a criminal and a murderer.⁴⁹

In the *Hostages Trial*, German leaders faced prosecution for crimes committed during the occupation of and campaigns in Greece and Yugoslavia. Rejecting the argument that the illegal use of force prevented Germany from invoking the law of belligerent occupation, the Tribunal emphasized that “[w]hatever may be the cause of a war that has broken out, and whether or no[t] the cause be a so-called just cause, the same rules of international law are valid as to what must not be done, may be done, and must be done by the belligerents themselves in making war against each other.”⁵⁰

IHL’s effectiveness depends in many ways on this separation of *jus in bello* and *jus ad bellum*. If the cause at arms influenced a state’s obligation to abide by the laws regulating the means and methods of warfare and requiring protection of civilians and persons *hors de combat*, states would justify all departures from *jus in bello* with reference to the purported justness of their cause. The result: an invitation to unrestricted warfare. This article demonstrates one highly problematic example of how mixing *jus in bello* proportionality and *jus ad bellum* proportionality violates this longstanding proscription and, in doing so, undermines the core of IHL—the protection of civilians from the ravages of war.

III. LAWFARE—EXPLOITING THE LAW AS A TOOL OF WAR

The problems inherent in conflating *jus ad bellum* and *jus in bello* are compounded by the growing use of lawfare, generally defined as “the strategy of using or misusing law as a substitute for traditional military means to achieve military objectives.”⁵¹ Two aspects of lawfare are relevant to the instant discussion: strategic and tactical. The former occurs when technologically and militarily disadvantaged forces target public support and seek to force a political end to the fighting because of opposition to a seemingly extra-legal war.⁵² In essence,

⁴⁹ Trial of Josef Altstötter et. al., 6 THE U.N. WAR CRIMES COMM’N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 2 (1948).

⁵⁰ United States v. List (Case 7), XI TRIALS OF WAR CRIMES BEFORE THE NUERNBERG MILITARY TRIBUNALS 1247 (1948) (citing OPPENHEIM, 2 INTERNATIONAL LAW 51–52 (Longman 1920)).

⁵¹ Colonel Kelly D. Wheaton, *Strategic Lawyering: Realizing the Potential of Military Lawyers at the Strategic Level*, 2006 ARMY LAW. 1, 7 (2006).

⁵² See, e.g., W. MICHAEL REISMAN & CHRIS ANTONIOU, THE LAWS OF WAR xxiv (1994) (“[i]n modern popular democracies, even a limited armed conflict requires a substantial base of public support. That support can erode or even reverse itself rapidly, no matter how worthy the political objective, if people believe that the war is being conducted in an unfair, inhumane, or iniquitous way.”).

[R]ather than seeking battlefield victories, *per se*, challengers try to destroy the will to fight by undermining the public support that is indispensable when democracies like the U.S. conduct military interventions. A principal way of bringing about that end is to make it appear that the U.S. is waging war in violation of the letter or spirit of [the law of armed conflict].⁵³

The tactical piece occurs when the disadvantaged side—insurgents, terrorists, or others—openly violate the law of war to gain a tactical advantage in specific operations by handicapping the ability of the IHL-compliant military to carry out its mission within the bounds of the law. The most classic way lawfare affects military operations and the implementation and enforcement of IHL is through challenges to the principle of distinction, as described in this section. However, as Section IV below will explain, lawfare also contributes to and feeds off the mixing of the two proportionalities, leading to obfuscation in the enforcement of the law and greater opportunities for the exploitation of the law for strategic and tactical purposes.

Distinction is one of the cardinal principles of IHL⁵⁴ and requires that any party to a conflict distinguish between those who are fighting and those who are not and direct attacks solely at the former.⁵⁵ Similarly, parties must distinguish between civilian objects and military objects and target only the latter. Article 48 of Additional Protocol I sets forth the basic rule:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.⁵⁶

Distinction lies at the core of IHL's seminal goal of protecting innocent civilians and persons who are *hors de combat*. This purpose is em-

⁵³ Col. Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* 11 (2001), available at <http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf>.

⁵⁴ Nuclear Weapons, *supra* note 10, ¶ 78 (Dissenting Opinion of Judge Higgins, dissenting on unrelated grounds) (declaring that distinction and the prohibition on unnecessary suffering are the two cardinal principles of IHL).

⁵⁵ Exhortations regarding distinction date back to the Lieber Code: "Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit." Lieber Code, *supra* note 22, art. 22; *see also* CIHL, *supra* note 25, Rule 1.

⁵⁶ AP I, *supra* note 2, art. 48. Article 48 is considered customary international law. *See* CIHL, *supra* note 25, Rule 1.

phasized in Article 51 of Additional Protocol I, which states that “[t]he civilian population as such, as well as individual civilians, shall not be the object of attack.”⁵⁷ The obligation to distinguish forms part of the customary international law of both international and non-international armed conflicts, as the ICTY held in the *Tadic* case.⁵⁸ As a result, all parties to any conflict are obligated to distinguish between combatants, or fighters, and civilians, and concomitantly, to distinguish themselves from civilians and their own military objects from civilian objects.

In recent conflicts, “the most typical and also most damaging form of lawfare . . . has been the decision of disadvantaged combatants to not distinguish themselves from the local populace.”⁵⁹ By hiding amongst otherwise protected persons and objects, such fighters take advantage of the more advantaged military’s compliance with IHL principles and obligations, using both the law and the presence of civilian persons and objects as a tactical weapon. The lack of boundaries between conflict areas and civilian areas in contemporary conflicts, between those actively participating in hostilities and those who are not, therefore poses particular challenges for distinction. One news article described combat in Afghanistan as:

The elusive insurgents blend easily into the population, invisible to Marines until they pick up a weapon. They use villagers to spot and warn of U.S. troop movements, take up positions in farmers’ homes and fields, and attack Marines from spots with ready escape routes.⁶⁰

Iraqi insurgents used similar tactics during Operation Iraqi Freedom, wearing civilian clothing when approaching American and British forces in order to get closer without seeming to present a threat.⁶¹

⁵⁷ API, *supra* note 2, art. 51(2).

