Proportionality in international humanitarian law

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Chapter 5
Chapter 5. Proportionality and the Use of Force

5.1 Introduction

As is explained in the previous chapter, the notion of proportionality is often used as a concept that strikes a balance between competing interests, such as the protection of the human dignity of one or more individuals and another consideration. Of course, respect for human dignity is especially under pressure when armed force is used and in situations of armed conflict. Proportionality developed to prevent the practice of self-help by States from escalation into an uncontrollable spiral of full-scale war. Therefore, it can be no surprise that the legal frameworks that deal with the use of force, including those which apply during armed conflict, contain manifestations of proportionality.

This and the following chapters analyse the principle of proportionality as it occurs in the legal frameworks that apply during armed conflict, in particular the *ius ad bellum* and the *ius in bello* (international humanitarian law, IHL). Additionally, the framework of IHRL deals with the use of force and remains applicable in times of war as well. First, however, it is relevant to assess the origins of proportionality in Just War theory, which stems from moral philosophy, because “the ‘moral’ roots of the proportionality principle [in armed conflict] provide valuable insight into the scope and limits of the legal test.”

1 Franck discusses “proportionality in military matters” and distinguishes between the *ius ad bellum*, *ius in bello* and the role of proportionality in determining individual criminal responsibility. In the discussion below, the principle of proportionality in human rights law will be discussed additionally, where it is applied as a restraining factor to the use of force. Although the circumstances in which this will occur does not necessarily imply that a state of conflict exists, the part in which it is discussed is nevertheless called “proportionality in armed conflict” because particularly in that context, the relation between proportionality in the *ius in bello* and human rights law surfaces. Technically, the heading used by Franck of “proportionality in military matters” may be deemed to be more precise. International criminal law will receive less attention, except for the fact that some judgements that arise from it will be used to explain or explore concepts from, in particular, *ius in bello*. See Franck 2008b, pp. 4-17.


3 ICJ: Nuclear Weapons Advisory Opinion, p. 226; para 25, p. 240; the Wall Advisory Opinion, para. 106, p. 178: “the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.”

5.2 Just War Theory

5.2.1 Introduction

The historical and normative predecessor for the concept of proportionality in international law during armed conflict is the Just War theory, as developed in moral philosophy. Just War theory has deep historical roots and is based on the writings of philosophers from a wide variety of cultural backgrounds. The concept of proportionality as it appears in modern Just War theory is the result of the way philosophic schools have thought about war for centuries.

5.2.2 From Morality to International Law

War was the subject of philosophical debates in many ancient civilizations. The origins of Just War theory may be deemed to start at the Stoic writings of Aristotle (364-322 BC) and his followers in ancient Greece. The Stoic ideas were later developed by Roman writers like Cicero (106-43 BC).

During the middle ages, Augustine (354-430) argued that, subject to a number of conditions, it could be morally justified to wage war. These conditions included a declaration of war by the competent authorities and that the war was fought for the right reasons, such as reinstating the peace or punishing wrongdoers. Francisco de Vitoria (1485-1546) writes that even if the war is undertaken for a just cause, there are limits to the way the war is fought. He holds that the innocent must be spared if that is possible, although the ‘guilty’ may be killed, even after the actual battle is over and the adversary is no longer a threat.

During the classical period, (1600-1815), the ius gentium (or the Law of Nations) and natural law were understood to co-exist and as such both regulated international relations. Suárez (1612) played an instrumental role in the distinction between the natural law and the ius gentium. The former was understood to be eternal, universal, and though it was based on the ancient Stoic and Roman traditions, it developed to a large extent during the medieval Catholic Church, for example through the writings of Thomas Aquinas. The ius gentium, on the other hand, was a strictly human affair, to be applied between States and developed under the influence of civilizations that had organised themselves as separate States that shared a common culture. The ultimate goal of both natural law and ius gentium was to create

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6 It is important to note that the moral discourse was phrased in terms that are understood in this study as legal terms: the ius in bello and the ius ad bellum.
7 Neff 2005, p. 49.
8 Kinsella and Carr 2007b, p. 55.
9 Francisco de Vitoria, pp. 70-79.
10 Neff 2014, p. 5-6.
a framework based on justice. In war, the goal to achieve justice was framed in terms of a war being waged for the right reason (the *ius ad bellum*) and with the right methods (the *ius in bello*).

In Hugo Grotius’ *De jure belli ac pacis* of 1625, the theological arguments on war, based on the work of Augustine and his predecessors, were transformed into normative claims.\(^{11}\) Hugo Grotius applied natural law principles to international affairs, although he also referenced to the *ius gentium*.\(^{12}\) Nonetheless, some philosophers, among who was Thomas Hobbes, maintained that the *ius gentium* had no binding character and referred to natural law instead.\(^{13}\) De Vattel subsequently framed both types of philosophical notions in a more systemic, and thus more legal fashion in his “The Law of Nations” of 1758.\(^ {14}\) Ultimately, in the 19th century, through the period during which positivism dominated international law, the two drifted apart even more, resulting in both branches of modern international law (IHL and *ius ad bellum*) as in a branch of ethics (Just War theory).

Modern Just War theory may be characterised as the middle ground between two other influential philosophical schools: realism and pacifism.\(^ {15}\) Realists argue that that there is no morality in warfare: why a war is started does not depend on the question whether it would be morally just, and nor are there any moral constraints on the way the war is fought. Rather, as Morgenthau argues, “international politics, like all politics, is a struggle for power.”\(^ {16}\) Therefore, war may be used by States to increase their power in order to survive and prosper.\(^ {17}\) Rules for conduct in war may still be agreed upon by the parties, but only because this limits their own losses.\(^ {18}\) Pacifists such as Erasmus (1466-1536), on the other hand, argue that war is wrong because it is immoral and that it should therefore be abolished altogether.

As a result of the gradual developments of international law and ethics, the the *ius ad bellum* and *ius in bello* concepts of proportionality in Just War theory and in international law have common roots, but today all these four concepts have their own distinct meaning.

\(^{11}\) Elshtain, p. 753.
\(^{12}\) Neff 2014, p. 9. See also Elshtain, p. 753-754: “The theological work of charity informed Grotius’ work, hence it has a foundation in God’s commands and calls to humankind, as well as in notions of a *ius gentium*, a secular law of the peoples, as encoded in Justinian’s *Corpus Juris Civilis*”.
\(^ {13}\) Neff 2014, p. 9, see also Shaw 2014, p. 18.
\(^ {14}\) Shaw 2014, p. 18-19.
\(^ {15}\) Fotion, Coppetiers and Apressyan, p. 11. But see Kinsella and Carr, p. 55, who hold that there can be no middle ground between pacifists and realists.
\(^ {16}\) Morgenthau, pp. 24-31.
\(^ {17}\) Kinsella and Carr, p. 13.
\(^ {18}\) McPherson, p. 83.
5.2.3. Proportionality in Just War Theory

Just War doctrine acknowledges that, under certain restrictions, there may be a just cause to go to war, but the war fighting is subject to restraints. Just War theory contains both a *ius ad bellum* and a *ius in bello* component and both components contain a proportionality test.

5.2.3.1 The *Ius ad Bellum* Proportionality in Just War Theory

Hugo Grotius lists a number of conditions for a war to be just, including “a just cause, the necessity of waging war to attain the just cause, a determination of the probability of success, the right intention by the defender, a public declaration of war by the proper authority, and a proportional response to aggression.” Other commentators add the condition that waging the war must be the last resort for a State.

The proportionality condition of the *ius ad bellum* part of Just War theory says that “even if a war does achieve relevant benefits, it is wrong if the destruction it causes is excessive, or out of proportion, to those benefits.” The *ad bellum* proportionality principle in Just War theory may therefore be described as a proportionality ‘of ends’. This criterion asks the question “whether the overall harm likely to be caused by the war is less than that caused by the wrong that is being righted.” This implies that not all wrongs are sufficiently wrong to justify armed force, because inevitably, the war would also result in evil. This must be understood as a calculation of all the wrongs that result from the war, not only the evil that is expected to fall upon the party that is contemplating to use armed force, and compared to all the good that is likely to result from the war. The criterion of last resort is related to this calculation, because it “demands that actors carefully evaluate all the different strategies that might bring about the desired ends, selecting force if it appears to be the only feasible strategy for securing those ends.”

