

# Contextualizing proportionality: *jus ad bellum* and *jus in bello* in the Lebanese war

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## **Abstract**

*This article analyses the role and content of proportionality under contemporary international law governing the use of force, with a view to clarifying the legal framework governing the conduct of the parties to an armed conflict. In the system of jus ad bellum, protection is primarily granted to the interest of the attacked state in repelling the attack; the other competing interests are considered only to curtail the choice of the means to be employed in order to achieve that aim. Conversely, in the system of jus in bello there is by definition no prevailing interest, but instead a variety of interests and values which are entitled to equal protection of the law and must be balanced against each other. The existence of two distinct normative systems, with distinct standards of legality applicable to the same conduct, does not as a rule give rise to major problems. The legality of recourse to force is measured against the proportionality of self-defence, whereas individual actions would have to conform to the requirement of proportionality in jus in bello. However, beyond the large area in which these two standards overlap, there might be situations in which the strict application of the jus ad bellum standard makes it impossible to achieve the aims of jus in bello. In these cases, the proportionality test under jus in bello must be regarded as part of the proportionality test under jus ad bellum. States must thus take humanitarian implications into account in determining the level of security they may seek to obtain using military action.*

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Even the most unaware reader can easily see the relevance of proportionality in the debate on the legality of the forceful campaign conducted by Israel in Lebanon in the summer of 2006. Virtually all the positions adopted by states and international bodies with regard to that intricate issue revolve around an assessment of proportionality. Indeed, the opinions expressed generally seem to agree that Israel's recourse to force was justifiable as self-defence in response to attacks by the Hezbollah militias, a political and religious group exerting exclusive control over the territory of South Lebanon. Hezbollah periodically launched rockets against settlements on Israeli territory and ultimately, in the course of a cross-border incursion, exchanged fire with Israeli soldiers, killing some and kidnapping others. However, that response was widely labelled as disproportionate because it began with air attacks even on those military and civilian infrastructures far away from the combat zone, resulting in heavy civilian casualties, and finally took the form of tank operations across the border, with the alleged goal of dismantling the Hezbollah organization in southern Lebanon and establishing a buffer zone in that part of Lebanese territory.<sup>1</sup>

The present analysis of the role and content of proportionality under contemporary international law governing the use of force is designed to delineate the legal framework governing the conduct of the parties in the case in point. Indeed, those events and the reactions of the international community may be instrumental in determining the role assigned by the international community to proportionality in the context of armed conflicts. A study on proportionality with reference to the Lebanese war thus offers a twofold methodological advantage: the concept of proportionality helps to determine the legal framework for assessing the legality of the parties' conduct; and the positions adopted with regard to the Lebanese war may contribute to further development of that concept and to resolving some still controversial issues concerning its role and content.

1 For example, at the 5,489th Meeting of the Security Council of 14 July 2006 (SC/8776) many state representatives, while condemning the Israeli action as disproportionate, nonetheless referred to it as self-defence (Argentina, Japan, United Kingdom, Peru, Denmark, Slovakia, Greece, France). According to the UK representative, "Israel has every right to act in self-defence. But it must exercise restraint and ensure that its actions are proportionate and measured; conform to international law; and avoid civilian death and suffering. Disproportionate action will only escalate an already dangerous situation." According to the Statement by the Council of the European Union on the Middle East of 17 July 2006, "The EU recognises Israel's legitimate right to self-defence, but it urges Israel to exercise utmost restraint and not to resort to disproportionate action." In the same vein, according to the statement issued by the leaders of the G-8 Summit of 16 July 2006, "It is critical that Israel, while exercising the right to defend itself, be mindful of the strategic and humanitarian consequences of its actions. We call upon Israel to exercise utmost restraint, seeking to avoid casualties among innocent civilians and damage to civilian infrastructure and to refrain from acts that would destabilize the Lebanese government." See also the report of the Commission of Inquiry on Lebanon, established on 11 August 2006 by the Human Rights Council by resolution S-2/1, available at <http://www.ohchr.org/english/bodies/hrcouncil/specialsession/2/CI-Lebanon/index.htm>. Israel's view on proportionality was expressed in the document issued by the Ministry of Foreign Affairs on 25 July 2006: "Responding to Hezbollah attacks from Lebanon: Issues of proportionality – legal background," available at <http://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Responding+to+Hizbullah+attacks+from+Lebanon+-+Issues+of+proportionality+July+2006.htm>

The narrowness of that scope will also dictate the course taken by the analysis, which will focus only on certain specific issues arising in connection with the events in Lebanon. Bibliographical and documentary references will be kept to the minimum required to illustrate the line of reasoning. Other issues which might be relevant for a comprehensive review of the legal framework governing the parties' conduct will be left aside, such as the legal status of Hezbollah in international law and the legality of self-defence against non-state entities.

