

Proportionality in Military Force at War's Multiple Levels: Averting Civilian Casualties vs. Safeguarding Soldiers

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ABSTRACT

To what lengths may a state go to protect its soldiers in war? May it design its military operations to further that goal if this significantly increases civilian casualties? International law currently offers no clear answers. Because recent wars have seen many states prioritize soldier safety over avoiding civilian casualties, spirited debate has arisen over the legal defensibility of this practice. This debate currently focuses on an ethics code proposed by two influential Israeli thinkers and allegedly embodied in Israel's conduct of its 2008–2009 Gaza war with Hamas. This Article shows that current discussion fails to appreciate how judgments about proportionality in the use of military force necessarily differ at the tactical, operational, and strategic levels of warfare. It illustrates this with empirical material from recent armed conflicts. If international law is to address war's inescapable moral complexities, it must be interpreted to reflect the variation in the kind of decisions that soldiers confront at distinct organizational echelons. This approach largely resolves one of the most vexing conundrums that has perennially bedeviled the law of war.

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I. INTRODUCTION

Consider three questions arising from the following circumstance of armed conflict:

Border skirmishes have been occurring for some time between a state and one of its military adversaries. In these encounters, that adversary regularly attacks small units of the state's soldiers who are patrolling the shared border. The enemy also plants roadside bombs within the state's territory, near its military bases, to kill its soldiers. After one of these bombs causes extensive casualties, the state finally responds, opening a large-scale military campaign, intended to deter the enemy from continuing these practices. The state directs its response against enemy military forces and installations; these are

“military objectives,” hence lawfully subject to being targeted.¹ Even so, this response will likely produce greater harm to civilians, though unintentional, than the enemy’s intentional actions have caused the state and its troops. To what extent does international law limit the state’s response in light of these facts?

Second, during the ensuing conflict, the enemy captures one of the state’s soldiers. Her company knows that she is being held in a nearby house also containing an elderly civilian couple unable to escape the combat. Does international law allow the company to rescue its fellow soldier, even if it is probable that the couple will die in the crossfire?

Third, in the same war, the state orders a division commander to capture a town that houses both civilians and enemy combatants. The commander can either ask for aerial support to bombard the town, seeking to target only enemy locations (insofar as these can be identified), or alternatively deploy ground units to take the town house by house. The first option minimizes the risk that soldiers will be harmed, but imposes much greater danger to civilian residents. May the division commander, consistently with international law, call for aerial support?

These three scenarios respectively arise at the strategic, tactical, and operational levels of decision making. They all pose the same essential question: to what extent may a state take protection of its soldiers (hereinafter *force protection*) into account when determining the proportionality² of contemplated military action? The question bears on both the legality and morality of that action.

Military concern with force protection has increased as Western publics have grown averse to suffering military casualties, even as most people recognize that force protection often comes at the price of increased civilian harm.³ That harm is itself the object of increasing preoccupation in many quarters. International rules on proportionality are being reassessed and reinterpreted in light of these vexing new realities. A recent code of military ethics, proposed by two prominent Israeli commentators (a leading philosopher and a distinguished army general), explicitly provides that protecting soldiers’ lives should always receive priority over safeguarding

1. 1 Jean-Marie Henckaerts & Louise Doswald-Beck, Customary International Humanitarian Law: Rules 29–32 (Int’l Comm. of the Red Cross ed., 2005) (defining *military objectives*).

2. *Proportionality* is a colloquial expression, and it is not the accurate legal term used in the relevant *jus in bello* and *jus ad bellum* norms; the accurate terminology will be presented *infra* Part II.

3. See, e.g., Lawrence Freedman, *Using Force for Peace in an Age of Terror*, in LEASHING THE DOGS OF WAR: CONFLICT MANAGEMENT IN A DIVIDED WORLD 245, 249, 256 (Chester A. Crocker et al. eds., 2007) (describing fundamental changes in post-Cold War Western military intervention and the resulting increase in importance of force protection, despite cost of civilian casualties).

foreign civilians, when these goals collide.⁴ Some have accused the Israel Defense Forces (IDF) of unofficially adopting this code and thereby causing disproportionate harm to Palestinian civilians during the 2008–2009 Cast Lead operation in Gaza. The code’s alleged overvaluation of force protection was blamed for the operation’s high lethality to innocent Palestinians.⁵

