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Four Comments on the Application of Proportionality under the Law of Armed Conflict

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I. INTRODUCTION

The existence of the principle of proportionality as a norm is undisputed, and military commanders in armed conflicts around the world apply it continuously. As the principle is formulated in general terms—prohibiting attacks that may be expected to cause incidental loss of civilian life, injury to civilians, or damage to civilian objects, or a combination thereof, that would be excessive in relation to the military advantage anticipated—it is also clear that interpreting and applying the different elements of the principle is no simple task.

This Article shall consider four select issues regarding different elements of the principle of proportionality.

First is how to determine "excessive" (Part II). International law does not elaborate on how one must determine what is "excessive." What is generally accepted, however, is that proportionality is assessed *inter alia* on the basis of subjective considerations and values. The Final Report to the Prosecutor Reviewing the NATO

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Bombing Campaign in the Federal Republic of Yugoslavia (FRY), for example, has espoused for this purpose the standard of a "reasonable military commander." How should this standard be understood and applied?

Second is interpreting "military advantage" (Part III). Here, should the military context in which the attack or operation is taking place matter, and if so, to what extent?

Third is the impact of defensive systems on determining "military advantage" (Part IV). Many parties to conflicts have some sort of defensive measures to protect civilians from attack (from passive systems, such as shelters and air raid warnings systems, to active defensive systems, such as aerial defense facilities or rocket interception mechanisms). Should the apparent reduced lethality of enemy capabilities as a result of these systems be taken into account when assessing military advantage in attacks against the enemy?

Fourth is the impact of "force preservation" on determining "military advantage" (Part V). It is axiomatic that in conflict, preserving one's forces is important. What role should this play in proportionality assessments?

II. ASSESSING "EXCESSIVENESS" AND A "REASONABLE MILITARY COMMANDER"

As noted above, customary international law prohibits attacks that may be expected to cause incidental loss of civilian life, injury to civilians, or damage to civilian objects, or a combination thereof, that would be excessive in relation to the military advantage anticipated. Thus, once a commander values both the anticipated military advantage and incidental damage, he or she must decide whether one—the expected incidental damage—is not excessive in relation to the other. When presented this way, it may seem that a proportionality assessment will always lead to a singular, simple answer. This is obviously not the case. If comparing apples to oranges is difficult, comparing incidental damage to military advantage—let alone assessing whether the former is excessive in relation to the latter—is very challenging.

Difficulties in weighing two distinct and dissimilar variables make it particularly challenging to assess how significant the imbalance between the expected incidental damage and the anticipated military advantage should be so as to render an attack excessive.[1] The primary means in LOAC's toolbox for dealing with

1. Some studies have reached the conclusion that excessiveness in this context means a "significant imbalance" between the two sides of the equation. HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE 98 (2013); Michael

this problem is the standard of "a reasonable military commander." The reference to "military commander" in a legal standard does not simply indicate the identity of the person expected to make an assessment on proportionality. It first and foremost stresses that a special skillset is required to make such assessments: just as one has to be a jurist to properly consider legal questions, only military commanders can properly make proportionality assessments. Hence, a standard based on the perspective of a "military commander" implies that the determination whether an attack was excessive can only be made with a certain degree of operational expertise. At the same time, the term "military commander" is quite wide. The expertise demanded is non-specific, since commanders assessing proportionality come from different operational backgrounds and roles; some are infantry specialists making the assessment on the field, while others may be experts in fires or tanks sitting in a back office. Another aspect of the term "military commander" is that it includes a wide range of persons in the military apparatus—from the most senior officer to non-commissioned officers.[2]

The standard does not refer to simply *any* "military commander." Rather, the "military commander" making the assessment must be "reasonable." A few observations on this point are warranted. First, reasonableness implies that the law accepts that assessing excessiveness is not a matter of reaching the "one and only" answer to a determination. It would be a mistake to think that in each and every case of a proportionality assessment there is a single point on a scale where each and every reasonable military commander agrees that a proportionate attack becomes excessive. Reasonableness implies a certain margin of appreciation—a possibility for an array of different ways of assessing proportionality, each way being reasonable, hence within the boundaries of the legal framework. This is especially—although not exclusively—the situation in borderline cases. The Committee Established to Review the NATO Bombing Campaign against the FRY itself acknowledged this in its final report to the ICTY Prosecutor.[3]

N. Schmitt, *Targeting in Operational Law*, *in* THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS 269, 283 (Terry D. Gill & Dieter Fleck eds., 2nd ed. 2015).

