

Proportionality in Warfare as a Political Norm¹

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Proportionality is one of the most widespread norms in the field dedicated to the study of legal and ethical norms in warfare. It is commonly used by those who fight and those who counsel the military as well as policy makers over legal issues. It is an essential part of IL and IHL and proportionality is one of the main norms of both *jus ad bellum* and *jus in bello*. It also pervades the public space, when commentators report on how wars are being fought; both the initial decision to wage war and the way armies use force while in battle are being put to the test of proportionality. To that extent, because proportionality is both central for specialists and the wider audience in democratic societies that are directly or indirectly confronted to war and because it covers a vast domain of war activities, we can speak of proportionality as a **focal point**.²

Proportionality is born out of a **compromise** between political constraints, military necessities, legal claims and ethical aspirations. The notion of proportionality at which center we find the issue of military advantage is one of the most remarkable evidence of this attempt to reconcile these different logics. One should note that proportionality as a terminology does not even exist prior to the codification of international humanitarian law (Watkin, 2006). Its creation is highly contingent (Alexander, 2015) and results from the necessity to make the use of force acceptable according to some shared legal and moral standards without limiting the state's strategic and tactical margin of maneuver. However, although its framing in law and in the ethics of war is recent, the idea of finding a right measure when making political decisions including those involving the use of force is not new and echoes some concern that we both find in 17th century authors and in ancient philosophy.

This article argues that, proportionality, as it is generally framed today in ethics and law, is highly problematic. I argue that, to some extent because of its numerous flaws and its resilience, proportionality is an “**empty focal point**”.³ This state of affairs should encourage us to think anew this norm. Either, proportionality is perfectible and one should redefine it

² In the social sciences, the concept of focal point was developed by Thomas Schelling (Schelling, 1960: 57). According to Schelling, a focal point is based on “each person's expectation of what the other expects him to expect to be expected to do”. I refer here to a focal point in the context of a “marketplace of ideas” (Sparrow and Goodin, 2001), i.e. as a concept around which, for different reasons, a majority of those who participate to this marketplace converge.

³ Applied to norms of warfare, this terminology is used by Johnson, although he considers that rules of warfare are « more than mere focal points ». As a general normative system, they might be more than that, but proportionality can be particularly the target of such criticism (Johnson, 1981: 190).

following the ethical and legal paths set by these two disciplines and traditions. Or, a more radical shift is needed. As an alternative, I will argue in favor of the latter.

This article focuses on the *narrow proportionality test*, which operates as a core concept: in order for a military decision to be proportionate, the harm that it causes (mostly to civilians) ought not to outweigh the military advantage that is being pursued.⁴ I will start this paper with an analysis of jus in bello. However, my analysis goes beyond the jus in bello jus ad bellum divide and I argue in favor of framing **proportionality in political term**, this affects both ad bellum and in bello.

In the first part of the paper, I will develop the reasons why it seems highly improbable that we can reach an improvement of the epistemic validity of proportionality on the basis of its actual definition that would be satisfying in the eyes of those who, rightly so, point at its current fallacies. Those problems, I argue, are grounded in the limitations and premises of the ethical and **legal individualist** paradigm and in the riddle of non-commensurability that is obscured by this model. More specifically, I put a particular emphasis on the temporal dimension of the non-commensurability problem.

In the second part of the paper, I argue why proportionality should be set in **political** terms, which implies a departure from the actual framework upon which proportionality is based. I argue that proportionality was originally a politically oriented concept that, for historical and contingent reasons, has deviated from its route by following the paths of ethics and law. In a new historical context, as a norm, proportionality should reintegrate the sphere of politics.

Finally, in the third part, I attempt to define what should be the main criteria of proportionality as a **political norm**.

Section 1: The fallacies of proportionality in the individualist model

We find proportionality as a norm in **three overlapping spheres**. Proportionality is a legal norm codified in IL and, most of all, in IHL.⁵ It is a moral norm embodied in jus ad

⁴ The damages that are taken into account in this calculus also include property belonging to civilians and property whose destruction will affect their lives.

⁵ There is an ample literature. Among others, see Gardam (2004), Solis (2010), Dinstein (2005).

bellum (Kretzmer, 2013) and jus in bello (Hurka, 2005). It is also one of the main rules embodied in military manuals and doctrines and, as such, it is widely taught in military academies worldwide.⁶ Although there are differences between these three domains, we find strong similarities in the different definitions and interpretations they each provide as, indeed, legal, moral and military definitions usually overlap around the jus in bello – IHL “*narrow proportionality test*”. These different legal, ethical and procedural models also share another characteristic: they are *individualistic*, i.e. they focus on the individual, the agent responsible is the soldier (the “reasonable commander”). The current academic debate on proportionality is grounded on this basis and we rarely depart from this comprehensive individualistic model.