Fotion notes that the principle suffers a major deficit, because it is only possible to apply the principle in the easy cases. In the hard cases, even if it would be accepted that...
it is sufficient if the overall harm likely to be caused by the war is less than 50 percent, it is simply impossible to quantify the percentage in any credible way.\textsuperscript{26} This leads Fotion to conclude that the \textit{ius ad bellum} proportionality principle in Just War theory “will tend to be permissive”.\textsuperscript{27}

\textbf{5.2.3.2 The Ius in Bello Proportionality in Just War Theory}

The proportionality condition of the \textit{ius in bello} says that “an act in war is wrong if the harm it causes, especially to civilians, is out of proportion to its military benefits.”\textsuperscript{28} The term proportionality thus refers to “the total calculus of the balance of goods and evils associated with a particular operation or action in the course of a war.”\textsuperscript{29}

The \textit{ius in bello} component of Just War theory may be explained through the (philosophical) doctrine of double effect. The theory of double effect was first formulated by Thomas Aquinas. It may be summarised as the idea that any act that is done may have both an intended consequence, and an unintended consequence. Even if the objective of an act is good, the action might still result in unintended negative consequences. The doctrine of double-effect states that the unintended negative consequences are excusable if four conditions are satisfied. First, the desired end must be good in itself. Second, only the good effect must be the intention of the act. Thirdly, the good effect must not be produced by means of the evil effect, and finally, the good of the good effect must outweigh the evil of the evil effect (proportionality).\textsuperscript{30}

In military terms, “[d]ouble effect is a way of reconciling the absolute prohibition against attacking non-combatants with the legitimate conduct of military activity.”\textsuperscript{31} For the purpose of collateral damage during armed conflict, the theory of double effect says that it matters whether damage to civilian objects or loss of civilian lives result from a deliberate attack on these persons or objects, or whether these were the result of an attack on another, legitimate military objective (consisting of either persons or objects), as a foreseeable, but still not desired side effect.\textsuperscript{32} Some philosophers criticize the doctrine of double effect. For example, McKeogh argues that “for an attack on a military objective to be just, there must be not only an intention but also a likelihood of no civilian deaths occurring as a result (...) For a military act to be just, it must be reasonably probable that no civilian will be killed.”\textsuperscript{33}

\begin{thebibliography}{99}
\bibitem{26} Fotion, p. 93.
\bibitem{27} Fotion, p. 93.
\bibitem{28} Hurka 2008, pp. 127-128. See also Bellamy, p. 124.
\bibitem{29} Van Damme and Fotion, p. 129.
\bibitem{31} Walzer 1977, p. 194.
\bibitem{32} There is no unanimity among philosophers about the justification the double effect doctrine provides for collateral damage. See for example Lefkowitz, p. 159.
\bibitem{33} McKeogh 2002, p. 170, and accompanying footnotes.
\end{thebibliography}
Waltzer notes that even though it is important that the intention is that civilians are spared, the theory of double effect fails to acknowledge that in some instances the death of civilians may be nonetheless foreseen. He concludes that the danger is, that an attack may be morally just on the basis of the doctrine of double effect, but still is likely to cause a large number of foreseeable civilian casualties. He believes that the principle of proportionality that is also included in the theory of double effect, is “a weak constraint” and therefore, there is a danger that the theory of double effect provides a “blanket justification” for civilian damage. Waltzer therefore argues that not only must the intention of the attacker be good, he must also “aim narrowly at the acceptable effect; the evil is not one of his ends, and, aware of the evil involved, he seeks to minimize it, accepting costs to himself.” An interesting preliminary test that may be relevant here, derived from the doctrine of double effect, is the answer to the test question provided by Bennet: “if you had believed that there would be no civilian deaths, would you have been less likely to go through with the raid?” This filters out any attack that has the objective to kill civilians, in particular to lower the morale of the civilian population to sustain or support the fighting. The principle of proportionality in Just War theory entails that if damage to civilians is foreseeable, it must also be minimised. This may sometimes lead to a moral obligation on the soldier of the attacking party that they risk their own lives to a certain extent. Therefore, a soldier acts morally just if he displays a “positive commitment to save civilian lives” because civilians are entitled to more protection than soldiers. Walzer provides two relevant examples. The first concerns the way French pilots engaged factories in occupied France during World War II. Because they were so keen to hit as few French civilians as possible, they flew at low altitude, bombing as precisely as they possibly could. This posed more risk to themselves, but they decided to go ahead with that method anyway. The second example, also from World War II, is the way the Allied troops attacked the plant for heavy water located in Vemork, Norway. In 1943, the plant was attacked for the first time. The military advantage that was sought was the delay of the development of nuclear weapons by German scientists. This was obviously a very important objective, thus the military necessity of this attack may be deemed to be high. Nonetheless, the British and Norwegian planners did not decide to attack the plant through a devastating airstrike. The first attempt by commandoes was a failure however, killing 34 men. A second attempt, by a smaller squad, succeeded without any casualties. When later in the war, the production of heavy water at the plant had resumed, and the security of the facility had been ameliorated, the plant was bombed by planes, killing 22 Norwegian civilians.

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37 Bennet, p. 189.
38 Walzer 1977, p. 156.
39 Walzer 1977, p. 156.
In short: the doctrine of double effect justifies killing civilians when attacking military targets. The constraint on these unintended, yet foreseen, civilian casualties is the proportionality principle. This principle prevents that the mere intention to hit a military objective is sufficient to justify any number of civilian casualties, and destruction of civilian property. There needs to be a fair balance.

5.2.4 Sub-Conclusion

As mentioned above, the proportionality requirement is found in both the *ius ad bellum* and the *ius in bello* components of Just War theory, but the meaning of the notion of proportionality is different in the two components. According to a commonly accepted understanding of Just War theory, the *ius ad bellum* and the *ius in bello* must be judged separately. Yet, there is a connection between the *ius ad bellum* and the *ius in bello* with regard to proportionality, because the use of armed force "is not justified where the necessary means to be employed to achieve the object would be inherently excessive or indiscriminate." Whether a similar connection is present in international law is explored below in Chapter 8.

As is demonstrated in Chapter 6 and in Part IV of this study, the interpretation of the IHL proportionality rule, is very different than this understanding of the theory of double effect. The prohibition to launch a disproportionate attack that applies to the armed members of a party to an armed conflict is not necessarily based on moral considerations, but on a legally binding rule. Therefore, the following sections will deal with law rather than moral considerations. First, in the next section, the *ius ad bellum* proportionality principle is discussed.

5.3 The Concept of Proportionality in the *Ius ad Bellum*

5.3.1 Introduction

In international law, the *ius ad bellum* regulates the recourse to the use of armed force by States. States, courts and authors agree that proportionality is one of the regulatory conditions that applies to the use of armed force by States under the *ius ad bellum*. This section presents some of the debate regarding the interpretation of these conditions.

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41 Bellamy, p. 128.
42 Shearer, p. 1. See also Bellamy, p. 128-130
43 Although this branch of international law is normally referred to as the law regulating the use of armed force by States, this study refers to this field as the *ius ad bellum* for reasons of clarity, because the use of armed force by States is also regulated by IHL and IHRL.
Traditionally, the *ius ad bellum* concerns primarily inter-State armed force, but the principles of the *ius ad bellum* are also invoked in response to non-State armed groups. Before World War I, the right of States to resort to war was generally regarded as a matter of sovereign discretion, although in most cases States did justify their war efforts referring to self-defence or self-help. In cases where States resorted to armed measures short of war, customary international law, derived from the Caroline Case, dictated that a justification for the armed force was provided. Also in that context, proportionality was considered to be part of the legal requirements governing such armed measures.