The vexing questions these circumstances present are by no means unique to Israel, even if that country confronts them more acutely than do most other states. Many wars are today fought in heavily populated areas, where enemies of Western armies deliberately intersperse their fighters among civilians in order to capitalize on the aversion of Western democracies both to harming civilians and to incurring losses among their own troops, losses that door-to-door combat (in seeking to minimize civilian casualties) will inevitably multiply.⁶

The resulting predicament has prompted domestic outcry in several countries, as their troops suffer many casualties in ground operations, notably in Afghanistan. NATO policy there shifted in 2009 from heavy reliance on close air support to counterinsurgency,

4. See Asa Kasher & Amos Yadlin, *Military Ethics of Fighting Terror: An Israeli Perspective*, 4 J. MIL. ETHICS 3, 14–21 (2005) (arguing that protecting the lives of the state’s citizens, noncombatants under its effective control, and its combatants takes priority over protecting the lives of noncombatants not under the state’s effective control); see also *infra* notes 17–24 and accompanying text.

5. Muhammad Ali Khalidi, “The Most Moral Army in the World”: The New “Ethical Code” of the Israeli Military and the War on Gaza, 39 J. PALESTINE STUD. 6, 15 (2010); see also Avery Plaw, Upholding the Principle of Distinction in Counter-Terrorist Operations: A Dialogue, 9 J. MIL. ETHICS 3, 4–5 (2010) (“Nonetheless, it is highly plausible that the kinds of argument advanced by Kasher and Yadlin have influenced Israeli combat practices, and in at least some cases those practices have affected the numbers of combat casualties and civilian casualties in particular.”); Avishai Margalit & Michael Walzer, This Is Not the Way To Manage a Just War, HAARETZ (Apr. 8, 2009, 2:44 AM), <http://www.haaretz.co.il/opinions/1.1254834> (Isr.) [hereinafter Margalit & Walzer, *Not the Way*] (stating that “[i]n order to understand the disputed code of conduct of the IDF during the last operation in Gaza one should read the article of Asa Kasher and Amos Yadlin” (Ziv Bohrer trans.)). In the English version of their article, Margalit and Walzer were less decisive with regard to this issue. See Avishai Margalit & Michael Walzer, *Israel: Civilians and Combatants*, 56 N.Y. REV. BOOKS 21, 22 (2009) [hereinafter Margalit & Walzer, *Israel*] (declining to join the debate about whether the IDF actually follows Kasher and Yadlin’s guidelines); see also Daniel Statman, *Morality in War and ‘Cast Lead,’* 38 TCHELET 3, 5–7 (2010) (Isr.).

6. For claims regarding the universal significance and applicability of this debate by the main scholars, who will be discussed in this Article, see Kasher & Yadlin, *supra* note 4, at 60–61 (“[T]he principles are suggested as universal and should be evaluated and applied as such.”); Margalit & Walzer, *Israel*, *supra* note 5 (responding to Kasher and Yadlin’s article “Assassination and Preventive Killing” and stating that “[t]here is nothing . . . unique to Israel,” as it is a dilemma faced by soldiers in many armed conflicts—such as in Afghanistan, Sri Lanka, and Gaza); David Luban, *Risk Taking and Force Protection* 5–6 (Georgetown Pub. Law & Legal Theory Research Paper No. 11–72, 2011) (asking if soldiers should make themselves more vulnerable in combat to reduce civilian casualties, while using as examples the actions of several different states).

aiming to win “hearts and minds” through patient, day-to-day interaction with locals.⁷ This policy change caused an increase in military casualties,⁸ however, which generated effective domestic pressure for withdrawal.⁹ Public disaffection with soldier casualties also prompted renewed reliance on air power and, with it, an increase in civilian casualties.¹⁰

This Article seeks to advance the heated current discussion of whether force protection may, consistently with international law and emergent global mores, legitimately influence deliberations about proportionality in the use of military force. Part I describes three leading positions in current debate. First is that of Asa Kasher and

7. See A. Walter Dorn, *Warfighting, Counterinsurgency and Peacekeeping in Afghanistan: Three Strategies Examined in the Light of Just War Theory*, in *WAR, HUMAN DIGNITY AND NATION BUILDING: THEOLOGICAL PERSPECTIVES ON CANADA'S ROLE IN AFGHANISTAN* 16, 25–26 (Gary D. Badcock & Darren C. Marks eds., 2011) (discussing the International Security Assistance Force's shift to classic counterinsurgency in Afghanistan in 2009).