2. For a more detailed and expert discussion of the meaning of 'reasonable military commander,' see Geoffrey S. Corn, *Humanitarian Regulation of Hostilities: The Decisive Element of Context*, 51 VAND. J. TRANSNAT'L L. 763 (2018); Ian Henderson & Kate Reece, *Proportionality under International Humanitarian Law: The "Reasonable Military Commander" Standard and Reverberating Effects*, 51 VAND. J. TRANSNAT'L L. 835 (2018).

3. *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, U.N. INT'L CRIM. TRIB. FORMER YUG. ¶ 50 (June 13, 2000), www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal (accessed Jan. 29, 2018) [https://perma.cc/58C5-XZ3V] (archived Feb. 27, 2018).

It should also be noted that the "reasonable military commander" standard relates to all parts of the proportionality analysis: the quantification of the expected incidental damage, the evaluation of the anticipated military advantage, and the comparison between the two. Each of these parts must be approached and handled reasonably.

Most importantly, this standard explicitly establishes that it is the military commander who is responsible for implementing the principle of proportionality. This does not mean, however, that the legal adviser becomes irrelevant, and lawyers may play different roles in assisting the commander to implement his or her obligations in this regard. Most importantly, in my view, is ensuring the commander's understanding of the principle through legal education, integration into trainings, and incorporation within military directives and procedures. The legal adviser may also assist with reaching a decision concerning individual incidents. In such cases, the legal adviser can help structure the commander's subjective thought process and provide the commander the tools to know the reasonable limits for the decision. The legal adviser can also instruct the commander regarding possible considerations to be included in the proportionality determination. For example, not every *prima facie* advantage resulting from an attack will be a relevant military advantage for a proportionality assessment, and not every relevant military advantage will be sufficiently concrete and direct. Conversely, there is no additional obligation to consider every harm to the civilian population that is expected to result from an attack in the proportionality assessment; this is another issue in which a legal adviser can assist.

III. "MILITARY ADVANTAGE" IN CONTEXT

Much has been written on the correct interpretation of the phrase "concrete and direct military advantage." While it is generally accepted that this phrase excludes purely political or economic gains as well as highly speculative and hypothetical military advantages, there are other aspects of the term that remain more complex. One relevant question is to what degree does the context of an attack influence the anticipated "concrete and direct military advantage." There appears to be very little in the way of official statements that can shed light on state practice or *opinio juris* on this question. Similarly, it appears that academic discussions have also focused less on this question than others. Nevertheless, taking context into account remains crucial, as an attack is always conducted in a particular context, and the context is likely to be different in light of a myriad of factors—time, place, resources, directives, and so on.

First and foremost, the quantification of "military advantage" is of course heavily dependent on the particular adversary. An attack that strongly affects the activities of a certain adversary can have a different or no effect on another adversary. Hence, it is possible that what may constitute a great military advantage against one adversary will be of less military value against another. In this regard, in a conflict where the adversary bases its fighting and goals upon certain capabilities and methods of conduct, depriving that adversary of such capabilities and methods will provide a greater military advantage than in a conflict involving a different adversary, which employs different capabilities and methods of conduct. This is true even in the same conflict where the adversary's capabilities and methods of combat evolve over time.