The most important sources of the contemporary *ius ad bellum* are the Charter of the United Nations (UN Charter), complemented by customary international law that has developed from State practice since the adoption of the UN Charter. The starting point is article 2(4) of the UN Charter, which prohibits the threat or use of force. The exceptions to this are contained in Chapter VII of the Charter, including the collective enforcement measures of the Security Council as well as self-defence. Article 51 of the UN Charter restricts the right to self-defence to cases where an armed attack has taken place. Some commentators have claimed that a customary right of self-defence beyond Article 51 exists. The ICJ concluded in the Nicaragua Case that the customary right of self-defence complements the right as it is described in Article 51 of the UN Charter.

Article 51 of the UN Charter dictates that a State under attack must fulfil a number of conditions for the legitimate use of armed force in self-defence. First, there needs to be an

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44 See for example Dinstein 2012, p. 272 and Judge Kooijmans’ Separate Opinion in the Armed Activities DRC-Uganda, para 30: “It would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker state, and the Charter does not so require”. See Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, ICJ Reports 2005, p. 306. Examples include the incursions of the Turkish armed forces into Northern Iraq against Kurdisch PKK fighters and the attack by the Colombian armed forces into Ecuador against a base of the FARC-rebels in 2008. See also Ruys.

45 Bryde, p. 361.

46 The ICJ has dealt with questions of the *ius ad bellum* in a number of cases, for example in the Nuclear Weapons Advisory Opinion, the Oil Platforms Case between Iran and the U.S. and the Armed Activities Case.

47 Dinstein calls the prohibition to use force the “bedrock of the contemporary international legal system.” See Dinstein 2005, p. 326. For a thorough study of the scope and content of article 2(4) of the UN Charter, see Stürchler.

48 See Article 51, which notes that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures to maintain international peace and security.” For the subsidiary role the United Nations General Assembly may play, see Stein and Morrissey, pp. 1232-1235.

49 See in particular Bowett, p. 184-185. See also Bryde, p. 363 and Brownlie 1963, p. 272.

50 “The court does not consider that, in the areas of law relevant to the present dispute, it can be claimed that all the customary rules which may be invoked have a content exactly identical to that of the rules contained in the treaties which cannot be applied by virtue of the United States [multilateral treaty] reservation. On a number of points, the areas governed by the two sources of law do not exactly overlap, and the substantive rules in which they are framed are not identical in content. But in addition, even if a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability. Nor can the multilateral treaty reservation be interpreted as meaning that, once applicable to a given dispute, it would exclude the application of any rule of customary international law the content of which was the same as, or analogous to, that of the treaty-law rule which had caused the reservation to become effective.”. The Nicaragua case, para 175, p. 94. Brownlie came, writing in 1963, to the same conclusion as the ICJ did in 1986. See Brownlie 1963, p. 274.

51 See also Ducheine 2008, p. 148 for a discussion (in Dutch).
armed attack. Once an armed attack is under way, the UN Charter sets a procedural condition that the attacked State needs to fulfil: the attacked State needs to inform the UN Security Council that an armed attack has occurred. Thirdly, there is a temporal requirement to halt the use of armed force in self-defence as soon as the Security Council has taken measures necessary to maintain international peace and security. Three more conditions, though not spelled out in article 51 apply. These are the substantive conditions of immediacy, proportionality and necessity, which are derived from the famous *Caroline Incident*.\(^{52}\)

The principle of proportionality in the *ius ad bellum* is closely connected to the notion of necessity.\(^{53}\) Both are “inherent in the very concept of self-defence.”\(^{54}\) One commentator notes that “if a use of force is not necessary, it cannot be proportionate and, if it is not proportionate, it is difficult to see how it can be necessary.”\(^{55}\) However, it seems appropriate to consider necessity separately, before the proportionality of an attack is assessed, in particular for a response in self-defence against an isolated attack. In that situation, the attacked State is obliged to “verify that a reasonable settlement of the conflict in an amicable way is not attainable.”\(^{56}\) Necessity thus refers to the existence of an armed attack and the lack of feasible alternatives. Proportionality relates to the qualitative and quantitative elements of the response to halt and repel the initial armed attack.

### 5.3.2 Proportionality in the Use of Force in Self-Defence

The principle of proportionality regulating the right to self-defence by States is “well established under general international customary law and has to be regarded as implicit in the very notion of self-defence.”\(^{57}\) This is obvious, because when the main rule is that the use of force between States is prohibited, it would make no sense to leave the exception to that rule to be unlimited. Secondly, from the primary purpose of self-defence, which is to restore the situation as it was before the act occurred that provoked the right to self-defence, it also follows that the response must be restrained.\(^{58}\) Proportionality must be applied to determine the scope of the right to self-defence and “serves to determine the intensity and the magnitude of military action.”\(^{59}\)

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53 See for example Gardam 2004.

54 Nuclear Weapons Advisory Opinion, para 41, p. 245.

55 Gray, p. 150.

56 Dinstein 2012, p. 262.

57 Bryde, p. 362.

58 Bryde, p. 363.

In order to determine whether the use of armed force in self-defence is proportionate, the notion of self-defence itself must be defined as much as is possible, for “if left undefined and unregulated, [it] could virtually deny to the prohibition [of the use of force] any meaning.”\textsuperscript{60} For States, the principle of proportionality plays an important “role in modulating the escalation of conflict”\textsuperscript{61} and with the objective to preserve the international order.\textsuperscript{62} The limit of self-defence is the situation where the continuation of the use of armed force would amount to punitive measures. In that situation, the use of force is no longer motivated by an armed response out of self-defence, but as a reprisal and the legality of the applied force must thus be determined on the basis of the legal framework for reprisals.\textsuperscript{63}

In State practice, sometimes other interpretations of the moderation of the use of armed force are encountered. For example, the so-called ‘Powell doctrine’ aims to guide decision makers entering into a war, following an armed attack. Sullivan states that “[t]he Powell doctrine calls for massive or overwhelming force to be used. This is to ensure that U.S. casualties are minimized and the military objective is accomplished without delay.”\textsuperscript{64} The use of the terms “massive” and “overwhelming” in this doctrine seem to stand at odds with the requirements of the principle of proportionality. Sullivan notes that the principle of proportionality should be used to effectively critique the “massive force” of the Powell doctrine, as well as the pre-emptive strike doctrine of the Bush Administration.\textsuperscript{65}

\subsection*{5.3.2.1 Components of the Ius ad Bellum Proportionality}

The amount of armed force that may be legally applied in response to an armed attack in accordance with the right to self-defence is thus not unlimited. Its exact scope has been extensively debated.\textsuperscript{66} The ICJ was confronted with the proportionality test in the \textit{ius ad bellum} in the 2003 \textit{Oil Platforms} Case.\textsuperscript{67} In that case, the ICJ determined that the attack on two Iranian oil platforms was not a proportionate use of force in self-defence “[a]s a response to the mining of, by an undetermined agency, of a single United States warship, which was severely damaged but not sunk, and without loss of life in the circumstances of this case.”\textsuperscript{68}

As a proportionality equation implies that there must be a balance between different values, it must be determined of which components the \textit{ius ad bellum} proportionality equation

\begin{itemize}
  \item \textsuperscript{60} Bowett, p. 4.
  \item \textsuperscript{61} Franck 2008b, p. 3-4.
  \item \textsuperscript{62} Greenwood 1989a, note 22 on page 278.
  \item \textsuperscript{63} See also Section 7.5 below.
  \item \textsuperscript{64} Sullivan, p. 5.
  \item \textsuperscript{65} Sullivan, p. 6.
  \item \textsuperscript{67} \textit{Oil Platforms} Case.
  \item \textsuperscript{68} \textit{Oil Platforms} Case, para 77, p. 198-199.
\end{itemize}
consists. This issue is, according to Gardam, “rarely carefully analysed.” Gardam proposes to use four factors for assessing the proportionality of a response in self-defence: (1) the geographical and destructive scope of the response; (2) the duration of the response; (3) the selection of means and methods of warfare and tactics and (4) the effect on third States. According to Gray, proportionality in the ius ad bellum relates to the size, duration and target of the response. Dinstein describes the principle of proportionality in self-defence as “a standard of reasonableness in the response to force by counter-force” and as a comparison between “the quantum of force and counter-force used, as well as casualties and damage sustained.” According to Dinstein, the proportionality comparison should be made a posteriori. However, he limits this standard to instances where there has been a limited attack or when there have been reprisals. In his opinion, once a full-scale war has started, the attacked State, while acting in self-defence, is not obliged to limit its reaction to the attack it has suffered, but instead it may continue its counter-attack until the attacking party has been defeated in total, with the exception of a legally binding resolution of the United Nations Security Council imposing a cease-fire. The approach advocated by Gazzini is based on the qualitative standard, or, as he calls it, a functional approach to proportionality. Under this approach, it is not on the magnitude of the reaction to an initial attack that is assessed, but the “the objective of the reaction – namely stopping the hostile military activities – and the force employed to achieve it.”