This consensus contrasts with the fact that proportionality is also a widely **disputed norm**.⁷ The general public very often fails to understand proportionality claims made by governments and or their lawyers.⁸ Therefore, the norm fails itself to be legitimate to an audience that falls outside military, governmental and scholarly circles. This is most often the case when Western powers such as the United States, Israel or NATO are being criticized for being too heavy-handed in their struggle against much less powerful states or non-state actors.⁹ Arguing is part of any democratic debate, however, in this case, the great controversies around both the definition and the interpretation of proportionality are true symptoms of a larger problem inherent to proportionality itself as a vague yet resilient norm.¹⁰

Proportionality is also problematic as a normative category.¹¹ Both in ethics and in law, proportionality is fundamentally a **consequentialist** pragmatic moral claim. No doubt, consequentialism has been the target of a numerous critiques in moral philosophy (Williams and Sen, 1982). Proportionality quite dramatically exposes itself to such criticism and is

⁶ In the US, LOAC (Law of Armed Conflict) is the most comprehensive of these legal manuals. Its most updated version has been published in June 2015 (General Counsel of the DoD, 2015). See also Parks (1990). However, proportionality is framed in doctrines and war manuals of many other different countries (ICRC, 2005: 59). As a military doctrine, proportionality is part of the “economy of force”, as it is referred to in War manuals such as *US Army Field Manual 3-0* (Keiler, 2009: 58-59).

⁷ On the negative perception of proportionality in warfare, see Blum (2013: 419). Some authors go as far as to say that the norm of proportionality should be disposed of (Keiler, 2009).

⁸ Among the many examples of this controversial debate as it is staged by the media, see the case of the late Israeli military campaign in Gaza as it is reported here: <http://time.com/3019833/gaza-israel-war-death-rocket-invasion/>. Proportionality is very often equated to the tit for tat or lex talionis model, which is, according to what the current definition is, incorrect.

⁹ See the debate on NATO bombings during the campaign against Serbia in 1999. The ICTY released a report in 2000 where the issue of the proportionality of NATO’s strikes over Serbia was raised (ICTY, 2000). On this controversial debate see Benvenuti (2001) and Fenrick (2001).

¹⁰ On vague norms, see Endicott (2003).

¹¹ On a criticism of proportionality a general norm in law, see Urbina (2012).

particularly vulnerable to the Rawlsian critique of consequentialism, i.e. the separateness of persons, according to which “one personal hardship cannot be compensated by someone else’s benefit” (Raws, 1999).

Proportionality and the individualist paradigm

Both in jus in bello proportionality and in IHL, the calculus of proportionality relies upon an **individualist paradigm** (Zohar, 1993). In this framework, the soldier is responsible for the violation of a norm that obliges him to refrain from using force if the harm that this would create outweighs the benefits of the direct military advantage that this decision to use force should cause.

This is true of every agent-attributed action in warfare, but it is particularly so in the case of proportionality, violations of the norm of proportionality **cannot be solely attributed to individuals**. Collective responsibility is one of the fundamental yet neglected aspects of the ethics of war that has been overshadowed by the predominant individualist paradigm. Individualism has been challenged by several authors who have pointed at the collective dimension of warfare decision-making and at the state as a collective agent and have stressed the importance of its responsibility (Colonomos, 2009; Crawford, 2007). Nonetheless these authors are a minority among those who pertain to the field of the ethics of war. For reasons that will appear in the second part, the individualist paradigm is appealing as a legal and moral fiction. It is all the more functional as it enables an overlapping consensus between ethics, law and military doctrines. Yet, it does so at the detriment of epistemic coherence and of political justice.

The “reasonable commander” is part of a chain of command set by governments that frame the general policy both tactical and strategic that will translate into military decisions on the field. The reasonable commander legal and moral fiction dissociates the individual’s decision from that context and that **organizational structure**. A government and military organization define what is the “military advantage” to be gained, not only its empirical content, i.e. the concrete objectives that are pursued, but also the generic definition of what is a military advantage.¹² The individual’s decision heavily depend on this organizational

¹² As we will see further, the definition of what is military advantage, in itself, lacks clarity. There is no official definition as such. Moreover, the question of military advantage in the context of “irregular warfare” fails to be addressed (Pfaff, 2016).

structure and therefore, in great many instances, an individual cannot be judged independently from the collective is being part of.

Military and government leaders also define what should be a threshold of acceptable civilian casualties beyond which the operation needs to be scrutinized and put to the test. This process – **collateral damage assessment** (CDA) – is inherently collective. The “reasonable commander” provides the assessment on the basis of the work of a group that uses an algorithm when establishing the prediction of collateral damage. If this prediction exceeds the number fixed a priori (which could be 0 as many military want to stress), then a commission has to review the details of the operation and sets a new CDA. If this number is still higher than the acceptable number of casualties fixed a priori, the operation gets reviewed by a commission that has greater authority than the previous one.¹³