## Two notions of proportionality?

The prevailing view in legal scholarship tends to draw a clear-cut distinction between two different ways in which proportionality limits the use of armed force. Proportionality constitutes a limit both to the power of states to resort to force (*jus ad bellum*) and to the power to choose the means and methods of warfare (*jus in bello*).<sup>2</sup>

The distinction between these two notions of proportionality, though clear in theory, tends to blur in practice, as they are not uncommonly merged together in a comprehensive assessment of the legality of the use of force. This is also what happened in the case of the Lebanese war. Although emphasis in the reaction of many states is placed on the disproportionate character of the Israeli response, it is much more difficult to see which kind of proportionality was being referred to. Quite often their statements contain elements of both *jus ad bellum* and *jus in bello* arguments.<sup>3</sup>

Carelessness in the legal appraisal of proportionality in international practice is by no means surprising. Even in legal scholarship, although the opinion that these normative systems have different historical roots and perform different functions is widely accepted, there is no clarity as to their mutual relationship. It is therefore appropriate to devote a brief analysis to the role and content of proportionality in both *jus ad bellum* and *jus in bello* and to ascertain whether they are autonomous notions in each system, or whether there is a case for analysing their mutual interaction.

## Proportionality in *jus ad bellum*

### Proportionality and the notion of armed attack

In *jus ad bellum*, proportionality has a dual role: it serves to identify the situations in which the unilateral use of force is permissible; and it serves to determine the intensity and the magnitude of military action. In both regards, the events in Lebanon can make a valuable contribution to legal analysis.

2 See Judith Gardam, *Necessity, Proportionality and the Use of Force by States*, Cambridge University Press, Cambridge, 2004. For a more general analysis, see my previous study, Enzo Cannizzaro, *Il principio della proporzionalità nell'ordinamento internazionale*, Giuffrè, Milan, 2000.

3 For a clear example, see the remarks by the representative of France within the Security Council at the meeting of 14 July 2006, Doc. S/PV.5489.

As to the first aspect, situations in which force can be unilaterally used are determined by recourse to a functional argument: states can unilaterally resort to force only defensively, in the presence of an armed attack and to the extent necessary to repel it.<sup>4</sup> This means that self-defence is not an open-ended instrument, but only has the aim of repelling armed attacks and provisionally guaranteeing the security of states. The forcible removal of threatening situations and the creation of permanent conditions of security seem to have been reserved by the international community as tasks to be performed collectively. This solution is consistent with the structure of the international community, where unilateral use of force can result in irremediable abuses and carries the permanent risk of escalation that could jeopardize collective security.

Moreover, defensive force can be used only in order to counter armed attacks starting from a certain threshold of intensity. Below that threshold, the use of minor types of force falls short of the notion of “armed attack” and cannot be met with a forcible response. This is probably because the self-defence regime does not protect the interest of individual states in responding to *any* offensive use of force, but regards forcible measures as appropriate only in response to acts of aggression which objectively endanger their security, and only to the extent necessary to repel them. This means that the system of *jus ad bellum* predetermines the interests for which force can lawfully be employed, as well as their standard of protection, and that proportionality serves only to determine the means appropriate to attain that aim.

In the *Nicaragua* case, the International Court of Justice (ICJ) ruled that the mere cross-border flow of arms and logistic supplies did not constitute a violation of the prohibition of the use of force that might, as such, prompt an armed response.<sup>5</sup> More recently the Claims Commission, when asked to settle the dispute between Ethiopia and Eritrea concerning, *inter alia*, the lawfulness of an armed response to a cross-border incursion, went even further by holding that “the predicate for a valid claim of self-defence under the Charter is that the party resorting to force has been subjected to an armed attack. Localized border encounters between small infantry units, even those involving the loss of life, do not constitute an armed attack for purposes of the Charter.”<sup>6</sup> It follows that minor violations of the prohibition of the use of force falling below the threshold of the notion of armed attack do not justify a corresponding minor use of force as self-defence.<sup>7</sup>

4 See the findings of the ICJ in the decision of 27 June 1986 on the *Nicaragua* case (*Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Reports 1986), paras. 176ff., esp. paras. 194–195 and 211.