⁵⁸ *Prosecutor v. Dusko Tadic*, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 110, 127 (citing U.N. General Assembly Resolution 2675) (“Bearing in mind the need for measures to ensure the better protection of human rights in armed conflicts of all types, [the General Assembly] Affirms the following basic principles for the protection of civilian populations in armed conflicts, without prejudice to their future elaboration within the framework of progressive development of the international law of armed conflict: . . . 2. in the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations.”); *See also* Nuclear Weapons, *supra* note 10, ¶ 79 (distinction is one of the “intransgressible principles of international customary law”); CIHL, *supra* note 25, Rule 1; *Abella v. Argentina*, *supra* note 47, ¶ 178.

⁵⁹ Eric Talbot Jensen, *The ICJ’s “Uganda Wall”: A Barrier to the Principle of Distinction and An Entry Point for Lawfare*, 35 *DENV. J. INT’L L. & POL’Y* 241, 270 (2007).

⁶⁰ Ann Scott Tyson, *In Afghanistan, a Test of Tactics Under Strict Rules to Protect Civilians, Marines Face More Complex Missions*, *WASH. POST*, Aug. 13, 2009, at A6.

⁶¹ *Id.* Similarly, Afghan militants often pose as women to escape from firefights unseen. *See Official: Afghan Militants Fled Dressed as Women*, *CNN.COM*, July 6, 2009,

Storing munitions in mosques or hospitals, launching rockets from residential compounds, and generally fighting from within the civilian population without any distinguishing markings all create situations where an IHL-compliant military often appears forced to choose between engaging a legitimate target and endangering civilians. For example, Taliban militants have stored heavy weaponry in mosques and reportedly positioned two large anti-aircraft guns in front of the office of a major international humanitarian aid organization.⁶² “By shifting soldiers and military equipment into civilian neighborhoods and taking refuge in mosques, archeological sites and other nonmilitary facilities, Taliban forces are confronting U.S. authorities with the choice of risking civilian casualties and destruction of treasured Afghan assets or forgoing attacks.”⁶³ Similarly, United States and allied forces in Iraq encountered multiple examples of insurgents using civilians as human shields, attacking from locations protected under IHL, fighting without wearing a uniform or other distinctive sign, and using protected places for weapons storage and command posts.⁶⁴ Operation Cast Lead, the Israeli military operation in Gaza in 2008–2009, faced the same challenges. Palestinian militants hid or stored rockets, missiles, and other munitions in mosques, hospitals, schools, and other civilian buildings.⁶⁵

When militants and other groups exploit IHL for tactical purposes, the net effect is to place civilians in greater danger. When soldiers cannot distinguish between civilians and fighters, or when fighters disguised as civilians launch attacks, innocent civilians end up in danger as they are trapped in the combat zone, used as human shields, or mistaken for enemy fighters and targeted. And yet beyond these challenges lies a broader dan-

<http://www.cnn.com/2009/WORLD/asiapcf/07/06/afghanistan.marine.stah><http://www.cnn.com/2009/WORLD/asiapcf/07/06/afghanistan.marine.standoff/index.html>.

⁶² See, e.g., Mark Mazzetti and Kevin Whitelaw, *Into the Thick of Things*, U.S. NEWS & WORLD REPORT, Nov. 5, 2001, at 24 (“[h]eavy weaponry is being sheltered in several mosques to deter attacks. The Taliban has even placed a tank and two large anti-aircraft guns under trees in front of the office of CARE International . . .”).

⁶³ Bradley Graham and Vernon Loeb, *Taliban Dispersal Slows U.S.*, WASH. POST, Nov. 6, 2001, at 1.

⁶⁴ See Dexter Filkins, *The Conflict in Iraq: With the Eighth Marines; In Taking Falluja Mosque, Victory By the Inch*, N.Y. TIMES, Nov. 10, 2004; Tony Perry & Rick Loomis, *Mosque Targeted in Fallouja Fighting*, L.A. TIMES, Apr. 27, 2004, at A1; *Coalition Forces Continue Advance Toward Baghdad*, CNN Live Event/Special, Mar. 24, 2003; *The Rules of War are Foreign to Saddam*, OTTAWA CITIZEN, Mar. 25, 2003; David Blair, *Human Shields Disillusioned with Saddam, Leave Iraq after Dubious Postings*, NATIONAL POST (Canada), Mar. 4, 2003, available at <http://www.FPinfomart.ca>.

⁶⁵ ANTHONY H. CORDESMAN, THE “GAZA WAR”: A STRATEGIC ANALYSIS 24, (Center for Strategic & International Studies 2009) (describing how Hamas used a mosque to store Grad missiles and Qassam rockets), http://www.csis.org/media/csis/pubs/090202_gaza_war.pdf; Jeffrey Fleishman, *Charges Fly in Battle Over What Happened in Gaza*, L.A. TIMES, Jan. 23, 2009, p. A1 (detailing how Hamas used a bunker beneath a hospital as a headquarters).

ger—the use of lawfare to mix *jus ad bellum* proportionality with *jus in bello* proportionality, to take the civilian casualties caused by the very failure to distinguish and use them to buttress claims of unjust war and the crime of aggression.