Moreover, while debating over proportionality, both the norm itself and its uses, states share military or political traditions. Each of them follows a specific ethos that is mostly historically and politically contingent (or dependent upon technology), such as for example a preference for defensive or offensive strategy. Military doctrines are taught to soldiers. This process of **socialization** is related to their national history and is therefore imprinted in the minds of their military personnel. This organizational variable (Crawford, 2007) needs to be taken into account. Indeed, the “reasonable commander” feels a sense of belonging to that culture and one cannot dissociate his rationality from that organizational culture which, in great many cases, reflects his national history and, to some extent, sometimes his personal identity. There are of course cases where the reasonable commander ought to distance himself vis-à-vis the rules and the military doctrine is supposed to abide by. In the most extreme case, this is particularly true when he is asked to obey illegal orders.¹⁴ Yet, clear cut cases of violations of the rule of proportionality are less frequent than in the case of other norms, as the interpretation and the use of proportionality is highly subjective. As an example, we can think about the case of Israel. Both for historical and political reasons, an ethos of the offensive has for a long time prevailed in the history of war in Israel. This collective dynamic affects proportionality claims. We can think of another example. The decision to go to war in

¹³ Personal interviews with the author (JAGs Washington DC and Charlottesville, March 2016).

¹⁴ I am not arguing that individual proportionality ought to disappear. However, collective political proportionality ought to be introduced as a norm. Moreover, collective proportionality might mitigate the effects of claims based on individual responsibility. We could still envision a situation where there is a radical disconnection between individual agency and collective responsibility. In those cases, a soldier could be held responsible on the basis of the current IHL rule.

Afghanistan and in Iraq were both related to 9.11 and the shock it had created in the US. In this case as well, it is important to analyze proportionality while taking into account this social context. If the US had violated proportionality, it would be unfair to solely blame individual soldiers for that, whereas the whole policy itself set by the government in the aftermath of 9.11 should be questioned.

We can draw two conclusions. First, when debating over his personal responsibility we ought to **take into account the agent's culture**, as his rationality will be influenced by his culture and the organizational structure is part of. This social fact does not imply sheer relativism. In a deliberative political space, this political and military culture should be consistent with some universal meta-principles, such as, for example, the need to minimize human suffering.

Second, assuming that we agree upon a common definition of proportionality set in the legal and ethical framework, even if the reasonable commander objectively violates it, he **ought not to be the sole agent** to be accountable for that. There is ultimately a collective responsibility of the group for such violations of the norm of proportionality. Current reflections on the ethics of proportionality do not capture that double dimension. They focus exclusively on how soldiers ought to follow proportionality and, in such model, proportionality is a norm that can be objectively interpreted.

Within a group that is collectively responsible, individuals share a **joint dynamic** and are tied by **interlocking expectations** (Gilbert, 2006; Feinberg, 1968). As proportionality is a norm that is also embedded with other rules of war such as, for example, the *doctrine of double effect* and is also directly related to the *rules of precaution* and *necessity*, this creates a web of meaning and strengthens both a joint dynamic and a set of collective expectations on part of different actors within the chain of command and the state. Different members of armed forces and government share this vocabulary and participate to the creation of moral standards of proportionality which would be applicable by their group.

Eclectism and non-commensurability

Whether we favor the individualist or the collectivist model, we are confronted to a major difficulty when assessing proportionality. The different elements that are needed in order to establish this ratio are difficult to aggregate and we may even wonder to what extent

they are commensurable and comparable.¹⁵ This is a more general problem of proportionality that theorists of law have amply addressed and we see here the **limits of the theory of balancing** upon which proportionality is based (Urbina, 2012).¹⁶

In the individualist paradigm, authors such as MacMahan and Hurka do not consider that **non-commensurability** is a problem, because, as Ali Ahmad Haque points at, they argue, military advantages has no intrinsic value. Such view is highly problematic as it relies solely upon the individualist paradigm and is meaningless if one departs from this paradigm. Indeed, (admittedly it is possible to provide a satisfying definition of the military advantage), one may well argue such advantage has an intrinsic value for the political community: it is the reason why combatants put their lives at risk, because they want to win a battle and preserve their political community, not just save civilians' lives. Saving civilians' lives then becomes a derivative of the military advantage of the homeland and not the reverse, as MacMahan or Hurka seem to suggest, precisely because they follow the individualist paradigm. I will argue in parts 2 and 3 that "military advantage" as a constitutive variable of proportionality should be replaced by another variable and category. Moreover, even from an individualistic perspective, it seems impossible to infer from something that remains obscure and undefined – i.e. the military advantage – the number of lives that could be saved, precisely when trying to maximize this mysterious advantage.

This reasoning is largely symptomatic of two dimensions that are very characteristic of the ethics of war debate. First, some notions remain unquestioned because it is in the best interest of the various participants to the debate on the norms of warfare to leave them unchallenged. This case shows to what extent ethicists take for granted security concepts that remain unclear. It also shows that it is not something that policy makers lament. On the contrary, such vagueness gives them an ample margin of maneuver in their decision-making. Ethicists produce a discourse that is detached "from reality" (Shapiro, 2007) which is, as such, left unchallenged by policy makers who can all the more ignore it as it remains obscure and fails to integrate basic empirical information. Second, avoiding to question the definition of military advantage reflects the lack of interest for politics, its concepts but also the empirical information that is needed to argue in political and military affairs. The **ethics – politics** debate is based on this **equilibrium**. However, by perpetuating itself, this system operates at

¹⁵ One of the main problems of non-commensurability is the arbitrary power it gives to judges, or in the case of warfare to the "reasonable commander" (Endicott, 2014: 340).