For example, if it is known that a party to a conflict relies exclusively on certain vehicles in order to transport combatants to the front line, then the military advantage in attacking those specific vehicles would be significant. Geography can also play a role. During the 2014 Gaza Conflict, for example, the IDF found motorbikes in cross-border attack tunnels. These motorbikes (and other small vehicles, such as quadbikes and scooters) were intended for use by non-state armed groups such as Hamas and Islamic Jihad in the Gaza Strip during the hostilities to quickly move from the densely populated neighborhoods bordering Gaza and Israel, into Israel's defensive positions and its civilian communities in order to carry out attacks and quickly retreat back to Gaza.[4] In such a situation, the military advantage in attacking the adversary's transport vehicles would seemingly have been greater than if the hostilities were taking place far away from Israel and with no threat to the civilian communities across the border. This is also clearly the case for the cross-border tunnels themselves, in which there is naturally a significant military advantage in their neutralization.

Protecting one's civilian population is another case of military advantage that should be considered in context. All of Israel's armed conflicts in the past few decades have involved deliberate, systematic, and persistent attacks on its homefront and civilian population. Indeed, this seems to be the most basic strategy of Israel's immediate adversaries—to harm the civilian population and way of life—and is the driving factor in their military development, acquisitions, and training. This is not limited to Israel's experience, and the military efforts of the Global Coalition Against Daesh against ISIS and affiliated groups evidences the same.

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4. *See, e.g.*, STATE OF ISRAEL, THE 2014 GAZA CONFLICT: FACTUAL AND LEGAL ASPECTS 58–105 (May 2015), http://mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf [https://perma.cc/2EUH-2T7A] (archived Feb. 27, 2018) [hereinafter 2014 Gaza Conflict Report].

Such groups often have as their primary goals not the weakening of the state's military forces and capabilities, but rather the harming and terrorizing of a civilian population. In such circumstances, it is clear that taking positive steps to protect the civilian population is not only the moral duty of the state's military, but also provides a concrete military advantage. The very definition of military advantage includes anything that weakens the enemy or hampers its operational activities. As a result, where an adversary acts to harm the civilian population, a reasonable military commander will certainly find military advantage in attacking enemy targets likely intended to cause harm to the civilian population.

Indeed, in contemporary armed conflicts, one of the central aims of a military campaign will actually be to protect the civilian population from attacks. One could argue that this is a fundamental and underlying shift from wars of the past. In the past, wars were fought not with the primary aim—tactical or strategic—of stopping or minimizing civilian harm, but rather in order to weaken the adversary militarily so as to result in surrender or incapacity to fight. In contrast, the nature of today's wars means that an army may enter a specific battlefield tasked primarily with finding and neutralizing the specific military capabilities of the adversary that it uses to threaten the civilian population. Thus, attacking rocket launchers directed towards the civilian population, as well as rocket storage facilities, will not only be considered to be militarily advantageous; it may even be prioritized by the attacking party, and the military advantage attained will be greater than the inherent military advantage that normally arises in destroying the adversary's means of warfare. Context indeed heavily affects the operational value of striking certain targets.

IV. DEFENSIVE SYSTEMS AND PROPORTIONALITY

States have consistently sought to adapt to the changes in the adversary's aims and pursuits described above, including by developing active defense systems to protect the civilian population. Should the success of such systems—such as Israel's Iron Dome, which intercepts rockets—have an impact when planning an attack against the adversary? Particularly, should we see a lesser military advantage in attacking the adversary's offensive capabilities, when such capabilities are less likely to punch through the state's defense systems and harm the civilian population? In my view, the employment of defensive measures intended to protect one's own civilian population—whether passive (such as bomb shelters) or active (such as missile interceptors)—does not have a significant impact on a proportionality assessment when considering an attack

on the adversary's offensive capabilities. This is for a number of reasons, each sufficient on its own merits.