IV. A NEW TWIST ON AN OLD STORY

Contemporary conflicts abound with the latest buzzwords—COIN, collateral damage, targeted killing, zone of combat, “hearts and minds,” and so on—but the issue at the heart of all of these is civilian casualties. Several factors have combined to create this critically important focus on the impact war has on innocent civilians, civilian property, and the ability of men, women, and children to carry out their daily lives amidst the horrors of armed conflict. First, international law has trained a spotlight on the protection of civilians in wartime since the horrors of World War II and the drafting of the Geneva Conventions in 1949. One of IHL’s primary purposes is the protection of civilians, as evidenced by the fundamental principles of distinction, proportionality, and humanity that lie at the law’s very foundation. Second, the development of modern smart weapons has made precision targeting possible, indeed the norm for advanced militaries, thus increasing awareness of civilian casualties. Third, intensive media coverage, the Internet, and the twenty-four hour news cycle create fertile ground for immediate wide-ranging coverage of individual incidents and attacks in even the remotest parts of combat areas. Whereas in the past, civilian casualties from particular military operations or attacks might have gone unnoticed by those outside the immediate vicinity, we now know of civilian deaths within hours of any given attack. The effect is to bring home the suffering of the civilian population in real-time and in a way not seen before.

On the most fundamental level, this increased focus on and awareness of civilian casualties is a positive step, one that we should embrace in an attempt to mitigate suffering during armed conflict. No less, it complements mission fulfillment and military strategy in counterinsurgency campaigns, in which gaining the support of the local population is a key factor in success. However, these developments have—unexpectedly and unfortunately—a more troubling side as well. Insurgent groups and terrorists manipulate and exploit this greater focus on civilian casualties—and concomitantly on minimizing such casualties—to their own advantage through the tactics described above, blurring the lines between civilians and fighters. Not only do they do so to seek greater protection for their fighters, but also to use the resulting civilian casualties as a tool of war in and of themselves. This latter development raises significant concerns about the mixing of proportionalities and the conflation of *jus ad bellum* and *jus in bello*. This section will first detail the growing use of alleged violations of the *jus in bello* principle of proportionality to make claims of disproportionate force under the *jus ad bellum* before analyzing the strategic and operational ramifica-

tions for combat operations and the impact on investigations and analyses of IHL compliance and accountability. Ultimately, this new twist on an old story has significant consequences for the application of IHL, for decisions to use force, and for the implementation of strategic, operational, and tactical goals during conflict. Most of all, it places civilians in increasing danger because it encourages tactics and strategies that directly harm civilians.

A. *Use of Civilian Casualties and Alleged In Bello Violations to Find Ad Bellum Violations*

As detailed above in Section I, *jus ad bellum* proportionality focuses on whether the force used in self-defense is commensurate with the need to repel or deter an armed attack. Civilian casualties do not enter the equation. In contrast, civilian casualties, often referred to as collateral damage, are a primary factor in assessing *jus in bello* proportionality. Thus, one form of indiscriminate attack on civilians under Additional Protocol I is an attack in which the expected civilian casualties are excessive in relation to the anticipated military advantage gained.⁶⁶ This analysis bears only on whether the particular attack in question constitutes a violation of IHL, not whether the use of force itself was lawful. In the past few years, however, civilian casualties have been offered up as a hallmark of an unlawful use of force under *jus ad bellum*—a direct and problematic conflation of the two proportionalities.

United States operations in Afghanistan have begun to trigger exactly this type of response from certain quarters. Thus, news coverage of a NATO airstrike in June 2007 that killed at least twenty-five civilians prompted a former Afghan government official to find “a more sinister meaning behind the . . . spate of civilian deaths” and to suggest that despite United States claims of mistakes leading to civilian casualties, he was “not convinced that [the United States was] doing this without intention.”⁶⁷ Similarly, at least one report analyzing the extent of civilian casualties in Afghanistan calls the war “criminal” precisely because of the high number of casualties.⁶⁸ *Jus in bello* proportionality requires that we assess civilian deaths in relation to the military advantage of the particular attack—in the first example, the NATO attack on an insurgent base in southern Afghanistan. This analysis must be taken in a prospective manner from the perspective of the commander at the time of the attack; that is, did the commander expect,

⁶⁶ API, *supra* note 2, art. 51(5)(b).

⁶⁷ Aryn Baker, *Backlash from Afghan Civilian Deaths*, TIME, June 23, 2007, available at <http://www.time.com/time/printout/0,8816,1636551,00.html>.

⁶⁸ Marc W. Herold, *A Dossier on Civilian Victims of United States' Aerial Bombing of Afghanistan: A Comprehensive Accounting*, CURSOR, Mar. 2002, http://cursor.org/stories/civilian_deaths.htm.

or should he have expected, excessive civilian casualties relative to the military advantage he anticipated gaining, based on what he knew at the time of the decision to attack the target. The frequent tendency to link civilian deaths automatically with IHL violations—a fairly constant theme today—is in and of itself a legally problematic approach. *Jus in bello* proportionality cannot be assessed after the fact, when the urge to simply count the casualties and declare a war crime is powerful. Unfortunately, we see this mistake far too often in both media coverage and investigations in recent years.⁶⁹

Immediate claims of criminality after an attack that causes civilian deaths fail to adhere to the basic parameters of *jus in bello* proportionality, by eschewing the necessary prospective approach and finding violations based solely on an after-the-fact totaling of death and destruction.⁷⁰ More importantly, for the instant analysis, the comments and reactions above regarding NATO actions in Afghanistan evince a troubling trend of using an attack that allegedly violates the *jus in bello* principle of proportionality to claim that the entire operation is unjust or unlawful. In essence, the steps are as follows: (1) an attack leads to civilian deaths, (2) claims are immediately made that the attack was disproportionate (under IHL) because civilians died (a faulty IHL analysis in the absence of intent or an indiscriminate attack), and (3) claims are made that this disproportionate attack on a specific target automatically means that the entire military operation is a disproportionate use of force in response to an armed attack or threat. On the most basic level, the third step is fundamentally flawed because the *jus ad bellum* proportionality analysis rests on whether the use of force is proportionate to the objectives in repelling the armed attack—not on whether a particular target is legitimate under IHL. Beyond that, however, these claims manifest an inappropriate use of *jus in bello* to reach conclusions about the *jus ad bellum*.