¹⁶ For a defense of balancing in proportionality see Barak (2012) or Möller (2014).

the detriment of the robustness of normative arguments that fail to be taken seriously if they are not empirically substantiated and if its variables are not properly defined.

In warfare, the security of one group and the harm suffered by its opponent are, at some point, incompatible. But these two goods are not only incompatible. They are also non-commensurable. From an epistemic perspective, we find **no common measure between military advantage and harm**, as we find no common ground between the types of **knowledge** that can address these questions and that refer to those values. Military strategic thinking or political science differ from epidemiology, the science that, at best, would capture a measurement of the suffering of civilian populations in warfare.¹⁷

Epistemic non-commensurability (Chang, 1997) is a strong limit to the validity of proportionality as a norm in the current ethical and legal frameworks. It is all the more so given that “military advantage” and “the sufferings of the civilian population” are even difficult to conceptualize beyond ethics and law. They are also problematic within those disciplines that would be most susceptible of addressing these questions. Political science has never dealt seriously with the notion of military advantage. In his work, Clausewitz constantly refers to strategic and tactical advantage, yet does not provide with one single definition of military advantage. In Clausewitz’s work, there is no absolute advantage, the author refers to the circumstantial measurement of the relativity of achievements in warfare. Clausewitz also raises questions that those of who have framed the norm of proportionality in IHL and jus in bello have not addressed. For example, Clausewitz asks if an advantageous move can be disentangled from the more general result of the war in itself.¹⁸ This would clearly make it very difficult to establish jus in bello proportionality independently from jus ad bellum. As for the suffering of civilian population, it is, of course, possible to witness and denounce the suffering of civilians. However, proportionality is also assessed in relative terms as it is compared to other proportionality claims, i.e. counterfactuals, (Mellow, 2006) that would result from other possible military decisions. This shows there is a need to find a common scale in the measuring of civilians’ pain, that is absent from most current analyses. Moreover, the current norm of proportionality states that the loss of civilians lives and the damages to

¹⁷ Historically, medicine and doctors – Henri Dunant and his followers at the Red Cross – have been of crucial importance in the development of IHL.

¹⁸ Clausewitz, *On War*, Book III, Chapter I, 4, “We might say that, just as in commerce the merchant cannot set apart and place in security gains from one single transaction by itself, so in War a single advantage cannot be separated from the result of the whole. Just as the former must always operate with the whole bulk of his means, just so in War, only the sum total will decide on the advantage or disadvantage of each item”.

their property are both part of the equation. It does not tell us how to aggregate them in order to compare this total to the worthiness of military advantage.

Epistemic non-commensurability is reinforced by **knowledge uncertainty** conditions that are highly prevailing in the context of war. The “fog of war” reinforces the “fog of norms” (Colonomos, 2016) that surrounds proportionality. Uncertainty can also be unequally distributed. As in some cases, it could be easier to foresee the damages of a specific bombing, whereas it would be more difficult to assess what would be the benefits of this decision. Such epistemic uncertainty is also reinforced by differences in the temporal status of these two variables, but this problem within the proportionality calculus will be more fully addressed further.

Goods in proportionality are also **normatively non-commensurable**. From a Kantian perspective, there is a radical distinction between values with dignity and those with price (Chang, 1997). In the case of proportionality, the suffering of civilian populations would fall in the first category. As for military advantage, we could argue that an army establishes a set of material goals, such as the conquering of a city, the destruction of the armament of one’s opponents etc... Yet, those two values are normatively dissimilar. Dignity (in the first case) cannot be substituted with materiality (in the second one).

Temporal non-commensurability

Could it be, then, that both terms, civilians’ lives and military advantage, are related to a **meta-value**, in our case **security**? Instead of framing proportionality as a ratio where security trumps moral concerns such as the right not to be harmed, proportionality could be viewed as a security ratio that justifies the possibility of affecting the well-being of civilians within the society we oppose to and therefore their security for the sake of maximizing our own security, notably of our civilians. As for utilitarians, they would adopt value monism and consider that security is the common value. They could also adopt another meta-value, the minimization of suffering, as the broad characterization of war as a “lesser evil” (Ignatieff) would suggest.

Yet, even these considerations fail to be satisfactory. One of the greatest fallacies of proportionality lies in the **eclectism** of the temporal status of its variables. In *jus in bello* proportionality, military advantage could be set in the short term, although if we follow Clausewitz it is hard to disentangle the specificity of the gains of one single operation from the

more general military advantage of the war itself. The suffering of the population is rather a long term measurement of the losses people will suffer from, i.e. the suffering of those who have lost their relatives, the pain of the wounded and the material losses and the destruction of their homes and their goods.