As a minimum, it seems that there is consensus on the proportionality equation in the ius ad bellum to mean that the use of armed force necessary to halt and repulse an armed attack that has occurred, is not disproportionate. For example, if as a result of the initial attack territory of the attacked State has been occupied, the ‘liberation’ of that territory is deemed to be a proportionate response to the attack. However, a more precise answer to the exact content of the principle of proportionality in the ius ad bellum depends to a large extent on the circumstances of the situation, such as the military capacity of the aggressor. It seems clear that proportionate use of force in this context does not only mean an equal use of force in the quantitative sense. For example, a part of the State’s territory that has been occupied with little resistance, may be liberated with a larger amount of armed force, assuming this is a legitimate end to use armed force.

Kretzmer is of the opinion that there should be room for both a quantitative and a qualitative approach. In the quantitative approach, the degree of force that was used in the

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71 Gray, p. 150.
72 Dinstein 2012, p. 233.
73 Dinstein 2012, p. 238.
74 Dinstein 2012, p. 262.
75 Dinstein 2012, pp. 262-267.
76 Gazzini, p. 148
initial attack by the attacking State is the standard for the maximal proportionate response to that attack.\textsuperscript{78} The qualitative approach seems to equate the functional approach taken by Gazzini. In this context, “proportionality relates to an assessment of the harm caused by means used to further legitimate ends (means-ends proportionality).”\textsuperscript{79} Thus, if the magnitude of the counterattack needed to achieve the desired result, which is to halt and repulse an initial armed attack, is below the level of the initial attack, this is the maximum of armed force that may be used. This is a qualitative proportionality assessment. If the magnitude of the counterattack needed is above the level of the initial attack, the next check is a quantitative approach that evaluates whether the counterattack has reached its objectives when a similar magnitude is reached as that of the initial attack. After the quantitative approach has been assessed, but the State that was initially attacked cannot reasonably be claimed to have halted and repulsed the initial armed attack, it may still not be disproportionate to use more armed force than the initial attack did.

5.3.2.2 The Temporal Component

The temporal condition for the use of armed force in self-defence is relevant both before the actual use of armed force in self-defence and during that use. In the former case, the deciding factor is the question whether the measures that have been taken by the Security Council (if any), have been effective.\textsuperscript{80} If that is not the case, the armed force in response cannot be delayed indefinitely, but action must be taken rather quickly. This requirement of immediacy means, that there “must not be an undue time-lag between the armed attack and the exercise of self-defence in response.”\textsuperscript{81}

Although the \textit{ius ad bellum} is sometimes explained as the legal framework regulating the right of States to go to war, the question remains of whether there are still proportionality requirements once the armed conflict is already under way. On this issue, different approaches are advocated.\textsuperscript{82} Dinstein states that the proportionality of the response should be considered at the beginning of the war, and has to be “predicated on the gravity of the...
isolated armed attack and the degree to which it affects the victim State." He thus denies the continued applicability of a proportionality requirement after the armed conflict has actually evolved into a full-scale war. Gazzini holds that the proportionality requirement “must be constantly kept under review while the military operations persist.” This means that an initially legitimate use of armed force in the sense of the *ius ad bellum* can no longer be deemed to be proportionate once a certain level of destruction and military gain has occurred, and the continued use of armed force thus becomes illegal. Applying the qualitative approach of the *ius ad bellum* proportionality, the symmetry may disappear between the result sought by the use of force in self-defence and the quantity of the armed force. An example may be the use of force that was needed to expel Iraqi armed forces occupying Kuwait from Kuwaiti territory and beyond a certain distance beyond the borders, and the subsequent retreat by the US-led Coalition forces in 1991. It must be noted that in that event, the proportionality and necessity of the use of armed force in self-defence are closely connected, since it does no longer seems to be necessary to apply armed force once the enemy has been expelled from the territory it occupied.

5.3.2.3 Necessity and Proportionality in the *Ius ad Bellum*

Where the proportionality requirement regards the magnitude of the armed response to an armed attack, the necessity requirement regards the question of whether the use of armed force is necessary in the first place. As Ago noted: “the state attacked must not, in the particular circumstances, have had any means of halting the attack other than recourse to armed force.” Like the proportionality requirement, the necessity requirement is confirmed by the ICJ to be part of the law on use of self-defence both under the UN Charter and customary international law. It must also be deemed to remain applicable once the conflict is already on-going. In general, the definition of necessity of the use of armed force in self-defence is derived from the Caroline formula, which states that the ‘[n]ecessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.’ In contemporary terms, this must be understood as being subject to the requirements of article 51 of the UN Charter. This means, as a strict interpretation of necessity, that if the UN Security Council is taking action, there is no need to use armed force in self-defence and if the attack is already over, there is no necessity to use armed force in self-defence and

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83 Dinstein 2012, p. 263.
84 Dinstein 2012, pp. 262-267.
85 Gazzini, p. 147.
86 But see Dinstein 2012, p. 262.
87 Ducheine 2008, p. 238.
88 Ago, p. 69.
90 See the Caroline Case, pp. 1137-1138.
the attacked State must rely on the Security Council to take measures.\textsuperscript{91} However, this strict view is not followed in State practice in a consistent manner\textsuperscript{92} and it may be argued that the authority to use armed force in self-defence is dependent on the condition that the measures the UN Security Council has taken are effective. In any case, there is a link with the temporal component here. Tibori-Szabó explains that the armed attack must "create an immediate need for action."\textsuperscript{93} In addition, there is a necessity requirement that needs to be satisfied during the armed conflict. If it is no longer necessary to continue the armed response, for example because the threat has ended, the necessity requirement prescribes that the armed response is halted.

The link between proportionality and necessity is clear in this context. Once it is no longer necessary to use armed force, any type of armed force that is used nonetheless, will be disproportionate in comparison to the objective of the use of that armed force. That does not make the use of that force disproportionate because it is unnecessary, but also disproportionate because the distinct requirements of the \textit{ius ad bellum} proportionality test are not satisfied. As is noted in the Caroline Case: "self-defence must involve ‘nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within that.’"\textsuperscript{94} And if there is no necessity to take action in self-defence, any use of force is simply illegal, whether it is proportionate or not.

\textbf{5.3.3 Other Proportionality Equations in the \textit{Ius ad Bellum}}

Except for the use of armed force by States for reasons of self-defence, a number of other justifications for the use of armed force may be possible. These include: the protection of nationals abroad, humanitarian intervention, reprisals, the protection of vital national or international interests, aid to national liberation movements and reprisals.\textsuperscript{95} It must however be noted that there is no unanimity amongst States or scholars on the legality of any of these justifications for the use of armed force. If accepted as legal justifications for the use of armed force, the proportionality requirements in those situations may differ from the proportionality requirement as discussed above. For example, in situations where the protection of nationals abroad is relevant, it seems clear that proportionate use of force in self-defence for this reason is limited to the function of this specific use of force.\textsuperscript{96}