5 *Ibid.*, paras. 195, 230. See also the ICJ decision of 6 November 2003 in the *Oil Platforms* case (*Islamic Republic of Iran v. the United States*, Merits, [2003] ICJ Rep.), para. 55, and Judge Simma’s discussion on that point in his Individual Opinion, esp. paras. 12 and 13.

6 Arbitral award of 19 December 2005, “Ethiopia vs. Eritrea, *jus ad bellum*, Ethiopia’s claim 1–8”, available at [www.pca-cpa.org](http://www.pca-cpa.org).

7 This means that proportionality in the context of self-defence is not a full-scale functional standard, but is instead a threshold functional scale. This way of approaching the proportionality argument is consistent with the philosophy of social control of unilateral force. Since force used unilaterally is a dangerous instrument, it must be employed only as a last resort. The flipside is that, if the collective security mechanisms fail, states do not have a coercive instrument at their disposal to guarantee effectively their own security.

The events immediately preceding the Israeli reaction against Lebanon seem to be very similar to the type of conduct which, according to the Court's ruling, does not justify recourse to an armed response. Indeed, press reports speak of an exchange of fire between patrols, with a limited number of losses and two soldiers captured.<sup>8</sup> Within the international community, however, as noted above, the Israeli reaction is widely qualified as self-defence. This might be explained by the fact that the Hezbollah incursion was viewed in the broader context of an array of minor attacks carried out repeatedly across the borders.<sup>9</sup> Thus the qualification of Israel's reaction as self-defence seems to imply that, for this purpose, one must not take into account single actions performed by the attacker but rather the entire plan of aggression, which can unfold throughout a series of small-scale attacks. This means that in order to determine what is an armed attack which justifies an armed reaction, one is entitled to take into account not only single armed actions amounting to minor violations of the prohibition of the use of force, but also other actions related to each other in a more complex strategy of aggression. However, it does not necessarily also imply that the response, instead of being tailored to the single actions which form part of such a complex strategy, can be commensurate with the entire series of actions considered as a whole. I shall return to this point below.

### Proportionality and the intensity of defensive action

Once an armed attack prompting an armed response in self-defence is considered to have occurred, the further question arises as to the type and scale of action that constitutes an appropriate response. Proportionality is measured by a *quantitative* test if the response is required to conform to quantitative features of the attack, such as the scale of the action, the type of weaponry and the magnitude of the damage. A *qualitative* test looks not so much at the extrinsic correspondence between attack and response, but instead seeks to establish whether the means employed are appropriate in relation to the aim sought by the response. As such, a proportionate response is one which is necessary and appropriate to repel the attack and which entails acceptable side-effects on other interests and values affected by the response.

Whereas quantitative proportionality intuitively satisfies a sense of symmetry between attack and defence and therefore might seem less prone to

8 See e.g. "Turmoil in the Mideast: Escalation – clashes spread to Lebanon as Hezbollah raids Israel", *New York Times*, 14 July 2006, p. 1. See also the Special Cabinet Communiqué of the Israeli government of 2 July 2006, available at [www.mfa.gov.il/MFA/Government/Communiques/2006/Special+Cabinet+Communique+-+Hizbullah+attack+12-Jul-2006.htm](http://www.mfa.gov.il/MFA/Government/Communiques/2006/Special+Cabinet+Communique+-+Hizbullah+attack+12-Jul-2006.htm).

9 Significantly, no state seems to have considered it relevant that a small part of Lebanese territory was, and still is, under the control of Israel. This might also shed further light on the particular structure of the rule on self-defence, in that it illustrates the fact that the objective of completely liberating a small part of a state's territory, which has moreover remained for years under the control of another state, cannot in itself justify forcible reactions.

subjective assessment, qualitative proportionality seems logically more in accordance with the structural element of the rule of self-defence, whose aim is not so much to give the attacked state the right to inflict punishment but to give only the right to repel the attack, using the means appropriate to the particular circumstances.<sup>10</sup>

In most cases application of the two tests leads to similar results. Both seem to emphasize the need for social control over unilateral recourse to violence by requesting the state acting in self-defence to maintain a certain level of correspondence between the defensive conduct and the attack which prompted it. Moreover, the qualitative test, wrongly said to leave broad discretion to the attacked state, also entails a quantitative analysis insofar as it calls for a balance to be struck between the need to repel the attack and the harm that defensive military action is likely to result in for other values and interests at stake, such as values of a humanitarian nature.