Proportionality presupposes that either we only take into account the survival and the loss of present lives, or that we establish a measurement of the worthiness of **past, present and future lives**. In the latter case, its actual form, the norm of proportionality does not explicitly offer that possibility or even suggest that we engage in such analysis. As for the former, it seems extremely difficult to consider that only present lives should count when we are addressing the issue of military advantage and the suffering of civilians. Even though they are poorly undefined, we could assume that military advantage and civilians' pain both imply a middle term if not a long term view. Otherwise, it could seem acceptable to inflict pain by using weapons that would, in the short term, incapacitate enemies until, more remotely, this weapon – radiations or ticking bombs for example – kills both civilians and the military and catch them by surprise.

Philosophers have argued extensively about the worthiness of future lives as compared to present ones (Broome, 2004; Parfit, 1984).¹⁹ Usually, in environmental studies for example, philosophers and economists apply **discount rates** (Sunstein, 2014). Could that be the case in the context of warfare? This is a difficult question, yet an important one that fails to be addressed in the current literature. We would need to establish a value for present lives that would serve as a reference for the measurement of civilian losses and pain set in a temporal perspective. This reference point is lacking in the actual theory or proportionality. In the next two following sections, I'll try to overcome this problem by setting a new perspective for proportionality.

Section 2: The importance of political proportionality

The **individualist** paradigm acts as a **firewall** protecting the state whereas a collective body should be (at least partially) responsible for the violation of rules of war that are most often the result of a policy set by executive and political leaders and the joint

¹⁹ We find many reflections on discount rates of future lives in environmental studies (Caney, 2014).

dynamic of a whole social and political group.²⁰ The state benefits from this responsibility attribution, as individual responsibility, i.e. responsibility for errors made by its “reasonable commanders”, **exonerates the state** from being the target of moral and legal accusations.

This is not only epistemically unsatisfying and politically unjust, it is also an outdated framework detached from a wide **social demand** that is very much characteristic of the post-Cold War Era that has called international institutions to account for their past or present wrongdoings (Colonomos, 2008). It is also contrary to the **foundations** of the laws of warfare that implied a reflection on the political legitimacy of war (Giladi, 2012).

Political proportionality is one of the most fundamental traits of proportionality in the wars fought by Western states. Especially for the US, **policy goals** are fully integrated into the calculus of proportionality (Pfaff, 2016). In the context of what some refer to as “irregular warfare”, the US tries to gather the largest number of people around a new political project in the countries where it fights. Therefore, the threshold of CDA is set very low (usually, military say it is 0), and is in accordance with the pursue of this political objective.

For reasons mentioned in the first section, the individualist paradigm contributes to the framing of proportionality as a “vague norm”. Those norms that are not made explicit and whose content remains obscure give states and those who exercise power a **strong advantage** in the public and legal arena. Contrary to what the lawfare literature would tend to suggest (Dunlap, 2009), states benefit from an important legal advantage as they hire highly skilled military lawyers. They would know better than other lawyers, for example in non-governmental organizations, how to use proportionality as a norm and take advantage of its vagueness, its flexibility and contextual nature.

This is unfortunate. States are always encouraged to endanger civilians’ lives especially in times where security risks and threats to civilians are perceived as very high. It is therefore important to put the **state and collectives** at the center of the debate on proportionality. It not only makes sense from a purely logical perspective, it is also extremely important from the perspective of political justice.

²⁰ We can draw a parallel here with Brian Barry’s comments and critiques of neo-liberal policies and Blair’s political program in the UK (Barry, 2005).

The “right measure” as the political foundation of proportionality

Historically, proportionality originates in Plato’s thinking, who, as a philosopher, was greatly concerned by the necessity of finding a “**right measure**” in governing the city (Poole, 2010). We may find this question raised by other thinkers such as Cicero, as well as in Aristotle’s work (Engle, 2011). This should not come as a surprise as these philosophers praise the virtue of temperance and the ability to find the right measure is both **a personal virtue and a political skill**. As a difference with contemporary moral thinking, proportionality is here defined as an aptitude that necessitates to define what is the common good, to discriminate between different political objectives and to measure the worthiness of material goods. Ante its legalization and ethicization, proportionality was essentially a quest for a right political order in the City. Given the problem posed by proportionality set in IHL and jus in bello, it is time to go back to this initial inspiration and see the implications for international politics of such vision.

Although individuals sometimes extract themselves from the chain of command’s decisions, usually soldiers depend upon an orientation and a calculus set by the state. At a more theoretical level, the idea that states make bets and decide over the use of force based on a calculus is far from being new. In this tradition where war appears as a gamble (Huizinga, 2002; Colonomos, 2013), we find, of course, Machiavelli. The Prince should be able to use *Virtù* and master *Fortuna*, both of them requiring to make a **calculus**, especially when it comes to warfare. *Virtù* is grounded on instrumental rationality and it implies that men ought to master their emotions. *Fortuna* is also a calculus, but it appears more as a bet. Taming chance is a bold move that every leader should be able to make in order to show his talent and his virtue.