The most comprehensive example of this mixing of proportionalities appears in the Goldstone Report, the report of the U.N. Human Rights Council on violations of IHL and human rights law during the 2008–2009 conflict in Gaza.⁷¹ Instead of examining the scale and nature of the Israeli

⁶⁹ See *infra* section III.B. See generally Laurie R. Blank, *The Application of IHL in the Goldstone Report: A Critical Commentary*, 12 Y.B. INT'L HUMANITARIAN L. 347 (2009) (analyzing the problems with a retrospective approach to *jus in bello* proportionality).

⁷⁰ Holland, *supra* note 29, at 47 (“Clearly, one cannot always attribute every civilian death after an attack to the attacker. . . . One cannot assess incidental civilian losses for which the attacker is responsible by simply conducting a body count. Such an oversimplification is as superficial as assessing the quality of a hospital by only counting the bodies in its morgue.”).

⁷¹ Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict*, A/HRC/12/48, Sept. 15, 2009, available <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGCReport.pdf> [hereinafter Goldstone Report].

military response in relation to that which would be reasonably necessary to defend itself against the rocket attacks and prevent future attacks, the report focuses on the civilian casualties as the benchmark,⁷² even though civilian casualties play no role in *jus ad bellum* proportionality determinations. Israel responded in self-defense to an eight-year campaign of rocket attacks from Gaza that terrorized the civilian population of southern Israel.⁷³ As the Goldstone Report documents, between April 2001 and December 2008, Palestinian armed groups launched more than eight thousand rockets and mortars into southern Israel from Gaza, including over five hundred in November and December 2008.⁷⁴ Operation Cast Lead's primary purpose was to destroy the rocket launchers and the tunnels used to smuggle the rockets and launchers into Gaza from Egypt.⁷⁵ *Jus ad bellum* provides the appropriate framework for analyzing the lawfulness of Israel's response, based on the requirements of necessity and proportionality. Whether Israel's use of force met those requirements may be debatable, but the Goldstone Report departs from the accepted *jus ad bellum* proportionality analysis.

Instead, the Goldstone Report uses its assessments of Israeli attacks on particular targets under *jus in bello*—faulty in many cases⁷⁶—to reach conclusions regarding the lawfulness of Israel's overall response under *jus ad bellum*. In so doing, the report thus reaches the conclusion that Operation Cast Lead was “a deliberately disproportionate attack designed to punish, humiliate and terrorize a civilian population, radically diminish its local economic capacity both to work and to provide for itself, and to force upon it an ever increasing sense of dependency and vulnerability.”⁷⁷ The Report does not examine whether Israel's objective of eliminating the rocket launchers and tunnels, and curtailing the ability of Hamas and other groups to fire rockets, was a proportionate response to the eight years of rocket attacks, which would be the appropriate *jus ad bellum* analysis.⁷⁸ Rather,

⁷² See, e.g., *id.* ¶¶ 1023, 1683, 1690.

⁷³ *The Operation in Gaza, 27 December 2008 – 18 January 2009: Factual and Legal Aspects*, ISRAELI MINISTRY OF FOREIGN AFFAIRS (July 2009), paras. 15–16, http://www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Terrorism+and+Islamic+Fundamentalism-/Operation_in_Gaza-Factual_and_Legal_Aspects.htm.

⁷⁴ Goldstone Report, *supra* note 71, ¶1630 (citing INTELLIGENCE AND TERRORISM INFORMATION CENTER AT THE ISRAEL INTELLIGENCE HERITAGE & COMMEMORATION CENTER (IICC), SUMMARY OF ROCKET FIRE AND MORTAR SHELLING IN 2008 5 (2009), available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/ipc_e007.pdf); see also Goldstone Report, *supra* note 71, ¶1634.

⁷⁵ The Operation in Gaza, *supra* note 73, para 16.

⁷⁶ For a comprehensive critique of the application of international humanitarian law in the Goldstone Report, see Blank, *supra* note 69.

⁷⁷ Goldstone Report, *supra* note 71, ¶1690.

⁷⁸ See, e.g., Schmitt, *supra* note 15, for a comprehensive discussion of the lawfulness of Israel's resort to force against Hezbollah in Lebanon in 2006.

this sweeping conclusion stems directly from selected incidents in which the Goldstone Report found civilian casualties excessive in relation to the military advantage gained. In this way, the report's conclusion is a direct descendant of the arguments made—and rejected soundly—at Nuremberg about the criminality of specific German acts based on the German war of aggression.

Although, as explained above, past conflations have generally involved using *jus ad bellum* violations to excuse *jus in bello* violations, the report's use of purported *jus in bello* violations to find an overall *jus ad bellum* violation is equally problematic. The same arguments appeared in media coverage of the conflict as well, with one editorial stating: “[w]hatever pretext Israel has cited for launching massive air strikes on the Palestinian-controlled Gaza strip over the weekend, the high casualty figure among civilians makes this military action totally unacceptable.”⁷⁹ This statement offers a clear example of how civilian casualties are simply substituted for the proportionality analysis required in the *jus ad bellum*, by directly disregarding the reason for the military operation, whether lawful or not under *jus ad bellum*, and treating civilian casualties as the definitive, indeed only, factor in any legal analysis.