This is a crucial point in assessing the legality of the Israeli response to the Hezbollah attacks. The disproportionality of Israel's response was mostly attributed to three considerations: the scale of its action, which considerably exceeded what was deemed necessary for repelling the attack; the fact that the response involved the destruction of military and civilian infrastructures located hundreds of miles from the area attacked, which were therefore unrelated to the defensive objective of the action; and the threat to and harm sustained by civilians. Although these arguments all refer to the quantitative aspect of the response, they do not point to the need for a strict quantitative correspondence between attack and defence, but rather to a requirement that the defensive action be reasonably related to its goal and that the goal be attained without having consequences out of proportion with what is normally considered the social cost of a defensive reaction.

This observation can help in grasping the distinctive features of the two tests. Although in the qualitative test the defender is permitted to depart from an exact correspondence to the original attack, which is the hallmark of the quantitative test, this wider discretion is offset by the need also to take into account an open set of interests and values which might suffer prejudice in consequence thereof. As the International Court of Justice said in the *Nuclear Weapons* case with regard to environmental protection, "States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality."<sup>11</sup>

10 For a further discussion of these conceptually different approaches to the proportionality issue, I refer readers again to my book, above note 2, pp. 278ff.

11 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep., para. 30.

## Proportionality and “accumulation of events”

This observation calls for a further remark concerning the specific standard for measuring the appropriateness of the response. We have seen that a complex strategy of aggression may qualify as an armed attack, under Article 51 of the UN Charter, even if composed of a number of small-scale individual violations of the prohibition of the use of force, none of which, individually considered, would perhaps exceed the scale of magnitude considered necessary to that end. Curiously enough, however, this logical operation, commonly referred to as the doctrine of the accumulation of events,<sup>12</sup> was not employed in the context of the Lebanese war in measuring the proportionality of the response. Quite to the contrary, the reactions of the international community seem to point out that the Israeli response was disproportionate to the various individual events which prompted the response, and could not be commensurate with the aggressive strategy of Hezbollah.<sup>13</sup>

This conclusion is hardly surprising if one considers the logic inspiring proportionality in *jus ad bellum*. Although assigning priority to the defensive needs of the attacker, proportionality remains an instrument for social control of unilateral resort to force. As such, the use of force must necessarily be commensurate with the concrete need to repel the current attack, and not with the need to produce the level of security sought by the attacked state. The idea that a series of small-scale attacks, none of which seriously jeopardizes the security of the attacked state, can be considered cumulatively and can therefore prompt a wide-scale response, seems to depart from the conception of proportionality as an instrument designed to keep the level of force to the minimum necessary for repelling an attack and to avoid escalation.

## Proportionality in *jus in bello*

The proportionality requirement in *jus in bello* is inspired by a different logic. Whereas the legal regulation of the use of force is based on a superior right of the attacked state in regard to the attacker, the legal regulation of the means and methods of warfare is dominated by the principle of the parity of the belligerents and by the concomitant principle of the respect owed by each of them to interests and values of a humanitarian nature. Thus the interplay which dominates the assessment of proportionality in *jus in bello* is concerned instead with the military advantage that either belligerent intends to attain and the harm to humanitarian values, in particular – but not only – among civilians and protected persons. It is well known that this conceptual structure underlies the assessment of

12 To my knowledge, the most elaborate conceptualization of this doctrine was made by Yoram Dinstein, *War, Aggression and Self-Defence*, 3rd edn, Cambridge University Press, Cambridge, 2001, p. 202.