Those who followed Machiavelli took good note of the duality of gambling and calculating politics. Hobbes also considered that war is a “**gamble**” and calculating the costs of war, both in military and political terms, is coherent with Hobbes’s ontology and his concept of “*ratiocinatio*”. *Ratiocinatio* is a calculus that men should perform and that, eventually, will lead them to master their passions, coexist within the Leviathan and pursue their endeavor or what Hobbes refers to as their “business”.

Hobbes and Grotius²¹ meet under the auspices of Aristotelian rationality and his definition of the **just**²². Aquinas follows the Aristotelian tradition and sets the principle of proportional self-defense which we also find in Grotius. The political project to establish proportionality as a political norm that I advocate for follows that tradition that preexists the just war moralizing and legalizing process.

From **Grotius onward**, proportionality has developed through law and ethics. As a concept, proportionality in law was obliged to make concessions with a military approach of warfare and with political constraints that we find in the tension between the quest for efficiency and the need for legitimacy. This process has been extremely useful as gradually states found a common grammar that would serve as a mode of expression when deliberating both internally and internationally about issues related to the use of force. This language is also used to signal political intentions. However for reasons mentioned in the first part, its individualization has led to contradictions with proportionality's original political meaning and purpose.

Combining quantitative and qualitative variables

A new version of in bello proportionality – a norm of proportionality that would focus on its political dimension – should combine **variables reflecting political concerns**. Proportionality would seek to measure the level of political benefit or damage induced by warfare. One should not try to measure “military advantage”, but rather aim at understanding what are the political benefits or harms of using force. Therefore, it would be indispensable to define a priori what are the political goals of warfare and, as war unfolds, what are the new political goals that the use of force seeks to reach. Indeed, it is very often the case that these goals change meanwhile the conflict unfolds. Likewise, one should try to measure the political harms done to the political community that is being targeted. This variable should not limit to the measurement of civilian losses and damages to their property, these losses should be translated in political terms. We should come to a ratio that would integrate the harms done to the political community as such and the impediments that it creates for its future development.

²¹ See Grotius: Book II, Chapter XXIV, V, *Precautions against Rashly Engaging in War*. “Wherefore in all cases of deliberation, the proportion, which the means and the end bear to each other, is to be duly weighed, by comparing them together.”

²² See Engle (2012: 4-7). The author here refers to the theory of proportionality set in *Nicomachean Ethics*, book V.

Building such new ratio is a challenging task as we should be able to set a measurement scale that would hierarchize political goals in warfare. Military goals should **not be differentiated from political outcomes**. They exist insofar as political objectives are aimed at. A new proportionality measurement would emphasize the value of these political goals when they are related to the military objective that is being pursued on the battlefield. For example, in political terms, the predation of a country's economic goods does not have the same value as freeing a country from dictatorship.

We should also try to identify what are true impediments for the **future of a political community** that is being targeted in warfare. Destroying schools and hospitals durably affects the political future of a country, it is much less the case if some replaceable economic facilities are being damaged. When civilians are being killed, lives are not to be valued equally. The future of a political community rests on the shoulders of its younger generations, its young leaders and those who will be their successors.

The assessment of proportionality necessitates to have a good **knowledge of military affairs** and the way conflicts affect politics. It is also necessary to have a future oriented approach, since proportionality is a concept that is based on an anticipation of the consequences of military decisions that are politically driven.

From a **methodological** standpoint, we see three main challenges. The first one is to define what are the variables that need to be included into the two broad categories of political benefit on the one hand and political harm on the other. The second is to develop a future oriented analytical approach that makes plausible forecasts in a time setting that needs to be defined a priori. The third one is to bridge within those political assessments quantitative data with qualitative assessments.

This last point is important as we need to have a debate about what are the variables to be included in the proportionality calculus, instead of merely concentrating, as it is the case in the ethics and law literature, on the ways to combine military advantage with human suffering (without defining these two categories). By making it more explicit what will be more **commensurable** variables, it will be easier to put proportionality claims to the test. Therefore, the norm will be taken more seriously and will be less used as a tool for propagandist purposes both on the part of those who justify the use of force of their state and those who criticize it.

We should try to make use of statistics and **indicators**. If properly used, indicators can be modes of “global governance” (Davis et alii, 2012) and the history of statistics is closely tied to the development of the state such as found in William Petty in the 17th century.²³ They sometimes are the object of criticism as these would be instrumentalized by those who frame them in order for them to pursue their interest. However, historically, this needs not necessarily to be the case (Porter, 1996). Indeed, facts, in this case statistics, are and have been powerful tools to criticize political decisions.