\begin{thebibliography}{9}
\bibitem{91} Gardam 2004, p. 150.
\bibitem{92} Gardam 2004, p. 150.
\bibitem{93} Tibori-Szabó, p. 122.
\bibitem{94} See the Caroline Case, pp. 1137-1138.
\bibitem{95} Greenwood 1989a, p. 274.
\bibitem{96} See Waldock, who notes that the humanitarian consideration could be decisive to invoke the general principle of self-protection, which could lead to a necessity to use armed force in self-defence. Waldock finds three conditions under which intervention for the safety of own nationals is justified: "(1) an imminent threat of injury to nationals, (2) a failure or inability on the part of the territorial sovereign to protect them and (3) measures of protection strictly confined to the object of protecting them against injury." See Waldock, pp. 467-468. See also Dinstein 2012, pp. 255-258.
\end{thebibliography}
The use of force with the objective to stop a certain human tragedy to continue, such as the use of armed force by an oppressive government against its own population that includes gross human rights violations, has not developed into an agreed exception to the prohibition to use armed force. A clear example is the use of armed force by NATO against Yugoslavia, during the Kosovo-crisis in 1999. However, in the event that an intervention is executed with a UN-Security Council mandate, a similar type of operation would obviously be legitimate. Similarly, the use of force to protect nationals abroad could have consequences for the type of force that may be used, in order to remain proportionate under the *ius ad bellum* because the use of force that affects civilians is directly contrary to the objective of the armed force that is used. However, to claim that no civilians may be hit at all, or only proportionate under the *ius in bello*, implies an inescapable mix-up between the *ius ad bellum* and the *ius in bello* proportionality principles. From a military perspective, a legal obligation that would amount to an absolute prohibition on civilian casualties during an armed conflict waged against military objectives, is unacceptable, because it is unrealistic. As an example, Francioni proposed that the prohibition to use force may be violated in order to prevent another State from committing gross human rights violations against its own citizens. The principle of proportionality in this context “entails that the use of force be strictly limited in its scope and intensity to what is absolutely necessary (a) to achieve the stated goal of protecting the life and security of innocent victims of other States massive violations of human rights and (b) to promote the objective of improving the overall legitimacy of the system by permitting an exceptional recourse to force to halt unacceptable atrocities.”

Reprisals in the *ius ad bellum* may be defined as “counter-measures that would be illegal if not for the prior illegal act of the State against which they are directed.” According to the majority of authors, armed reprisals in the *ius ad bellum* must be deemed to be prohibited since the adoption of the UN-Charter, unless they would fall within the scope of measures of self-defence in accordance with the UN-Charter. The objective of armed reprisals in the *ius ad bellum* in the pre-UN-Charter period was to punish States for illegal acts. It is important to point out that armed reprisals under the *ius ad bellum* are distinct from belligerent reprisals, which is a type of operation governed by the rules of the *ius in bello*.

It seems that the legality of the justifications to use armed force mentioned in this section is not settled today, nor will it be in the foreseeable future. However, it seems that

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97 This justification has been labelled as ‘humanitarian intervention’. See generally Gill 2010, pp. 221-227.
98 Francioni 2005, p. 291. Francioni applies his conditions to the 2003 invasion of Iraq by the US led coalition. He concludes that “[a]s to the conditions of proportionality and respect for humanitarian law, the hard reality of the US led intervention in Iraq is that in no way it can be characterized as a limited use of force intended to stop large scale violations of human rights: it rather constitutes an all-out war aimed at taking control of the whole target state and to coercively impose a new government, nominally in the name of democracy, but, in reality, in the pursuit of an hegemonic design of power politics.”
99 Schachter, p. 168.
101 But it must be noted that unarmed reprisals are not prohibited by the UN-Charter. Examples include the freezing of the assets of the offending State. See Schachter, p. 169.
102 See Chapter 7, Section 7.5 below.
invocation of one of these justifications will also invoke the application of proportionality as a regulating factor for the use of that armed force, to prevent further escalation.

5.3.4 Sub-Conclusion

The aim of the *ius ad bellum* is to put restraints on the use of armed force. Therefore, the exceptions to the prohibition of the use of armed force by States are strictly regulated. The principle of proportionality plays an important role in these exceptions, which makes it vulnerable to misuse by States whose aim it is to justify their recourse to armed force. The application of the principle of proportionality in the *ius ad bellum* works best when it is a clear case, or in other words: “the principle can deal with the easy cases.”\(^{103}\) The problem presents itself when it is confronted with a hard case, or when proportionality is used to pursue the political aims of a State. When it is a close call or when there is insufficient information to make an informed decision, the principle of proportionality “will tend to be permissive.”\(^{104}\)

The circumstances of the individual case will dictate to a large extent what kind of response is still proportionate. The size, duration and effect of the armed attack are relevant factors. In addition, a proportionate response is the use of armed force against an armed attack that “is required under the circumstances to repel it and put an end to the threat of further attacks”\(^{105}\), thus also the military capacity and expressed intention of the opponent to repeat or sustain its armed attack are relevant factors to the proportionality equation in the *ius ad bellum*.

In addition, it must be kept in mind that there are different types of proportionality equations applicable in the *ius ad bellum*, depending, for example, on the type of opponent, the question whether the armed attack is still ongoing and the objective of the use of armed force in self-defence. As Kretzmer summarises:

“The diverse types of situation in which a state might use force in self-defence, and the different ends that might be legitimate in those situations, lead to the conclusion that differing tests of proportionality might be appropriate in different cases. This is not a case of ‘one size fits all’. Several variables may affect the ends of the force used in self-defence, and hence the test for assessing its proportionality; whether the attack is ongoing, completed, or imminent;

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\(^{103}\) Fotion, p. 93.

\(^{104}\) Fotion, p. 93.

\(^{105}\) Gill 2007, p. 124. Gill explains that “[i]f an attack is simply an isolated incident, restricted in scale, location and time, self-defence will correspondingly be limited to what is necessary to ward off the attack. If, however, an armed attack consists of a series of related incidents over a period of time, proportionality would allow for a larger scale response aimed at putting an end to what is in effect a phased attack. In the case of a large scale attack, designed to significantly disrupt the target State, or take over (part of) its territory, proportionality would allow waging a full scale war in self-defense to reduce or eliminate the attacker’s capacity to conduct military operations, or otherwise continue the attack. This could necessitate, in some cases, the total defeat of an attacking State and the replacement of its government with one which is ready to meet its international obligations.”
whether it was carried out by non-state actors and, if so, whether it can be imputed to a state; and, finally, the scale and effects of the attack, when judged in the context of the relations between those responsible for the attack and the victim state.\textsuperscript{106}

In addition, although even proportionate reprisals are deemed to be illegal because of their punitive character, a certain retaliatory component and a desired deterrent effect is often present when armed force is used in self-defence. There may thus in some cases be only room for a relatively straightforward quantitative, or ‘tit for tat’ approach, for example when two States who are in a permanent state of war with each other perform rather limited attacks and counter attacks.\textsuperscript{107} In other situations, the objective of the self-defence may be the deciding factor for the proportionality of the use of armed force in self-defence.\textsuperscript{108} These situations call for a qualitative approach, which dictates that the magnitude of the use of armed force in response to an initial attack is dependent on the question whether the use of armed force is necessary to halt and repulse the armed attack.

5.4 The Concept of Proportionality in International Human Rights Law

This section provides a short overview of the manifestation of the principle of proportionality in IHRL. The main focus is on the application of the principle with regard to the use of force, inside or outside the context of an armed conflict. This concerns thus in particular the right to life.\textsuperscript{109} For that reason, after two introductory paragraphs that deal with the more general issues of proportionality in IHRL, the applicability of IHRL during armed conflict is briefly discussed and reference is made to the application of the principle of proportionality in the context of a ‘conduct of hostilities’ situation and the use of armed force in peacetime, which is referred to as a ‘law enforcement’ situation.\textsuperscript{110}

5.4.1 Introduction

IHRL is the framework of international law obligations that regulates the authority States exercise over individuals, governing the rights and obligations of individuals in order to protect them. IHRL regulates different types of rights, which aim to respect, protect or to fulfil

\textsuperscript{106} Kretzmer 2013, p. 267.

\textsuperscript{107} A case in point here could be the attack by North Korea on the isle of Yeonpyeong and the subsequent armed attack in return by the South Korean forces on 23 November 2010. See below, Section 12.2.3 for a description.

\textsuperscript{108} An example of this situation could be the response by the allied forces to the occupation of Kuwait by Saddam’s Husseins Iraqi forces in 1990-1991.

\textsuperscript{109} See generally, Schabas, pp. 365-386.