13 Here, too, see the remarks by various states within the Security Council on 14 July 2006, Doc. S/PV.5488, S/PV.5489.



proportionality laid down in Article 51(5)(b) of Protocol I additional to the Geneva Conventions of 1949 and relating to the protection of victims of international armed conflicts, which considers as indiscriminate and therefore prohibited, “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”.<sup>14</sup> Elements of this provision lead to the conclusion that it has now become a rule of customary law, applicable even beyond the scope *ratione personae* of Protocol I.<sup>15</sup>

Rules which do not impose a specific form of conduct upon belligerents, but require instead a proportionality test, apply in situations in which the balance between values is not predetermined by the law but must be achieved by reference to concrete situations, using as guidance the relative importance of the various interests in the light of actual needs in the situation in question. For want of an abstract rule of conduct, the task of reconciling competing interests is assigned to the state taking action, which must apply a standard of proportionality.

Thus the absence of a specific rule prescribing conduct in a certain situation does not necessarily mean that the parties are left free to do as they wish. Methodological insight is provided by the reasoning which led the ICJ, in the well-known *Nuclear Weapons* Opinion, to state that the consistency of threat or even use of nuclear weapons cannot be assessed *in abstracto*, but must be evaluated in the light of the concrete situations of each specific case.

### Proportionality and the aims-means relationship in *jus in bello*

The particular structure of proportionality as a normative technique applicable in *jus in bello*, in which no interest can claim absolute priority over the others, explains why, in that particular system, proportionality cannot logically be measured by reference to the ultimate goals of a military mission, but instead to the more immediate aims of each single military action. This element makes proportionality in *jus in bello* appreciably different from the analogous technique applicable in *jus ad bellum*. In the latter, international law confers upon the

14 This provision is complemented by Article 57 of the Protocol, which concerns the different, but related, aspect of precaution. Under Article 57(2)(a)(iii) it is mandatory to, *inter alia*, “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”. Article 2(b)(iv) of the ICC Statute also seems to rely on an assessment of proportionality, which may, however, differ from the notion included in Protocol I. The ICC Statute lists, among the forms of conduct constituting a grave breach of the laws and customs of war, “[i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated”. The emphasis placed on the subjective intention to launch an attack while being aware of its lethal consequences is probably due to the nature of the rule, which makes individuals criminally liable for violations of humanitarian law.

15 See the relevant practice in Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, Vol. II, part 1, Cambridge University Press, Cambridge, 2005, p. 297.



attacked state a superior power to take defensive action, and the proportionality requirement serves only to determine the degree to which other values can be sacrificed to that higher value. Conversely, in *jus in bello* there is by definition no higher value, as the offensive or defensive character of the military action does not count as such for assessment of the proportionality thereof.

This conceptual difference explains why, unlike *jus ad bellum*, in *jus in bello* the factors for assessing proportionality, in particular the notion of military advantage and that of collateral damage, are to be considered only in the short term. For example, in the assessment of the proportionality of Israel's military actions and the collateral damage to civilians, the ultimate aim pursued by Israel, which was allegedly to stop the aggressive conduct of the Lebanese faction, was immaterial – even if hypothetically the defeat of the Hezbollah strategy envisaging the use of civilians as human shields could, in the long term, have brought about a more secure situation for civilians on both sides and thus be considered more beneficial for humanitarian purposes.

### Proportionality as an objective assessment

In recent practice there is a growing tendency to present the assessment of proportionality as having to be conducted with the best means at one's disposal in order to avoid excessive collateral damage in attacks. In the large majority of cases this assessment, which emphasizes a certain relativism, leads to appropriate results. However, there are situations in which, mainly because of the belligerents' asymmetric technological development, a relativistic assessment is inaccurate and distorts application of the proportionality standard. The question, simply put, concerns the perspective from which one must proceed to assess the likelihood of collateral damage and strike a balance between the expected damage and the prospective military advantage. Should such a logical operation be accomplished according to the best practice available, or rather according to the best practice available to the state or to the individual commander who directs the action? The alternative, although sometimes suggestively formulated, is legally meaningless.<sup>16</sup> Proportionality is not a rule of conduct but a rule which requires a balancing of antagonistic values, such as the interest of the belligerent in carrying out a military action, on the one hand, and the interest of civilians who, although extraneous to the conduct of the hostilities, might be victimized by that action. It would therefore be illogical to assume that the level of protection of one of the parties to this balancing operation might depend on the subjective qualities of the other. What proportionality requires, on the contrary, is that civilians be protected independently of the intrinsic characteristics of the belligerents. If a state authority or agent is unable in a particular situation to assess with a certain degree of predictability the collateral damage likely to ensue from the envisaged attack, it or

16 This seems to be the position suggested by Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, Cambridge, 2004, p. 126.

he must simply abstain from taking that action. A subjective standard is thus inconsistent with the essence of the proportionality principle.