Section 3: Five principles of political proportionality

As Walzer argues, one of the main goals of any just war fought by a state is the defense of its **political community**. Although IHL has certainly contributed to the protection of civilians, it has also contributed to make us forget the importance of this original goal that should orient any normative thinking applied to warfare. Jus in bello and IHL also tend to prevail over jus ad bellum and, indeed, most of the discussion over proportionality focuses on jus in bello.

Some of the reasons for this fall outside the realm of this discussion. However, we may want to mention one of them: jus in bello is generally usually seen as more “objective” than jus ad bellum, as, in the case of proportionality, military advantage should be more easy to evaluate than political objectives that are part of the jus ad bellum calculus. This is largely incorrect for two reasons. First, political objectives are already part of jus in bello as any military advantage is related to a set of political goals.²⁴ Second, military advantage is no easier to define than the **political good**. Indeed, political philosophy dedicates itself to the

²³ Petty was the first to introduce statistics in politics in its attempt to build a “political arithmetic”.

²⁴ For example, given the ambiguities of IHL and the lack of consensus in the ethics literature, one may ask oneself whether religious sites that are used by combatants could be the targets of an attack. When ruling on this decision, states do not only try to assess the military advantage that such decision would enable them to pursue. They also put this decision into a political perspective and try to understand what are the political consequences and implications of such decision, for example in a context where religious identities are key factors in the conflict. In this case, organizational modes and collective identities appear as key structuring elements of the proportionality calculus.

discussion of what are good political goals, whereas we find no serious scholarship on what is military advantage.

Any reform of proportionality should seek to render **homogenous** the variables of the proportionality equation and, the two being related, remediate to the problem of non-commensurability. Proportionality is a political norm, in so far as it includes political variables, it also has a political function. We should concentrate our efforts on the definition of proportionality as a political norm (PPN) that not only limits the use of force but that also makes the use of force more transparent and increases deliberation over the use of force. Within a democratic setting, if the quality of the deliberation on the proportionate use of force increases, this should help bring some limitations to the use of force.

We find **five principles** that are set to help reach these goals, the first three principles are structural and procedural, whereas the other two are guidelines that seek to define what are the constitutive variables included in the proportionality calculus and how they should be aggregated.

Structural and procedural variables

- (1) The rule of political proportionality applies to states as *collective agents*. There isn't any "reasonable commander" as such without any collective decision that rules over who this commander is and how he should act and, to some extent, think, especially in a social context such as the army where (at least in democracies and in some authoritarian states as well) the military is subordinated to the political and, therefore, the state. This is particularly the case in planned military operations, but also to some extent in self-defense proportionality judgments as well.

States are defined as systems of *interlocking expectations* (Schelling, 1960), that live on "*joint commitment*" (Gilbert, 2006) on part of their members. Any such reasonable commander is part of that system. Collective responsibility might be distributive. In a context where the collective to which they are part of is responsible for using force disproportionately, individuals can share that responsibility or not. One might also think about cases where, *entirely on its own*, a commander decides to bomb indiscriminately a city whose strategic importance does not appear essential in winning the war. How many of those cases can we find? Usually, soldiers are being part of a joint and collective dynamic. In such case, responsibility is not merely individual or not individual at all and just collective.

In the context of today's conflicts, whether they are characterized as "irregular warfare" (Plaff, 2016) or asymmetrical warfare, this article looks at the *majority of cases* where *political variables* are needed to make proportionality assessments. If, in the context of the war, we find (according to the variables bellow) that the use of force exerted on the enemy is excessive therefore the responsibility befalls merely

on the state and not on the individual. Indeed, the responsibility to set a just politics of warfare befalls upon the state. Even, if they had the information needed to make this assessments, individuals won't be part of that chain of responsibility since they have not taken part to the initial decisions that led their state into the war and have not followed the whole process. Let us imagine a situation where a city in state B is being shelled by state A. State A's initial airstrikes are compatible with proportionality. However, at some point, because of what the community of people had already suffered from, the next wave of bombings force becomes excessive as regards to what the political community of state B could endure. The state is responsible for this continuum, not the reasonable commander that has been affected to this last mission.

What are the *social boundaries of the state* as a collective? A state is defined as an acting collective body. As such it would be far excessive to include citizens that are not part of the chain of collective action. Therefore, a state that is liable for the excesses of the use of force it employs during warfare includes its government, the military and the experts that work for these different acting institutions. A coalition of states can also be held responsible and accountable (Grant and Keohane, 2005) as well as an international organization (Buchanan and Keohane, 2004).

- (2) Political proportionality is a ratio that compares the consequences of the use of force that affect *two or more different political communities*, i.e. the belligerents within a conflict, one state vs. another state, or a coalition of states vs. one state or another coalition. Proportionality should also include in its calculus the consequences on states that are not directly part of the conflict but that might be affected by it, as well as consequences on the environment to the extent that they would affect different political communities. We have to measure the consequences of the use of force on the cohesion of these political communities and on the possibility for these political communities to be sustainable and autonomous.