\textsuperscript{110} These different situations have also been labeled ‘paradigms’. See Melzer 2010a, p. 36 and pp. 40-41 and Pouw, p. 331.
the rights of individuals. Proportionality in International Humanitarian Law is concerned with the vertical relationship between a State and the individuals under its jurisdiction and the purpose of IHRL is to provide “a number of freedoms and protection from arbitrary or discriminatory interference and treatment by the state and its agents, and to require the state to provide a legal framework to secure these rights and freedoms as well as (to undertake) to provide essential social, economic and cultural safeguards and security to its population.”

IHRL is based on numerous international and regional treaties and rules of customary international law. States may however in certain cases derogate from some of their IHRL obligations. The international instruments that are based on the human rights conventions have developed a considerable body of jurisprudence that assists in the interpretation of IHRL obligations.

There are many different manifestations of the principle of proportionality in IHRL. Firstly, proportionality has been applied in order to restrict States’ interference with the rights of individuals, for example in the European Convention of Human Rights. Proportionality is also applied as a means to balance the effects of the measures taken by a State to the standards of democratic society, which is sometimes referred to as the ‘margin of appreciation’ doctrine. Cannizarro refers to these two types respectively as ‘qualitative’ and ‘quantitative’ proportionality. In addition, proportionality is applied in IHRL to the determination of a certain punishment in criminal proceedings. But according to Christoffersen, the principle of proportionality is used in IHRL in a much wider sense, constituting an independent means of interpretation. He argues that “the proportionality principle is, or is likely to become, a central interpretative principle in [IHRL].” This central principle would be divided into three sub-principles:

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111 Kleffner 2013, p. 72.
112 Gill 2014, p. 337.
113 The most important international human rights conventions are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Important regional human rights conventions include the European Convention on Human Rights (ECHR) and the American Convention on Human Rights (ACHR).
114 Arai-Takahashi, p. 14. Arai-Takahashi provides different definitions for the principle of proportionality and the concept of ‘margin of appreciation’ in Human Rights Law. According to Arai-Takahashi, the term ‘margin of appreciation’ is “used to indicate the measure of discretion allowed to the Member States in the manner in which they implement the [ECHR]’s standards, taking into account their own particular national circumstances and conditions.” The principle of proportionality is described to “restrain the power of State authorities to interfere with the rights of individual persons, and hence it should be regarded as a device for the protection of individual autonomy.” In other words, the principle of proportionality in general Human Rights Law is “inherent in evaluating the right of an individual person and the general public interests of society.” Additionally, the organs of the ECHR have also applied a more specific notion of proportionality, that concerns the balance between “the means employed and the aim pursued in order not to overburden the rights of individual persons in return for social goods.”
115 See for example Cannizzaro 2000, p. 459.
116 D’Amico, p. 307: “[t]he principle of proportionality (...) concerns the severity of penalties in relation to the criminal offense that has been committed. This principle is widely enforced in the European legal systems, although it is not as omnipresent in their constitutions as the principle of legality is.”
117 Christoffersen 2010, p. 17.
a. the principle of suitability: the measure affecting individual rights must be suitable for the purpose of facilitating or achieving the pursued aim;
b. the principle of necessity: a suitable measure must also be necessary in the sense that there is no other equally suitable measure available, which is less restrictive to the protected right, and
c. the principle of proportionality in the strict or narrow sense (the principle of balancing): a suitable and necessary measure may not upset the fair balance and/or destroy the essence of the right.¹¹⁸

These three components may also be applied as the requirements that need to be satisfied before the use of armed force against individuals may be justified, as an exception to an individuals’ right to life, as will be explained below.

Cannizzaro and De Vittor view proportionality not only as an instrument to apply to the relationship between the State’s sovereign powers and the conventional human rights protections granted to individuals, but they argue that (in the scope of the European Convention of Human Rights) proportionality “can be truly considered as a general technique of conflict-settling.”¹¹⁹

In this study, the focus is on the more factual application of the proportionality principle as a restraint on the use of armed force.

5.4.2 Applicability of International Human Rights Law during Armed Conflict

When the situation in a State is developing from an ordinary peacetime situation to an armed conflict, the discussion will start which rules must be applied to the use of force by police or armed forces to counter the unrest and restore order, and which rules take precedence. It is evident that civilian protection by the rules of IHRL is under pressure when a situation of armed conflict emerges. This pressure becomes evident not only with regard to the use of lethal armed force, but also in other situations in which a proportionality test must be applied to other human rights. Proportionality is then used as an instrument applied to determine the extent to which a State may still be expected to possess the ability to protect the human rights of its citizens once an armed conflict exists on its territory. For example, the State may no longer be able to guarantee the right to education once it is no longer able to control certain parts of its territory. In addition, the existence of an armed conflict could be a reason for the State to decide that measures that restrict the privacy and freedom of movement of its citizens must be put in place. These measures must be taken in a proportionate manner,

¹¹⁸ Christoffersen 2010, p. 17. Christoffersen comments that in particularly the context of the European Convention of Human Rights, the principle of proportionality is (mis)understood as a means of limiting existing rights. Proportionality, in his view, should be seen as a means of interpretation of the balance between the interests that are behind the rights. (he quotes Sebastian van Drooghenbroeck, who introduces the phrase ubi interpretation, ibi proportionalitas). See also Christoffersen 2010, p. 43.

¹¹⁹ Cannizzaro and De Vittor, p. 137.
in comparison to the necessity of those measures. In addition, it may happen that certain persons who pose a threat to the State are deprived of their liberty because of that threat. In that case, provided these persons are not being held on the basis of regular criminal charges, a proportionality calculation must be made which takes into account the necessity to keep a person in administrative detention and the threat he may or may not continue to pose to the government.\textsuperscript{120}

It is now without debate that the start of an armed conflict does not mean that the rules of IHRL cease to be applicable, even if simultaneously the rules of IHL become applicable.\textsuperscript{121} For some types of human rights, the applicability of IHL does not make a difference, either because the protection is commonly afforded by both legal frameworks, such as the prohibition of torture\textsuperscript{122} and other inhumane treatment, or because the existence of an armed conflict is normally irrelevant for the protection of these human rights. Examples of the latter category include some civil liberties, such as the right to marry, and certain political rights.\textsuperscript{123}

The territorial reach of IHRL obligations is not limited to only a State’s own territory, but may also be exported to other areas, for example when a State deploys its agents, military or other, outside its own territory and exercises jurisdiction. The ICCPR states in article 2(1) that the human right obligations of States apply “to all individuals within [their] territory and subject to [their] jurisdiction.”\textsuperscript{124} This extraterritorial applicability of IHRL obligations, focussing on the interpretation of the term ‘jurisdiction’, has been the subject of deviating jurisprudence of Human Right Courts and debates within the academic community. The Human Rights Committee has said in General Comment No. 31, that any State party to the ICCPR must “respect and ensure the rights laid down in the [ICCPR] to anyone within the power or effective control of that State Party, even if not situated within the territory of that State Party. (…) This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement

\textsuperscript{120} See for example Kleffner 2010, pp. 465-479, Deeks, pp. 403-436 and McGoldrick, pp. 507-530.

\textsuperscript{121} See for example the ICJ Nuclear Weapons Advisory Opinion, the Wall Advisory Opinion, the ICJ Case Concerning Armed activities on the territory of the Congo, The UN Human Rights Committee, General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the ICCPR. See also Droge 2008, Hampson 2008, and Gill 2014.

\textsuperscript{122} See articles 1 and 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in IHRL and for the IHL protection: common article 3(1) (a) of the Geneva Conventions and article 75 (2) (a) (ii) API. Note however that the prohibition of IHRL is more restricted than the IHL prohibition of torture: where article 1 defines torture as acts committed by State agents, IHL protection does not include the requirement that the torture is executed by a State agent.

\textsuperscript{123} Schindler, p. 939-940. See also Bethlehem, p. 190.