B. *Strategic Impact on Contemporary Conflict*

The mixing of proportionalities in this particular way directly facilitates the burgeoning use of lawfare in today's conflicts on both the strategic and tactical levels. Lawfare at the strategic level seeks to chip away at the will of the technologically advanced military and country in an asymmetrical conflict and to undermine public support for the war, thus leading to a premature end to the conflict.⁸⁰ Insurgent groups use lawfare strategically on two levels. First, they promote allegations of IHL violations in the domestic and international media as a way to undermine support for the war because of public displeasure at alleged violations. Second, they use civilian casualties to introduce and bolster claims of unjust war, precisely the effect of the mixing of proportionalities discussed here. “Civilian casualty incidents are highly ‘mediagenic’ events that tend to receive high levels of re-

⁷⁹ Editorial, *An Unjust War*, JAKARTA POST, Dec. 30, 2008, at 6, available at <http://www.thejakartapost.com/news/2008/12/30/editorial-an-unjust-war.html>. The editorial continued in this vein, declaring:

Just how much “collateral damage”—the military phrase for civilian casualties caught in cross fires—is regarded as acceptable by Israel remains unclear. But to anyone with a sense of human decency, the figure is reprehensible, and the military action must be condemned in the harshest terms. It has made this Israel's unjust war.

Id.

⁸⁰ Dunlap, *supra* note 53, at 11–13.

porting by the press, and making the issue of civilian casualties more salient can lead the public to weigh the morality of wars against the importance of their aims.”⁸¹ Examples of the latter approach abound throughout recent conflicts, even to the extent that the governments of Serbia and Iraq used this type of lawfare as a primary strategy to counter the effect of United States military might.

The government of the Former Republic of Yugoslavia saw civilian casualties and collateral damage incidents as an effective means of splitting NATO’s coalition through the corrosive effect that civilian casualties were presumed to have on moral judgments about the war, and it accordingly went to great lengths to publicize—and enhance the possibilities for—such incidents.⁸²

Similarly, the Iraqi regime inflated the numbers of Iraqi casualties during the initial phase of Operation Iraqi Freedom in an attempt to highlight what it called the “criminal bombardment of Americans and British.”⁸³ This strategic use of lawfare through the conflation of the two proportionalities poses three significant challenges. First, it sparks media coverage of military operations that encourages a retrospective approach to *jus in bello* proportionality, even though a fundamental component of that principle is its prospective view of decision-making. Second, it leads to significant errors of legal application in investigations and analysis of IHL compliance during military operations. Third, and most important, it consistently fosters a climate in which civilians are placed in ever greater danger, a result fundamentally at odds with the goals and purpose of IHL.

1. Media coverage and a retrospective approach to proportionality

Civilian deaths are a horrible consequence of war, and while often unavoidable, should be minimized to the fullest extent possible. Indeed, one of the primary goals of IHL and, in particular, the Geneva Conventions, is the protection of civilians. Unfortunately, not only are civilians often in greater danger from military operations than in the past, but civilian casualties are now a tool in and of themselves. “News coverage is dominated by . . . the newest trend, civilian deaths, leaving coalition commanders to engage

⁸¹ ERIC V. LARSON & BOGDAN SAVYCH, MISFORTUNES OF WAR: PRESS AND PUBLIC REACTIONS TO CIVILIAN DEATHS IN WARTIME xx (2006), available at http://www.rand.org/pubs/monographs/2006/RAND_MG441.pdf.

⁸² *Id.* at 71 (citing BENJAMIN S. LAMBETH, NATO’S AIR WAR FOR KOSOVO: A STRATEGIC AND OPERATIONAL ASSESSMENT 79 (2001), available at http://www.rand.org/content/dam/rand/pubs/monograph_reports/MR1365/MR1365.ch4.pdf.)

⁸³ *Id.* at 161.

in an endless cycle of public apologies.”⁸⁴ While significant media attention on innocent civilian deaths is not only appropriate, but also critical, during wartime, the way in which that coverage is manipulated and encouraged for strategic purposes raises serious concerns. It is now quite common for media reports on civilian casualties caused by state forces, whether in Gaza, Iraq, Pakistan, Lebanon, or Afghanistan, to produce an immediate outcry and claims of criminal liability. Interestingly, reports of civilian casualties caused by militants frequently receive little, if any, attention. For example, there remains a general perception that United States forces—and the use of air power in particular—in Afghanistan are responsible for large numbers of civilian deaths, notwithstanding documented evidence that civilian casualties caused by multinational forces are steadily decreasing and casualties caused by the Taliban are increasing.⁸⁵

Insurgents quickly see the strategic benefits of greater media attention to civilian casualties and claims of unjust war, including an erosion of domestic support for military operations, increased tension among coalition partners, and changes in strategy, targeting parameters, and tactics. As they increase their propaganda efforts, they have great motivation to use tactics that place civilians in greater danger, such as human shields, launching attacks from civilian buildings and areas, and so on. As detailed below, this practice is perhaps the most significant result of the increased tendency to use civilian casualties as a marker of violations of *jus ad bellum* proportionality. However, the link between the mixing of proportionalities and the increased media coverage of civilian casualties has a problematic effect on the application and understanding of IHL as well. The use of civilian casualties to reach conclusions of unjust war depends first and foremost on a direct and automatic link between civilian casualties and violations of IHL, or the *jus in bello*, which are then used to launch the claims of disproportionate uses of force under the *jus ad bellum*. Because all of these claims take place in the media—the so-called court of public opinion, in many ways—the pace is immediate and instant. The result is that civilian casualties *become* the IHL violation in and of themselves—and the subsequent effect is the application of *jus in bello* proportionality using a retrospective approach. Although the law demands a prospective approach in analyzing the propor-