Obviously, in a conflict between two parties at different levels of development, the need to assess proportionality objectively is advantageous for developed states, which can draw on the best technology to minimize casualties and can consequently launch attacks in situations where the other party should abstain from attacking, since it does not have an equivalent technological advantage.<sup>17</sup>

But things are never as easy as might be expected. Even developed states may be inclined to favour a subjective standard in order to prevent proportionality from being invoked to restrict the choice of military strategies. The best example of this tendency is the recourse to “aerial war”. In the most recent conflicts, aerial war was strongly favoured by strategists in order to minimize losses among their own troops, even at the cost of altering the balance between military losses and civilian casualties.<sup>18</sup> Yet if proportionality must be assessed according to the circumstances in which a single action is performed, this implies that casualties can be considered reasonably related to the attainment of a military advantage even if it were proved that a different strategy would have made it possible to further minimize casualties, at the cost of exposing the troops to a higher risk. Nonetheless, this seems to be the position supported by the Public Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>19</sup> In her decision not to issue an indictment against NATO troops operating during the bombing campaigns in the former Yugoslavia, the Public Prosecutor endorsed the conclusions of a panel of experts which upheld the idea that the choice of strategy to be followed remains entirely at the discretion of the acting state, and that the proportionality of the action must be assessed strictly in regard to individual

17 The need to evaluate objectively the elements to be considered for the proportionality assessment means that, by virtue of the precautionary principle, one must abstain from conducting operations in situations in which those elements cannot be properly evaluated, and the risk of collateral damage consequently cannot be precisely assessed. Indeed, precaution is a particular form of application of the more general standard of proportionality. Unfortunately, this was not the principle which inspired the decision of the Eritrea–Ethiopia Claims Commission in its Partial Award, Central Front, and Ethiopia’s Claim 2, handed down within the context of a wider dispute between Ethiopia and Eritrea on 28 April 2004. Paragraph 110 of the award reads: “the Commission believes that the governing legal standard for this claim is best set forth in Article 57 of Protocol I, the essence of which is that all feasible precautions to prevent unintended injury to protected persons must be taken in choosing targets, in the choice of means and methods of attack and in the actual conduct of operations. The Commission does not question either the Eritrean Air Force’s choice of Mekele airport as a target, or its choice of weapons. Nor does the Commission question the validity of Eritrea’s argument that it had to use some inexperienced pilots and ground crew, as it did not have more than a very few experienced personnel. The law requires all “feasible” precautions, not precautions that are practically impossible.”

18 See the recent study by Luisa Vierucci, “Sulla nozione di obiettivo militare nella guerra aerea: recenti sviluppi della giurisprudenza internazionale”, *Rivista di diritto internazionale*, Vol. 89 (2006), p. 693.

19 See Paolo Benvenuti, “The ICTY Prosecutor and the review of the NATO bombing campaign against the Federal Republic of Yugoslavia”, *European Journal of International Law*, Vol. 12 (2001), p. 503; Michael Bothe, “The protection of the civilian population and NATO bombing on Yugoslavia: Comments on a report to the Prosecutor of the ICTY”, *ibid.*, p. 531; Enzo Cannizzaro, “Le operazioni aeree della NATO contro la Repubblica federale di Jugoslavia e il diritto umanitario”, *Rivista di diritto internazionale*, Vol. 84 (2001), p.133.

military actions. Their report also seems to support the idea that casualties caused by high-altitude bombers flying above the range of air-defence systems on the ground were proportionate inasmuch as the resulting damage could not, precisely because of the high altitude, be envisaged by the aircrew.<sup>20</sup> However, this conclusion appears to be at odds with that same idea of striking a balance between military advantage and collateral damage. It seems preposterous to assume that an action is proportionate if the agent, in order to maximize his own security and to avoid exposure to risk, deliberately chooses conditions which do not allow him to conduct an objective cost-benefit analysis on which proportionality is ultimately based.<sup>21</sup>

### Proportionality and collateral damage to civilians used as human shields

Again, it is worth stressing that in the particular context of humanitarian law, proportionality is employed to determine the balance between two clashing values: on the one hand, the military interest of the parties; and on the other, the interests of the civilian population, considered as a separate entity unconnected with the belligerents. However, it must be admitted that balancing two highly heterogeneous interests such as military advantage vs. humanitarian concerns is not an easy task. The respective value of either interest is subjective; it depends on a number of historical and social factors and varies greatly according to the level of humanitarian sensitivity of each epoch. Yet this does not mean that an objective assessment is impossible. In other fields of international law, the proportionality assessment is based on what is considered to be the “normal” social cost for a certain action, the notion of “normality” here being a historical notion which can be construed on the basis of the practice in the same or similar situations.