First, defensive systems are not infallible. This is the case even for those systems that have had sufficient testing and deployment so as to know generally their potential for success, and all the more so for those systems whose capacities are still not fully known or computable. Even where a rocket interception mechanism, such as Israel's Iron Dome, successfully intercepts an incoming rocket above a population center, the debris can cause (and in Israel's case, certainly has caused) significant harm.[5] Second, an adversary will naturally continuously study and seek to develop methods to overcome such measures—including by conducting attacks with the full knowledge that they will be intercepted, in order to conduct research. Third, rockets, mortars, and other such offensive capabilities possess an intrinsic military value for any military force, and destroying them therefore contributes toward weakening the enemy.[6]

Finally, to suggest that sophisticated defensive capabilities intended to defend civilians inherently reduce the military advantage in attacks would create a perverse incentive that completely undermines the rationales of LOAC. A state that wishes to defeat its adversary should not be incentivized to reduce the level of defense it provides to its citizens—doing so would contravene the most basic humanitarian rationale behind LOAC.

In Israel's case, significant resources and efforts have been invested in developing various defensive systems to protect its population against attacks from across its borders. Yet these systems are not infallible, require large expenditures and a diversion of resources from other military and defense-related activities, and still have not negated the threat posed by its adversaries to the civilian homefront. Constant rocket and mortar attacks from the Gaza Strip, for example, have continued to affect IDF activities and the homefront and cause deaths and injuries among the Israeli population.[7] Preventing such harm is a legitimate and important military advantage for Israel.

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5. *See, e.g., id.* at ch. V.

6. This is especially so in the context considered in the section above, where one of the primary aims of non-state armed groups has become to attack and terrorize the state's civilian population.

7. *See, e.g.*, 2014 GAZA CONFLICT REPORT, *supra* note 4, at ch. V. As well as the threat from the Gaza Strip, rockets and other projectiles aimed at Israel's civilian population remains the primary threat in Israel's northern arena. As reported by the IDF, in a future conflict with Hezbollah, it is assessed that their "main effort will be placed on firing hundreds of rockets and missiles at Israel per day. The majority of this barrage will be of high statistical accuracy, with some amount of highly long range missiles capable of reaching nearly the entire State of Israel. According to an IDF Home Front Command report that describes the threat Hezbollah will pose to the Israeli home front in a future war, roughly 1,000-1,500 rockets and missiles will be launched into Israel [a day], thousands of homes will be hit and hundreds of Israeli

A rumination on how such an argument would be applied in practice highlights its defectiveness. How could we expect a platoon commander, whose soldiers have uncovered a rocket launching unit hidden in a backyard in the suburb in which they are operating, to be able to calculate the ability of his or her country's active defense mechanisms to successfully intercept the rocket and to prevent the rocket from harming a civilian community, and then to factor this into the anticipated military advantage in neutralizing that launch unit?

Indeed, Article 58 of Additional Protocol I requires parties, to the extent feasible, to protect the population under their control from the effects of hostilities. It would make little sense to constrict a military's capacity to fulfill this obligation by limiting the offensive prerogatives that are clearly recognized and codified in LOAC.

V. FORCE PRESERVATION AND MILITARY ADVANTAGE

Preserving one's forces similarly remains an important military advantage and retains its important role in a proportionality assessment concerning individual attacks. The term "preservation" is deliberate. "Force protection" or "security of forces," as each has been commonly used, diverts from the proper focus of the legal discussion, as the terms misleadingly imply that the focus is solely on bringing the soldiers home safely to their beds. While this is of course a valid consideration, commanders take measures to protect their forces for an additional, crucial purpose—so that their forces may successfully complete their military mission and continue to pursue military missions in the future. Indeed, it is axiomatic that one's forces hold military worth. Their training, skills, capabilities, and resources are of value, and preserving them remains a central element in a military commander's decision making. Preserving such forces throughout combat clearly constitutes a military advantage.

It is likewise axiomatic that the military advantage attained from force preservation is not without limits. A commander may not inflate the military value of preserving a force beyond its actual contribution to the accomplishment of the mission. Moreover, the military advantage resulting from force preservation is context-dependent. In certain cases the advantage will be greater than in others, for example when the unit preserved is charged with an especially crucial and urgent mission.