⁸⁴ Allan Richarz, *To Win the War in Afghanistan, the US Military Has to Beat the Taliban at the Propaganda Game: With Effective PR, the U.S. Military Could Win the War in Afghanistan*, CHRISTIAN SCI. MONITOR (Mar. 15, 2010), <http://www.csmonitor.com/Commentary/Opinion/2010/0315/To-win-the-war-in-Afghanistan-the-US-military-has-to-beat-the-Taliban-at-the-propaganda-game>; see also LARSON & SAVYCH, *supra* note 81, at xxii (“[T]he issue of civilian casualties has become increasingly prominent in media reporting.”).

⁸⁵ See U.N. News Centre, *Afghan Civilian Death Toll Jumps 31 Percent Due to Insurgent Attacks*, U.N. Daily News Issue DH/5711, 1–2 (Aug. 10, 2010), available at <http://www.un.org/news/dh/pdf/english/2010/10082010.pdf>.

tionality of particular attacks under *jus in bello*, such an approach offers little benefit or appeal in the world of media coverage, where instant conclusions and graphic pictures are the key to success.

Lengthy investigations into the commander's perspective at the time of the attack, what he knew or should have known and his expectations regarding civilian casualties and military advantage simply do not fit into today's media cycle. The easy math of the retrospective analysis—multiple civilian casualties therefore IHL violation—does, in contrast. For example, in September 2009, the NATO bombing of two tankers in Kunduz, Afghanistan on the orders of the commander of the nearby German army base, killed over 130 people, including at least ninety civilians.⁸⁶ The immediate reaction was that a violation of IHL must have been committed because of the number of civilian deaths, notwithstanding uncertainty about how many dead were insurgents and how many civilians. In fact, President Hamid Karzai of Afghanistan even suggested that the attack had targeted innocent civilians, issuing a statement that “targeting civilian men and women is not acceptable.”⁸⁷ Events quickly unfolded showing precisely how the retrospective analysis of *jus in bello* proportionality feeds directly into the strategy of claiming *jus ad bellum* violations to weaken support for the war and drive wedges between coalition members. Germany's Minister of Defense, Deputy Minister of Defense and Army Chief of Staff all resigned over the incident as public support for the German mission in Afghanistan wavered substantially.⁸⁸ And yet, one year later, the federal prosecutor investigating the German commander for violations of both law and procedures dropped the case, concluding that he had violated no rules in ordering the airstrike—based on the information he had at the time of the strike.⁸⁹

The investigation, using a prospective approach to proportionality and targeting, was no match in the propaganda world for immediate claims of civilian casualties and disproportionate attacks in the media. As this example shows, the impact of media coverage of civilian casualties, particularly as a strategic tool for insurgents, promotes a retrospective analysis of *jus in bello* proportionality. From there it is a quick jump to using alleged

⁸⁶ Stephen Farrell & Richard A. Oppel, Jr., *NATO Strike Magnifies Divide on Afghan War*, N.Y. TIMES, Sept. 4, 2009, at A1, available at <http://www.nytimes.com/2009/09/05/world/asia/05afghan.html>; *Kunduz Airstrike Relatives to Demand Compensation*, NEW EUROPE, Nov. 28, 2009, available at <http://www.neurope.eu/articles/97814.php>; *Kunduz Air Strike Victims to Get \$5,000 Payout*, THE LOCAL, Aug. 5, 2010, available at <http://www.thelocal.de/national/20100805-28981.html>.

⁸⁷ *NATO Strike Magnifies Divide*, *supra* note 86.

⁸⁸ *Germany's Army Chief of Staff Resigns over NATO Airstrike in Kunduz*, DEUTSCHE WELLE (Nov. 26, 2009), <http://www.dw-world.de/dw/article/0,,4930694,00.html>.

⁸⁹ *German Military Drops Case Against Kunduz Airstrike Colonel*, DEUTSCHE WELLE, Aug. 19, 2010, available at <http://www.dw-world.de/dw/article/0,,5926249,00.html>.

jus in bello violations to claim *jus ad bellum* violations. This growing tendency to apply incorrect legal standards is itself a problematic result of the mixing of proportionalities—its strategic and tactical impact is even more troubling.

2. Investigations and analysis

The mixing of proportionalities plays a role in the faulty application of IHL and related legal frameworks in international fact-finding reports and investigations as well. Just as the media and the court of public opinion fall prey to the seemingly irresistible tendency to equate civilian casualties with disproportionate force under *jus ad bellum*, so has more than one international or non-governmental report. Although this issue arises in reports by human rights groups as well, the most recent—and most far-reaching—example appears in the Goldstone Report. As detailed in Section III.A. above, the Goldstone Report makes a sweeping conclusion that Israel engaged in a disproportionate use of force in launching Operation Cast Lead, specifically based on particular attacks allegedly in violation of the *jus in bello* principle of proportionality. In doing so, the report makes two key errors: it conflates *jus in bello* proportionality and *jus ad bellum* proportionality and it applies the former principle incorrectly.