8. See Marc W. Herold, *The Obama/Pentagon War Narrative, the Real War and Where Afghan Civilian Deaths Do Matter*, 5 *REVISTAS PAZ Y CONFLICTOS* 44, 45, 52–53 (2012) (describing the correlation between increased American military casualties and decreased Afghan civilian deaths due to that policy change).

9. See THE AFG. STUDY GRP., *A NEW WAY FORWARD: RETHINKING U.S. STRATEGY IN AFGHANISTAN 1* (2010) (stating that because the allies' 2010 offensives were unsuccessful, “U.S. and allied casualties reached an all-time high in July [2010], and several NATO allies have announced plans to withdraw”); Dorn, *supra* note 7, at 57 (noting the pessimistic outlook held by commanders in Afghanistan); Herold, *supra* note 8, at 65 (“The American war in Afghanistan will end after NATO country militaries withdraw. This process [already] began with the [withdrawal of several allies]. . . . In the end, bodies tell the story, America's lost war in Afghanistan will cease, cut by the scissors of Afghan bodies and mounting U.S. military bodies.” (emphasis omitted) (footnotes omitted)); *Canada To Pull Troops Out of Afghanistan by 2011*, *PRESSTV* (Oct. 10, 2009), <http://www.presstv.ir/detail.aspx?id=108284§ionid=351020701> (“[T]he mounting number of Western soldiers coming home in body bags has sent support for the war plummeting in Europe, Canada, and the United States.”); see also Steven Erlanger & Alissa J. Rubin, *France Weighs Pullout After 4 of Its Soldiers Are Killed*, *N.Y. TIMES* (Jan. 20, 2012), <http://www.nytimes.com/2012/01/21/world/europe/sarkozy-weighs-afghan-withdrawal-after-4-french-troops-killed.html?pagewanted=all> (discussing France, Germany, Italy, and the United Kingdom).

10. For the dissatisfaction of American soldiers with these rules of engagements, see Jason Motlagh, *Petraeus Toughens Afghan Rules of Engagement*, *TIME WORLD* (Aug. 6, 2010), <http://www.time.com/time/world/article/0,8599,2008863,00.html> (noting that soldiers worry that strict rules of engagement place them in greater danger); Eric Schmitt, *Allies Restrict Airstrikes on Taliban in Civilian Homes*, *N.Y. TIMES* (June 10, 2012), <http://www.nytimes.com/2012/06/11/world/asia/allies-restrict-airstrikes-against-taliban-in-homes.html> (discussing soldiers' complaints with restrictive rules of engagement). These sources state that when General David Petraeus replaced General Stanley McChrystal, he further restricted the rules of engagement. Yet, data seem to indicate otherwise. See, e.g., Herold, *supra* note 8, at 45 (“Since Gen. David Petraeus took command . . . in late June 2010, coalition aircraft have flown . . . 50% more [attack sorties] than they did during the same period in 2009. Not surprisingly, civilian casualties are on the rise” (quoting Spencer Ackerman, *Spin War Shift: Military Now Bragging About Afghan Air Strikes*, *WIRED* (Sept. 1, 2010, 11:45 AM), <http://www.wired.com/dangerroom/2010/09/nato-brags-on-air-strikes-hits-talibans-civilian-casualties/>) (internal quotation marks omitted)).

Amos Yadlin, authors of the controversial recent code prioritizing force protection over safeguarding civilians. That stance then receives trenchant criticism from Avishai Margalit and Michael Walzer, who contend that, when assessing proportionality, the lives of foreign civilians must virtually always receive priority over one's soldiers. A third standpoint is that of David Luban, also vehemently opposed to the Kasher and Yadlin approach to proportionality, but on somewhat different grounds. Namely, unlike Margalit and Walzer, Luban is ready to acknowledge possible bases for giving value to soldiers' lives. Yet, he argues that in practice force protection must generally give way when this goal clashes with that of protecting civilians.

Part II assesses current international law, which distinguishes between two forms of proportionality. The first is *jus ad bellum* proportionality, governing the decision to resort to force in the first instance and determining what overall measure of force will be consistent with the goal of national self-defense. Second is *jus in bello* proportionality, regulating operational and tactical conduct during an armed conflict. Because proportionality turns out to mean very different things at the strategic, operational, and tactical levels of war, it is essential to respect (as many pundits do not) this distinction between *ad bellum* and *in bello* proportionality. This Article then shows how each of the three positions in current debate accurately (or at least more accurately than the other two) renders the proportionality norm applicable to one (and only one) of the three levels of military decision making in war.