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civilians will be injured or killed. Hundreds of thousands are expected to be evacuated from their homes." *Hezbollah's Threat to the Israeli Home Front*, IDF, https://www.idf.il/en/minisites/facts-and-figures/hezbollah/hezbollahs-threat-to-the-israeli-home-front/ [https://perma.cc/GJS7-WK34] (archived Mar. 26, 2018)

While force preservation certainly constitutes a military advantage, in what circumstances does it actually play a role in proportionality assessments? To suggest an answer to this, consider an infantry unit trapped in an urban area, sustaining heavy fire. Clearly, an attack intended to preserve the unit's safety—whether carried out by the unit itself or by another unit—contains a concrete and direct military advantage, thus justifying some civilian harm. Then consider a case of an aircraft on its way to striking an arms depot, flying at an altitude where it is not threatened by enemy surface-to-air missiles (in other words, above the threat envelope). Such an aircraft is more likely to return to base safely than one flying within the threat envelope. Is this a case where force preservation plays a role in the proportionality assessment? It appears that the answer is negative. While flying above the threat envelope is certainly more militarily advantageous than flying within the threat envelope, it is arguably irrelevant when assessing the proportionality of the strike against the arms depot. A reduced risk to the aircraft does not render attacking the depot more advantageous in the sense that it now merits greater incidental harm.

At the same time, force preservation is definitely pertinent in such cases when considering the duty to take precautions. Indeed, the law does not necessarily require military forces to assume risks and takes such risks into account. Consider a different example, where two military objectives are dependent on each other and so attacking either one of them will suffice from an operational perspective. Assume that attacks against each target differ in terms of both risk to the attacking aircraft and the collateral damage expected. Engaging one target is expected to cause less collateral damage and will require entering an area containing a large number of anti-aircraft facilities that have an 80 percent success rate. On the other hand, engaging the second target is expected to cause greater (although still proportionate) collateral damage with no risk to the attacking aircraft. Under customary LOAC, when a choice is possible between several military objectives for obtaining the same military advantage, the objective to be selected shall be the one the attack on which may be expected to cause the least collateral damage.[8] It is therefore clear that in such cases force preservation counts as a military advantage in the context of precautions, because the two strikes are not anticipated to yield "the same military advantage."

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8. Israel does not consider Article 57(3) of Additional Protocol, which refers to a *similar* military advantage, to reflect customary international law in this regard. For recent official statements regarding Israel's position on this issue, see the 2014 Gaza Conflict Report, Chapter VI, especially page 181; *see also* U.S. DEP'T OF DEF., LAW OF WAR MANUAL 259–60 (2016).

VI. CONCLUSION

The principle of proportionality, as enshrined in customary law, is surely one of the most fundamental and important principles in the law governing the conduct of hostilities. Everyone is bound by it, and everyone must abide by it. Nevertheless, it is probably easier said than done. The centrality of the principle does not belie the difficulty in enunciating what it actually requires—the standards for its implementation, the interpretations of its elements, and the tests for compliance.

This Article attempted to share some insights regarding the principle of proportionality. Particularly, I have stressed how the implementation of the proportionality obligation remains a professional issue for the commander, which is obliged to act reasonably. This in turn is impacted, *inter alia*, by the commander's position, rank, training and surrounding circumstances, and context at the time of the decision. This naturally means that different commanders are likely to make different decisions, but all may be deemed "reasonable military commanders" and all may be law-abiding. Conformity in action does not necessarily equate to legal compliance.

The other perhaps important point of this Article was to stress the significance of context. The nature of the hostilities, the capabilities and abilities of the forces, the place in which the hostilities occur, the aims of the mission, and more, are all factors that have a direct impact upon the scope of legal obligations, particularly the obligation of proportionality.

These two factors—the "reasonable military commander" and the importance of context—as well as how we view force preservation are not only relevant in a discussion of *contemporary* issues in proportionality, and are not only relevant to the particular context of urban warfare against non-state armed groups. They are arguably relevant to *any* consideration of the application of this rule. More than that—but this is for another time—they are equally as relevant and applicable for the implementation of, and assessment of compliance with, other fundamental rules of LOAC, such as the principle of precaution.