Using force will be legitimate if it saves a political community without crushing another *society*. Indeed, you are authorized to save your political community and destroy the political community of your opponent – i.e. its regime. As for example in the case of World War Two, the Nazi regime has been destroyed by the Allies, yet German society was able to develop after the war. Culturally and economically, it met the expectations of its members. You could argue that Nazism has been destroyed, but German society has been revived after WW2. The norm of proportionality implies some commitment for the future, as it will imply that you take into consideration the value of the future political community of those that you are fighting against.

- (3) Political proportionality is a measurement in *continuous assessment*. Proportionality has to be captured in the flow of combat, starting with the preparation for the war and as the conflict unfolds. As such, it ought to give an indication about whether a state has to restrain itself and change its military policy and tactics or whether it is possible to accrue the pressure on the enemy by increasing the level of the use of force. Proportionality is a *forward-oriented* indicator: it is not only designed as a norm whose purpose is to monitor and sanction behavior, it is also a tool for communicating one's intentions. It is a measurement that is also addressed to one's political community and it is provided to stimulate a debate about the need to pursue the war, decrease pressure on the enemy or stop the conflict.

Calculating proportionality

(1) Political proportionality seeks to find a balance between the political necessity for a state to pursue its military strategy and the necessity to protect the future existence of both political societies. We call this the *political / military balance*, the debate about this balance is set in political terms not military ones, military objectives depend upon political goals. For example, the targeting of a governmental office is an open question. It might be justified if, for example, there are reasons to believe that a/ this will help reach some strategic goals, b/ if that governmental office lacks political support and is an impediment in the furthering of a suitable political process.

It is important to differentiate different forms of responsibility (Hamash, 2010), responsibility for *planning* the use of force and responsibility for *executing* military planning. In both cases, and most specifically in the first one, state responsibility is crucial.

To the extent that this is possible, ruling over the use of force should include the *concern for the future of the political community* that might emerge from the state that one is fighting against. Such responsibility particularly bears upon the shoulders of those strong states, such as Western powers, when they fight states and groups that are necessarily less powerful. You are responsible for the future of those people whose government or political representatives you are fighting against. It should also guide the decisions of states fighting in conflicts where there is less inequality between their different parties. Indeed, for their own benefit, in those cases as well, belligerents ought to have a middle or long term vision.

(2) Political proportionality establishes that the negative consequences of the decision to use force must not radically compromise the *possibility of a peace* or, at least, an agreement between the different parties that ought to follow the cessation of the conflict. We call this the *non-humiliation* clause and the *self-preservation* clause. This is also valid if one of the belligerents believes that when it crushes its enemy, the opponent state will disappear in its actual form (the Allies vs. Nazi Germany).

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The principle of proportionality prohibits attacks against military objectives which are "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". In other words, the principle of proportionality seeks to limit damage caused by military operations by requiring that the effects of the means and methods of warfare used must not be disproportionate to the military advantage sought. DINSTEN Yoram, "Collateral Damage and the Principle of Proportionality", in WIPPMAN David & EVANGELISTA Matthew (eds), *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts*, New York, Transnational Publishers, 2005, pp. 211-224. I propose that it is *ius in bello* proportionate to unintentionally kill or harm civilians as an unintended side-effect of achieving a military advantage that will prevent (or enable one to prevent) substantially greater harm to one's own forces or civilians over the remainder of the conflict. In these cases, the moral rights of the civilians harmed are permissibly. 9 For the purposes of this chapter, "one's own civilians" includes all civilians that an armed force seeks to protect through the use of military force, whether fellow citizens, allies, occupied populations, or intended beneficiaries of humanitarian intervention. As a result, the civilians an attack may harm and the civilians an attack may protect are sometimes members of the same political community. The principle of proportionality is firmly-entrenched in international humanitarian law discourse, and it applies in both international and non-international armed conflicts and does so as a matter of both international treaty law and customary international law. The language of the proportionality balancing test, furthermore, is consistent as regards both the prohibition of indiscriminate attacks and within the context of precautionary measures: the attacks at issue are those which "may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or Although proportionality has yet to be codified as a principle of civilian protection, the idea that military means should be proportionate to their anticipated ends is widely recognized as a basic norm of the law of warfare." Proportionality is closely related to other underlying principles of the law of warfare, such as military necessity and discrimination between combatants and non-combatants.' For example, a military act cannot be proportionate unless there is some military necessity for the operation in the first place. "The political and military aspects of insurgencies are so bound together as to be inseparable," the U.S. Army says in its 2006 Counterinsurgency field manual. "Most insurgent approaches recognize that fact. Military Introduction 17 actions executed without properly assessing their political effects at best will be reduced in effectiveness and at worst are counterproductive." As vital as it is, public diplomacy is commonly proffered as a throwaway recommendation or miraculous catch-all for what we need in the present conflict. But it is only a single tool in the arsenal of democracy. The State Department has flailed and floundered since 9/11 to dominate the public diplomacy function that its own foreign service neither wanted nor understood.