More serious seems to be the objection asserting that the rule, based as it is on the presumption that military and civilian interests are antithetical, is going to become, or will soon become, obsolete in relation to contemporary conflicts, in which civilians not uncommonly tend to participate more or less actively in the conduct of the hostilities.

The Lebanese conflict offers us a situation of this kind, where the civilian population were seriously regarded by Israel as being involved in the conflict insofar as they provided Hezbollah with logistical support and permitted it to operate behind a shield of civilians. This is a frequent occurrence in modern conflict, which involves a clash between armed forces on one side and a system of military militias acting with the support or behind the shield of civilian populations on the other. In these types of situations there will very likely be a certain asymmetry in the positions of the parties: one belligerent feels compelled to abide scrupulously by the rules of humanitarian law, which mostly favour the

20 See in particular, paras. 69ff of the report.

21 For a different conclusion see William J. Fenrick, “Targeting and proportionality during the NATO bombing campaign against Yugoslavia”, *European Journal of International Law*, Vol. 12 (2001), p. 489, at p. 501.

population of the other side, whereas its adversary infringes these rules and uses the population as a shield in spite of the possible harm its doing so may cause to civilians.

In these kinds of scenario the question is whether there is any justification for violating humanitarian law in response to the corresponding violations by the other party. In more concrete terms the issue is whether, in response to a violation committed by one party of the obligation to maintain a clear distinction between combatants and civilians, in particular by placing military equipment among civilian facilities and infrastructures, the other party is released from its obligation to distinguish between military and civilian objectives and to abstain from indiscriminate attacks.

Framed in this way, the question admits but one answer, namely a clear negative. In normative terms, since the interests of civilians are conceived as being formally detached from those of the belligerents, respect for these interests is owed by both parties. Consequently, violations of the rule of distinction by one party cannot justify a corresponding violation by the other, owing to the rule's lack of reciprocal character. This solution is less formalistic than it appears, since the absence of reciprocity in the entire field of humanitarian law, and in the treatment of civilians in particular, corresponds to a lengthy evolution of legal sensitivity which can be only mentioned here in passing. A different solution would be conceivable only by considering that in concrete situations civilians are active parties to the hostilities or by questioning the combatant/civilian distinction at its very roots and thereby casting doubt on some of the most fundamental principles of humanitarian law.<sup>22</sup>

A different question, technically more subtle and conceptually more insidious, is whether the conduct of civilians and the asymmetry resulting from the connections between militias and those civilians in modern conflicts alter the nature of the balance of values required by the proportionality test, and whether the “excessiveness” of the damage should be judged in that light. In other words, according to this solution a certain amount of collateral damage could be “less excessive” in situations where there is a strong presumption that civilians are aware of the danger, and accept it voluntarily as part of their participation as human shields, than in situations in which the civilians are genuinely unconnected to the violence.

Although implicitly referred to by attacking states, which claim that the (more or less active) participation of civilians in the conduct of hostilities justifies greater collateral damage, this argument is unconvincing. Humanitarian protection of civilians as it now stands is based on a clear-cut distinction between combatants and civilians. In order to change the status normally assigned to civilians, a threshold of involvement is required, usually corresponding to the performance of functions normally discharged by persons belonging to a military

22 See the study undertaken under the auspices of the ICRC and the TMC Asser Institute on the “Notion of direct participation in hostilities”, available at [www.icrc.org/web/eng/siteeng0.nsf/html/participation-hostilities-ihl-311205?opendocument#a1](http://www.icrc.org/web/eng/siteeng0.nsf/html/participation-hostilities-ihl-311205?opendocument#a1) .

corps. To go beyond this assumption, and to assume instead that civilians not actively involved in hostilities can nonetheless be deemed by virtue of their behaviour to accept a higher risk of collateral damage, entails the imposition on civilians of positive obligations, such as the responsibility to take action to prevent militias from using civilian facilities or even to leave civilian-inhabited areas. The failure to do so would then allow the other party to regard civilian facilities, or “double-use” facilities, as military targets and to act accordingly.