This article offers a range of arguments why conflating the two proportionalities has a highly problematic impact on the strategic and tactical implementation of IHL on the ground and in policy and command centers. Beyond the impact on conflict on the ground, however, this trend raises concern solely from the perspective of legal analysis and interpretation. International conventional law and jurisprudence consistently reinforce that the *jus in bello* and the *jus ad bellum* must remain separate and one cannot be used to reach legal conclusions regarding conduct falling within the other's framework. And yet, we now see official international bodies doing exactly that.⁹⁰ The effect will be to erode this fundamental separation between *jus ad bellum* and *jus in bello*, a troubling development.

Along the same lines, the mixing of proportionalities seems to give greater incentive to use a retrospective approach to *jus in bello* proportionality, notwithstanding the clear recognition that it demands a prospective approach. After all, if the retrospective approach can help create the justification for claims of *jus ad bellum* violations, then it becomes more and more appealing. Doing so, however, goes counter to international and domestic precedent, which consistently upholds the prospective approach. Thus, notwithstanding the extraordinary destruction Norway suffered when General Lohar Rendulic embarked on his “scorched-earth” retreat in the face of the

⁹⁰ See generally Ryan Goodman, *Controlling the Recourse to War by Modifying Jus In Bello*, 12 Y.B. INT'L HUMANITARIAN L. 53 (2009).

approaching Russian army, the Nuremberg Tribunal assessed his actions in light of his judgment in the circumstances at the time, finding no legal violation. In a clear statement of the nature of the proportionality analysis, the tribunal stated:

We are not called upon to determine whether urgent military necessity for the devastation and destruction in the province of Finmark actually existed. We are concerned with the question whether the defendant at the time of its occurrence acted within the limits of honest judgment on the basis of the conditions prevailing at the time. The course of a military operation by the enemy is loaded with uncertainties, such as the numerical strength of the enemy, the quality of his equipment, his fighting spirit, the efficiency and daring of his commanders, and the uncertainty of his intentions It is our considered opinion that the conditions, as they appeared to the defendant at the time were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made. This being true, the defendant may have erred in the exercise of his judgment but he was guilty of no criminal act.⁹¹

Likewise, the ICTY highlighted the reasonable commander approach in *Prosecutor v. Galic*, stating that the key question in assessing the proportionality of an attack is “whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.”⁹²

Domestic courts have adopted the same approach, such as in the trial of two United States servicemen for the death of José Couso, a Spanish journalist killed in the crossfire during a firefight in Iraq in 2003. Finding that it could not determine whether there actually was a sniper on the roof of the hotel shooting at the soldiers, the Spanish court held that in the absence of any evidence that the soldiers acted unreasonably, and given the tensions and confusion inherent in a hostile environment, it could not hold them criminally accountable for Couso’s death.⁹³ Similarly, in reviewing the actions of the Israel Defense Forces, the Israeli Supreme Court has repeatedly stated that its role is to ensure that a military commander’s decision falls within the “zone of reasonableness.”⁹⁴ By encouraging a retrospective approach, therefore, the mixing of proportionalities contributes directly to a change in

⁹¹ XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 1296–97 (1950).

⁹² *Prosecutor v. Stanislav Galic*, Case No. IT-98-29-T, Judgment and Opinion (Int’l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003).

⁹³ Victoria Burnett, *Spain: Court Drops Charges Against G.I.’s in Killing*, N.Y. TIMES, July 15, 2009, at A9; *3 U.S. Soldiers Cleared in Slaying*, L.A. TIMES, July 15, 2009, at A20.

⁹⁴ H CJ 7015/02 *Ajuri v. IDF Commander* 56(6) PD 352, 375 [2002] (Isr.). See also H CJ 1005/89 *Aga v. IDF Commander in Gaza Strip Area* 44(1) PD 536, 539 [1990].

legal interpretation and standards, away from accepted practice and conventional law.

3. The greatest danger—undermining civilian protections

Beyond the misapplication of the law in conflating *jus ad bellum* with *jus in bello*, these practices have highly problematic results for the very people the law is designed to protect during armed conflict—civilians. “The separation between *jus ad bellum* and *jus in bello* results in the uniform, neutral application of the latter, without reference to its distinctions between the rights and obligations of the parties.”⁹⁵ Such neutral application simply cannot exist in these circumstances, however. The use of civilian casualties as an automatic trigger for claims of war crimes and of unjust war—regardless of the actual legal elements of either legal violation—holds the advanced military to an entirely different standard than the insurgent group. While the insurgent group faces what appear to be lower standards than those present in IHL, the military essentially faces a standard of strict liability rather than the standards actually set forth in both IHL and in the law governing the use of force. In the former, the law requires a measure of intent to find an IHL violation, whether in the intentional killing of civilians or in the launching of an indiscriminate attack on civilians, one that violates the principle of proportionality under *jus in bello*. In the latter, civilian casualties are not a relevant factor at all.

Once it creates an environment in which civilian casualties are a factor—albeit incorrectly—in the *jus ad bellum* proportionality analysis, the insurgent group has significant incentives to create situations leading to greater and greater civilian casualties. The more civilian casualties result from military operations, the more strategic power they can wield. Here lies the true danger for civilians: one party to a conflict benefits greatly—on a strategic and a tactical level—from civilian casualties and therefore creates an environment in which civilians are at greater risk for loss of life and property. Militants use civilian deaths to their advantage on a strategic level to undermine support for the military campaign both domestically and internationally. In pursuing their goal of gaining “political leverage by portraying U.S. forces as insensitive to [IHL] and human rights . . . , opponents unconstrained by humanitarian ethics now take the strategy to the next level, that of orchestrating situations that deliberately endanger noncombatants.”⁹⁶ Civilians thus become a pawn at the strategic level as well, because they are used not only for tactical advantage (e.g., shelter) in specific situations, but for broader strategic and political advantage as well. The strategic use of lawfare, in which the mixing of proportionalities plays a starring role,

⁹⁵ Theodor Meron, *The Humanization of Humanitarian Law*, 94 A.J.I.L. 239, 241 (2000).