\textsuperscript{124} The wording in the regional IHRL instruments differs slightly, but both also refer to the ‘jurisdiction’ of states. See article 1 ECHR and article 1(1) ACHR.
Although not all States or commentators agree with the position of the Human Rights Committee, the ICJ, the European Court on Human Rights (ECtHR) and the Inter-American Court and Commission on Human Rights (IACiHR) have accepted the extraterritorial applicability of human rights obligations during military operations outside the territory of a State, provided that the jurisdiction requirement is fulfilled. In practice, it must be noted that this concerns in particular situations where a State is conducting detention operations extraterritorially. However, the IACiHR has included in its interpretation of jurisdiction also military air operations in international airspace, unlike the ECtHR has done in its Bankovic Case.

5.4.3 Proportionality Restraining the Use of Force in International Human Rights Law

Once a State has jurisdiction over a certain territory or person, it may take measures including the use of lethal force, thus risking the violation of the right to life of individuals. Proportionality plays an important role in the assessment of whether an individual’s right to life has been violated by the use of lethal force by a State agent. Because during an armed conflict the rules of IHL may be simultaneously applicable to the situation, this situation will be dealt with in Chapter 8. The ordinary circumstances where the IHRL principle of proportionality finds application, is peacetime, where the police is authorised to use lethal force within strict limitations, in their duty to enforce the law, and thus violate the right to life in case this force is used arbitrarily. The legitimate use of force is then restricted by both international human rights standards and national law. The international rule could emanate from customary international law or from international agreements that the State in question is a party to, such as the UN, European or Inter-American human rights treaties. The right to life may not be derogated from and is considered to be a rule of international

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126 See for example the position of Milanovic 2011: “the state obligation to ensure human rights is not limited territorially; however, the obligation to secure or ensure human rights is limited to those areas that are under a state’s effective overall control.” See Milanovic 2011, p. 263.
127 See for example the position of Israel, The Netherlands, the United Kingdom and the USA quoted in Droege 2007, p. 326. See also Conte 2013, p. 233-258.
128 See the Wall Advisory Opinion, paragraphs 108-111.
129 See for example ECHR Bankovic, paragraph 70 and 80, Öcalan, paragraph 91, Loizidou, paragraph 52, Al-Skeini, paragraph 130-142 and Hasson, paragraph 80.
131 IACiHR, Brothers to the Rescue, Report No. 86/99, Case no 11,589, 29 September 1999, paragraph 23.
132 ECHR, Bankovic and others v Belgium and others, application no. 52207/99, Judgement of 12 December 2001, paragraph 80. See also the Jaloud Case, in which the Grand Chamber of the European Court of Human Rights extended the notion of jurisdiction to cover the presence of armed military personnel at a roadblock. See Case of Jaloud v. The Netherlands (Application no. 47708/08), Judgement, 20 November 2014, para 152-153, p. 64.
133 Article 6 of the ICCPR: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” See also article 2 ECHR and article 4 ACHR.
customary law. The right to life serves as a foundation of democratic society and must therefore be subject to strict regulations. Accordingly, “[u]nder human rights law, the planning of an operation with the purpose of killing is never lawful.” The strict regulation of the use of lethal force is complemented by standards like the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions and the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (the 1990 Basic Principles).

An early manifestation of the IHRL principle of proportionality as a restriction on the use of force in peacetime is found in the jurisprudence of the Prussian Supreme Administrative Court, which applied the principle to police powers first in 1882, reviewing the police powers in law enforcement. The principle’s premise is that there must be a balance between the means used and the result desired. It must be noted that the use of proportionate force is also possible in circumstances where the objective is to arrest persons or even seize goods. IHRL requires that lethal force is used in a proportionate manner with the objective to protect life, including the life of the suspect. The right to life leaves uncertainty when deprivation of life must be deemed to be ‘arbitrarily’. Even if there would be a provision of national law in a certain situation that would permit the taking of one’s life, it could still be deemed to be arbitrary on the basis of IHRL: “[t]he prohibition of ‘arbitrary’ taking of life connotes that an individual must not be deprived of his life in unreasonable or disproportionate circumstances.”

There are a number of exceptions, which do not render

134 Bantekas and Oette, p. 316, Rodley, p. 176, see also Henckaerts & Doswald-Beck 2005a, rule 89, pp. 311-314.
135 Skinner, p. 37.
136 Droege 2007, p. 345.
138 The Basic Principles were adopted by the UN Congress on the Prevention of Crime and the Treatment of Offenders and subsequently welcomed by the UN General Assembly in resolution 45/166 in 1990. They include the following regulations in Principle no. 5:
Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall:
(a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved;
(b) Minimize damage and injury, and respect and preserve human life;
(c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment;
(d) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment.
6. Where injury or death is caused by the use of force and firearms by law enforcement officials, they shall report the incident promptly to their superiors, in accordance with principle 22.
7. Governments shall ensure that arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence under their law.
8. Exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles.
139 Emiliou p. 23-24, referring to the Decisions of 14 June 1882, 9 PROVG 353 and 10 April 1886, PROVG 424.
140 See the Saiga Case of the International Tribunal for the Law of the Sea (ITLOS), as an example outside ordinary law enforcement in the domestic situation, where the Tribunal states that “[a]lthough the [UNCLOS] Convention does not contain express provisions on the use of force in the arrest of ships, international law (...) requires that the use of force must be avoided as far as possible and, wherever force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law. These principles have been followed over the years in law enforcement operations at sea. See Judgement of 1 July 1999, concerning the M/V Saiga (no. 2) Case between Saint Vincent and the Grenadines v. Guinea, paragraph 155-156.
141 Rehman, p. 94.
the right to life as absolute as it may appear at first sight. For example, the ECHR permits the use of lethal force (a) in defence of unlawful violence, (b) to arrest a person or to prevent a detained person from escaping or (c) to restore order in situations of riots or insurrection. In addition, a person is deemed not to be arbitrarily deprived of his life if his killing was lawful under IHL. One could argue that there could be no question of introducing a proportionality test on top of these exceptions, since the right to life is such an important right, similar to the right not to be subjected to torture or inhumane treatment. However, proportionality plays a very important role in the determination of whether an individual was deprived arbitrarily of his right to life. Principle 6 of the 1990 Basic Principles states that:

“Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

International human rights courts have dealt with the proportionality principle in the context of the right to life on a number of occasions. Under the jurisdiction of the ECHR, the leading case is the McCann case of the ECtHR, that deals with the shooting of known IRA operatives by UK soldiers in Gibraltar. In the case, the Court found that as far as the temporal component is concerned, the consideration of proportionality may include the planning and conduct of the operation. For that reason, the Court decided that in the planning phase of the operation, the UK soldiers did not take sufficient precautionary measures, and as a result, the use of lethal force had not been absolutely necessary. The proportionality of the action must be judged with reference to the means used (lethal force), which must not be "out of proportion to the aim pursued." Another clear example of the application of proportionality by the ECtHR is the case of Nachova. In this case, the ECtHR stated that "recourse to potentially deadly force cannot be considered as ‘absolutely necessary’ where it

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142 Article 6 (1) ICCPR, Article 4 (1) ACHR, Article 4 ACHPR and article 2 (a) ECHR. For an overview, see also Bantekas and Oette, pp. 342-345 and Melzer 2006, pp. 91-102.
143 Article 6(1) ICCPR speaks of the ‘inherent’ right to life. It has also been labeled as the ‘supreme human right’ by the HRC, see HRC, general Comment 6, HRI/GEN/1/Rev.9 (Vol I) 176, paragraph 1.
144 For a discussion, see Palmer, p. 438-451.
145 See Melzer 2006, note 55 on page 98 for an overview.
147 McCann, paragraph 202-214.
148 Bantekas and Oette, p. 316.
149 Nachova et al. v Bulgaria, 2006 42 EHRR 43.
is known that the person to be arrested poses no threat to life or limb and is not suspected of having committed a violent offence.”

From the jurisprudence, it follows that first, if a legitimate aim to deprive a person of his right to life does not exist, the use of force is, besides being unnecessary, *a priori* disproportionate. But also the use of potential lethal force in pursuit of a legitimate aim is not unrestricted. However, since the deprivation of life must be proportionate, the law enforcement officers are obliged to consider non-lethal options first. Melzer defines this manifestation of the principle of proportionality of IHRL as follows:

“The use of lethal force violates the human right to life if the nature and scale of the concrete threat to be addressed does not justify putting human life at risk, regardless of whether this would be objectively necessary to remove the threat in question.”