It is easy to see that this line of reasoning has the effect of significantly subverting the logic of humanitarian law and creating the presumption that civilians who do not take clear action to dissociate themselves from militias are objectively contributing to the militias’ operations. The principle of proportionality, incorporated into humanitarian law in order to enhance the protection of civilians, is thus used in order to attain the *inverse* objective, that is, to grant greater discretion to the attacking party. Indeed, if the *onus probandi* in regard to the distinction between military and civilians fell on the civilian population, and if the protection normally accorded to civilians were revoked upon failure to make such a showing, then the application of the principle of proportionality would be indistinguishable from collective punishment, a result plainly antithetical to the more noble aims inspiring the application of that principle in humanitarian law.<sup>23</sup>

### **Concluding remarks: using proportionality as a link between *jus in bello* and *jus ad bellum***

The conceptual analysis undertaken thus far shows that proportionality also serves as a tool capable of bridging the gap between *jus ad bellum* and *jus in bello*. As emphasized more than once, these two normative systems have diverse historical origins and are each formulated in response to a different set of aims and values. The diverse values addressed account for a differently structured concept of proportionality. In the system of *jus ad bellum*, protection is primarily granted to the interest of the attacked state in repelling the attack, and the other competing interests are considered only to curtail the choice of the means to be employed in order to achieve that aim. Conversely, in the system of *jus in bello* there is by definition no prevailing interest, but instead a variety of interests and values entitled to equal protection of the law which must be balanced against each other.

The existence of two distinct normative systems, with distinct standards of legality applicable to the same conduct, does not as a rule give rise to major problems. The legality of recourse to force is measured against the proportionality of self-defence, whereas individual actions would have to conform to the requirement of proportionality in *jus in bello*. However, beyond the large area in which these two standards overlap, there might be situations in which strict application of the *jus ad bellum* standard would make it impossible to achieve the

23 For a different conclusion see Dinstein, above note 16, p. 131.

aims of *jus in bello*. In such cases, the proportionality test under *jus in bello* must be regarded as part of the proportionality test under *jus ad bellum*. States must thus consider the humanitarian implications in order to determine the security standard they may pursue using military action.

In terms of legal technique, this conclusion flows from an analysis of the interaction between these overlapping systems. As states are simultaneously compelled to abide by both the *jus in bello* and the *jus ad bellum* systems, it seems reasonable to assume that in the event of a clash, the principles which inspire one of the two systems must be considered as a source of guidance in striking a balance with the values of the other, and thus influence the way in which the principle of proportionality operates.

The appropriateness of this conclusion does not seem to be purely conceptual. It can also be appraised in practical terms in the light of the events in Lebanon. In a number of reactions by third states and international organizations the existence of collateral damage, in particular the high toll of victims among civilians, was invoked as proof of the disproportionality of Israel's self-defence reaction. This means that proportionality under *jus in bello* must be considered as an element of the more general assessment of proportionality to be conducted under *jus ad bellum*.

I started this analysis by noting that a number of reactions to the Israeli response in Lebanon did not distinguish between proportionality in *jus in bello* and proportionality in *jus ad bellum*, as one would expect on the basis of a rigorous distinction between these two systems. However, what might seem an oddity in fact improves our understanding of how these two systems, instead of functioning separately, interact and provide for an overall assessment of the proportionality of the armed response. The conclusion that the proportionality test provided for in *jus in bello* is a key element of the proportionality test required by *jus ad bellum* is significant in both systematic and practical terms, as it helps to determine the acceptable balance between security and humanitarian needs in contemporary international law. For example, in the case in point it means that a state cannot freely determine the standard of security for its own population if the achievement of that standard entails excessive prejudicial consequences for civilians of the attacked state. Even if the destruction of rocket bases and the eradication of paramilitary militias in southern Lebanon were proved to be the only means by which Israel might prevent further attacks, these objectives cannot be attained if they entail, as a side effect, a disproportionate humanitarian cost. The attainment of a lower standard, which implies a more acceptable humanitarian cost, appears more in conformity with international law.