Part III demonstrates how the place of force protection in proportionality assessment is very different at each of these levels. To illustrate these differences, this Article examines the choice made by Western forces in recent years between aerial bombardment and ground operations, indicating how this choice has distinct aspects and implications when viewed from the strategic, operational, and tactical standpoints. The decisions that commanders confront at these several organizational echelons therefore vary greatly, in ways that the international law of proportionality must respect and reflect.

II. CURRENT DEBATE ON FORCE PROTECTION

A. *Safeguarding Soldiers Comes First: Asa Kasher and Amos Yadlin on Israel's Code of Military Ethics*

Asa Kasher and Amos Yadlin authored the military ethics code that Israel was accused of adopting in Operation Cast Lead. Kasher is a leading Israeli philosopher who has written on professional ethics (including military ethics); Yadlin was a high-ranking military

commander. Both have extensive relevant learning and experience.¹¹ They argue that all states have a duty,¹² to the best of their abilities, to limit civilian casualties.¹³ But civilians are not a uniform class. Every state is obligated to protect its own citizens and other civilians who are under its effective control (hereinafter *the state's civilians*).¹⁴ A state has no similar duty vis-à-vis civilians not within its territory or otherwise under its control (hereinafter *foreign civilians*). The state's duty to protect those under its control does not dissolve when a person under its control becomes a soldier. Individuals' human rights do not vanish into air once they enter military service. During war, to be sure, a state may lawfully endanger the lives of its soldier-citizens. Even so, consistent with the soldier's right to life, a state may risk that life only insofar as necessary to advance the security of the state and its civilians.¹⁵ A state's priorities—both moral and legal¹⁶—receive the following rank: first, the lives of a state's civilians; next,

11. Asa Kasher is a leading Israeli expert on professional ethics who has aided different Israeli governmental bodies, including the IDF, in the formulation of their codes of professional ethics. See *Prof. Asa Kasher*, ISRAELI SPEAKERS, <http://www.israelispeakers.co.il/110277/Asa-Kasher> (last visited Mar. 23, 2013) (Isr.) (describing Kasher's educational background and expertise). In his personal life, Kasher's son was killed during his military service—an experience that, by Kasher's own admission, changed his worldview both in general and specifically with regard to the issues related to the subject matter discussed herein. See Musa Budeiri, *The IDF's Ethical Code in Action—Asa Kasher: Yes, We're the Most Moral Army in the World*, COSMOS (Sept. 30, 2009), <http://cosmos.ucc.ie/cs1064/jabowen/IPSC/articles/article0116765.html> (translating an article by Shari Makover that appeared at M13 in *Ma'ariv* on September 25, 2009). Major General Amos Yadlin wrote the code with Kasher while serving as Israel's military attaché to Washington. Prior to that position, he served as the joint commander of all IDF's military schools and colleges, and in his last position in the IDF, he served as the head of the IDF's Military Intelligence Directorate. See *Maj. Gen. (Ret.) Amos Yadlin: Director of INSS*, INST. NAT'L SECURITY STUD., http://www.inss.org.il/experts.php?cat=0&incat=&staff_id=89 (last visited Mar. 23, 2013) (providing Yadlin's biography).

12. Kasher and Yadlin do not clearly distinguish between legal and moral/ethical duties. They focus on moral and ethical duties, but think that international law can and should be interpreted/changed in order to dovetail with their moral views. For a further discussion of this issue, see *infra* notes 142–143 and accompanying text.

13. *E.g.*, Kasher & Yadlin, *supra* note 4, at 8–9, 16 (noting duties to protect human dignity and civilians notwithstanding priority of citizens, those under the state's effective control, and combatants).

14. *Id.* at 8–9, 15–21 (discussing the duty of self-defense and the priority given to certain protection-based duties).

15. See *id.* at 11, 15–17 (providing priority over a state's combatants only to noncombatant citizens and noncombatants under effective state control); see also, *e.g.*, Asa Kasher, *The Principle of Distinction*, 6 J. MIL. ETHICS 152, 164 (2007) (rejecting the doctrine of forfeiture of the right to life).