⁹⁶ Dunlap, *supra* note 53, at 12–13.

thus demands a greater tactical use of lawfare in order to generate higher numbers of civilian casualties, preferably at the hands of the advanced military.

This tactical exploitation of IHL has grave consequences for civilian protection during conflict. Classic examples of this form of lawfare include feigning civilian status, human shields, suicide bombing, and launching attacks from civilian areas, to name a few.⁹⁷ In addition to the primary goal of using civilians or presumed civilian status to launch attacks from behind the shield of civilian immunity, each of these practices also accomplishes the goal of creating ever-greater numbers of civilian casualties. In turn, these casualties, usually viewed as the result of military attacks, contribute significantly to the use of alleged *jus in bello* violations to claim *jus ad bellum* violations and thus to the strategic goal of diminishing support for the war or military operation. Media reports, investigations and other public responses that accept this mixing of proportionalities and conflation of *jus ad bellum* and *jus in bello*—when it should be rejected—simply enable the contemporary environment in which these tactics place civilians in great danger.

For example, there is little uncertainty about the dangers that involuntary human shielding poses for civilians; they are forced to surround or otherwise protect a target and often pay with their lives. Even when an attack is called off because of the presence of involuntary human shields, who retain their civilian immunity and are not directly participating in hostilities,⁹⁸ the civilians suffer great psychological and emotional trauma at a minimum. Attacks from protected sites, such as hospitals and religious buildings, turn an otherwise protected site into a military facility and therefore a legitimate target under IHL,⁹⁹ endangering the civilians who use those facilities.¹⁰⁰ Most dangerous for civilians is the nearly universal practice of

⁹⁷ See generally Jensen, *supra* note 59.

⁹⁸ See, e.g., Michael N. Schmitt, *Human Shields in International Humanitarian Law*, 47 COLUM. J. TRANSNAT'L L. 292 (2009); Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SEC. J. 5, 31 (2010); Nils Melzer, Int'l Comm. of the Red Cross [ICRC], *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, 90 INT'L REV. RED CROSS 991 (Dec. 2008); H CJ 769/02 Public Committee Against Torture v. Government of Israel para. 36 [2005].

⁹⁹ Article 19 of the Fourth Geneva Convention states that hospitals lose their protected status when "used to commit, outside their humanitarian duties, acts harmful to the enemy." GC IV, *supra* note 2, art. 19.

¹⁰⁰ Such attacks are unfortunately all too common in today's conflicts. See Human Rights Watch, *Off Target: The Conduct of the War and Civilian Casualties in Iraq* (2003), available at www.hrw.org/reports/2003/usa1203 (explaining how the Iraqi regime used hospitals as military headquarters); CORDESMAN, *supra* note 65, at 43–47, 49, 51–52, 54–55 (2009) (describing how Hamas uses mosques, houses and cemeteries for military operations and to store weapons); Jeffrey Fleishman, *Fighting in Gaza Over, a Battle Over What Happened*,

militants disguising themselves as civilians, intermingling with the civilian populations, and launching attacks (whether suicide attacks or other) while feigning civilian status. All of these practices violate the principle of distinction, which requires that fighters distinguish themselves from innocent civilians; the final example constitutes perfidy, which is a war crime.¹⁰¹ When fighters intentionally disguise themselves as civilians in order to lead soldiers on the opposing side to believe they need not take defensive action to guard against attack, they commit perfidy. The natural consequence of such actions is that civilians are placed at greater risk, since soldiers previously attacked by fighters disguised as civilians may be more likely to view those who appear to be civilians as dangerous and respond accordingly. Militants and insurgents clearly benefit from the confusion their behavior generates; civilians clearly suffer as a result. When militants have an incentive to continue these tactics not only because of the immediate tactical gain, but also because of the broader and longer-term strategic benefits, these practices become more and more entrenched.

V. CONCLUSION

The mixing of proportionalities—problematic on a range of levels, as discussed above—thus operates counter to one of the fundamental goals of IHL, the protection of civilians and those *hors de combat* from the ravages of war. Combating these unfortunate developments requires several approaches. First, militaries must continue to operationalize IHL effectively to meet the demands of these strategic and tactical challenges. The ISAF tactical directive providing parameters for the use of force, particularly air power, provides an excellent example of these efforts,¹⁰² notwithstanding some suggestions that it plays directly into the hands of the Taliban. Second, continued efforts to ensure even and accurate application of the law in official reports and the media are essential to maintaining the international legal standards that protect civilians in times of war. Third, neither of these first two steps will be sufficient without continuing and increasing efforts to hold non-state actors accountable for violations of IHL, not only for direct attacks on civilians—where appropriate—but also for perfidy,

L.A. TIMES, Jan. 23, 2009, at A1 (detailing how Hamas used a bunker beneath a hospital as a headquarters).

¹⁰¹ Article 37(1) of AP I forbids killing, capturing or injuring the enemy by resort to perfidy, which is defined as “[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy.” AP I, *supra* note 2, art. 37(1) (emphasis added).

¹⁰² Press Release, ISAF, General Petraeus Issues Updated Tactical Directive: Emphasizes “Disciplined Use of Force,” Aug. 4, 2010, available at <http://isaf-live.webdrivenhq.com/article/isaf-releases/isaf-commander-issues-updated-tactical-directive.html>.

human shielding, and other violations involving the principle of distinction. Together, these three steps can counteract this unfortunate new twist on an old story