From this test it follows, that an appreciation is required of the balance between the values that must be attributed to two factors in a given situation, at a given moment in time. The two factors that must be evaluated are (i) the expected scale of the risk to human life (of the suspect) of the contemplated use of (potentially) lethal force and (2) the nature and scale of the concrete threat to the law enforcement officer who is planning to use the armed force, and third persons.

It must be noted that in essence, there is a double requirement of proportionality applicable, because in addition to the proportionality requirement that relates to the scale of the armed response to a threat, there is also a proportionality calculation in the requirement of absolute necessity. The requirement of the absolute necessity of the use of lethal force entails that the circumstances at hand are decisive for the appreciation of the situation. This means that as a minimum, the perceived threat must be sufficiently concrete and imminent, as opposed to hypothetical. Three aspects of armed lethal force must be assessed to verify the absolute necessity of its use: the qualitative, the quantitative and the temporal aspects.

The qualitative aspect demands there to be a causal link between the concrete threat and the use of lethal force contemplated. In other words, it must be clear that less harmful means are not available or have been proven to be ineffective. The quantitative aspect of absolute necessity is in essence the requirement of proportionality *stricto sensu*. It means that no more armed force may be used than is required to attain the legitimate objective of removing the existing threat. The armed force that is thus used because it has become unavoidable to do so, must be limited to what is strictly necessary, based on the available information of the situation, and “State agents must endeavour to minimize damage and injury to human

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150 Nachova, paragraphs 71-74.

151 Pouw, p. 246.

152 Melzer 2006, p. 98.

life.”\textsuperscript{154} Thirdly, the temporal requirement means that once it is clear that the threat has passed, or is indeed not present yet, the armed force may not be used because it is no longer necessary to achieve the purpose of the operation. This means that under IHRL, lethal force can only be used if there is an ongoing or “an imminent danger of serious violence that cannot be averted save for such use of force.”\textsuperscript{155} This also implies that under IHRL, it is unlawful to use lethal force against a person because he is a member of a certain group. This is especially relevant in situations of armed conflict, as will be explained in the next section. Moreover, although it is not illegal as such, it is difficult to justify collateral damage under IHRL.\textsuperscript{156}

Closely related to both the necessity and the proportionality requirements as explained above, is the requirement of precaution. If lethal armed force is used during an operation that was not adequately planned, organised and if the equipment or training of the armed forces that executed the operation was not sufficiently appropriate, it may be that an otherwise proportionate and necessary deprivation of life is nonetheless unlawful.\textsuperscript{157} The ECtHR found in the Moscow Theatre Case that the use of an unknown poisonous gas during the storming of the Theatre, after Chechen kidnappers had occupied the theatre, taking a large number of hostages, was in the circumstances not a disproportionate measure because in its preparations, the government had failed to provide hospitals with adequate information and an anti-dose against the gas.\textsuperscript{158} This implies that if members of the military are deployed in circumstances where they are expected to execute law enforcement tasks, they must be properly trained in such operations and thus be aware of the fact that different rules apply when they are not engaged in hostilities against an opposing military force in the context of an armed conflict. In addition, when they are deployed in law enforcement operations, they should be provided with not only fire arms, but also with equipment that is fitting to conduct crowd and riot control operations, such as batons and other non-lethal weapons. Another measure that may be obligated during law enforcement operations on the basis of the requirement of precaution is the issue of an effective warning. The requirement of precaution is not absolute, but very much dependent on what is feasible and reasonable under the circumstances at hand. This means that the forces must take into account all information that is reasonable available to them, but they have not violated the requirement of precaution if after the operation the information that they relied on, proves to be faulty. In addition, part and parcel of the use of lethal armed force under IHRL is also the duty to

\begin{itemize}
\item \textsuperscript{154} Melzer 2010b, p. 283.
\item \textsuperscript{155} Droege 2008, p. 525. Italics in original.
\item \textsuperscript{156} According to Geiss, it is even more difficult to justify collateral damage under IHRL than it is under IHL. See Geiss 2010, p. 125.
\item \textsuperscript{157} See McCann, mentioned above. See also Pouw, p. 247.
\item \textsuperscript{158} Finogenov and others v. Russia, No. 18299/03 and 27311/03, Judgment of 20 December 2011, para 236 on p. 59 and para 266 on p. 68. The Court noted that: “in the circumstances the rescue operation of 26 October 2002 was not sufficiently prepared, in particular because of the inadequate information exchange between various services, the belated start of the evacuation, limited on-the-field coordination of various services, lack of appropriate medical treatment and equipment on the spot and inadequate logistics. The Court thus observed that the [Russia] breached its positive obligations under Article 2 of the Conventions.”
\end{itemize}
conducted a thorough *ex post* investigation into an operation that led to a deprivation of life that is attributable to a State.

5.4.4 Sub-Conclusion

There are many manifestations of the principle of proportionality in IHRL and it has even been suggested that proportionality must be applied as a general interpretative tool to the rules of IHRL. The applicability of IHRL rules that violate the right to life is dependent on the existence of jurisdiction. Also, the exact circumstances under which these rules apply during extraterritorial operations are still under debate. The IHRL proportionality principle applicable during law enforcement operations during peacetime puts considerable restraints on the use of lethal armed force. It is used to assess whether the use of lethal force is an arbitrary violation of the human right to life and consists of a balance between the nature and scale of a concrete threat and the nature and scale of the contemplated use of lethal armed force objectively necessary to remove it. It contains a temporal component, a component of absolute necessity and the proportionality *stricto sensu* requirement. Furthermore, the proportionality requirement is part of an entire system that applies to the use of lethal force outside armed conflict, including the requirement of precaution and the duty to investigate after an operation. As put by Pouw: “IHRL offers only a very limited permissible scope for targeting, which, as a rule, is prohibited, and may only be resorted to in exceptional circumstances.”

The existence of an armed conflict may lead to a shift in the authority to use lethal armed force from the conduct of an individual, consisting of the threat the concerned individual may pose, to the status. Here, the decisive issue may be whether the use of force is governed by an armed conflict paradigm or a law enforcement paradigm. It thus seems that the proportionality equation in IHRL is directly influenced by the existence of an armed conflict. This means that once the rules of IHL become applicable, the State may also have to deal with proportionality equations with regard to the extent to which the State is still able to guarantee certain human rights. The relationship between proportionality in IHRL and in IHL can only be meaningfully explored after an analysis of the principle in the latter legal framework (see Chapters 6 and 7). This relation is analysed in Chapter 8.

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159 Pouw, p. 254.
5.5 Conclusion

In this chapter, the manifestations of the principle of proportionality in Just War theory and in the legal frameworks of the *ius ad bellum* and IHRL have been analysed.

It is established that the proportionality requirement is found in both the *ius ad bellum* and the *ius in bello* components of Just War theory, but the meaning of the notion of proportionality is different in the two components. According to a commonly accepted understanding of Just War theory, the *ius ad bellum* and the *ius in bello* must be judged separately. Yet, there is a connection between the *ius ad bellum* and the *ius in bello* with regard to proportionality, because the use of armed force “is not justified where the necessary means to be employed to achieve the object would be inherently excessive or indiscriminate.”\(^{160}\) Whether a similar connection is also present in international law is explored below in Chapter 8.

With regard to the legal framework applicable to the resort to use of armed force by States, or the *ius ad bellum*, it is concluded that different standards of proportionality apply in different situations. These situations usually present themselves as exceptions to the general prohibition of the unilateral use of armed force by States, as codified in the UN Charter. In general, in any *ius ad bellum* proportionality calculation, the size, duration and effect are relevant factors of determining the legality of an armed attack in response.

Finally, it is established that there are various manifestations of proportionality in IHRL and proportionality puts considerable constraints on the legitimate use of lethal force under IHRL. In situations where an armed conflict is ongoing, the legal framework of IHL is also applicable. It is to the manifestations of proportionality in the legal framework of IHL that the following chapter turns.

\(^{160}\) Shearer, p. 1.