16. Kasher and Yadlin do not clearly distinguish between legal and moral/ethical duties. See *supra* note 12 and *infra* notes 142–143 and accompanying text.

the lives of its soldiers; and only thereafter the lives of foreign civilians (beyond its territorial control).¹⁷

Kasher and Yadlin assume that their position applies to everyone along the chain of command—from the state's top leaders to the individual soldier on the battlefield.¹⁸ For state leaders, the duty to proportionately employ force chiefly concerns the decision to enter into warfare, a decision that should reflect their assessment of the gravity of the attack their country has suffered.¹⁹ Kasher and Yadlin's position is that, in determining whether (and in what manner) to go to war in response to an enemy attack, a state legally may (and morally must) assess risks to its soldiers by the same standard it uses in assessing risks to its civilians.²⁰ This is because the lives of a state's soldiers are worth no less than—and hence must be weighed by the same metric as—those of its civilians. This way of thinking could easily justify initial resort to force via air power, rather than ground attack, notwithstanding the greater firepower employed and the more numerous civilian casualties likely to result on the other side.

The implications of their position are still more profound and astonishing with respect to *in bello* proportionality, i.e., for military decision making during an ensuing war. Here, the longstanding rule is that civilian harm may not be excessive in relation to the benefits anticipated from any given military action. In making this assessment, the aim of protecting foreign civilians often clashes with that of protecting one's own soldiers.²¹ Kasher and Yadlin argue that, when these two aims clash, a state's soldiers are duty bound to

17. Kasher & Yadlin, *supra* note 4, at 15–17; *see also* Asa Kasher & Amos Yadlin, *Assassination and Preventive Killing*, 25 SAIS REV. 41, 49–51 (2005) [hereinafter Kasher & Yadlin, *Assassination*] (discussing the principle of distinction); Asa Kasher & Amos Yadlin, *Israel & the Rules of War: An Exchange*, 56 N.Y. REV. BOOKS 77, 77 (2009) [hereinafter Kasher & Yadlin, *Israel & the Rules of War*] (responding to Margalit and Walzer's criticisms); Kasher, *supra* note 15, at 166 (stating the moral justification for risking soldiers' lives is the duty of their state to defend its citizens, but this justification does not exist when a state prefers risking its soldiers over risking foreign civilians in the close vicinity of the target).

18. *See* Kasher & Yadlin, *supra* note 4, at 7–8 (noting that the proposed principles apply at the strategic, operational, and tactical levels).

19. The conditions of the *ad bellum* proportionality norm are discussed extensively *infra* Part II.D.

20. *See* Asa Kasher, *Operation Cast Lead and Just War Theory*, 37 AZURE 43, 53 (2009) (implying this in the way he discusses how there are two national security threats: one directed against civilians and the other against soldiers); *see also* Kasher & Yadlin, *supra* note 4, at 7–8 (viewing their principles as equally applicable at the strategic, operational, and tactical levels and accordingly only briefly discussing the strategic level unique from the other two).

21. The conditions of the *in bello* proportionality norm are discussed extensively *infra* Part II.B–C.

minimize the loss of foreign-civilian lives only when so doing would not endanger their own lives, or the lives of fellow soldiers:²²

Where the state does not have effective control of the vicinity, it does not have to shoulder responsibility for the fact that persons who are involved in terror operate in the vicinity of persons who are not. Injury to bystanders is not intended. On the contrary, attempts are made to minimize it. However, jeopardizing combatants rather than bystanders during a military act against a terrorist would mean shouldering responsibility for the mixed nature of the vicinity for no reason at all.²³

This approach would pertain not only to decisions by high-ranking commanders, choosing which kind of operation to conduct, but also to small units in the field, to soldiers of the most humble echelon. Kasher thus applies it to the following scenario: Terrorists and foreign civilians both occupy a building. The state's army could strike the building from the air, or seize it in a face-to-face combat. The aerial option will kill many civilians but will not risk soldiers' lives. Ground combat will kill fewer civilians but pose greater risk to soldiers. Kasher contends that the state's commanders are duty bound to select the aerial option:

It is important to emphasize that the state must come up with a compelling justification for endangering the lives of its soldiers. . . .

Therefore, in the dilemma at hand, the state should favor the lives of its own soldiers over the lives of the neighbors of a terrorist when it is operating in a territory that it does not effectively control, because in such territories it does not bear the responsibility for properly separating between dangerous individuals and harmless ones.²⁴

He adds that the soldier

would be justified in asking: Why does my state prefer an enemy citizen over me, when it is not my state that put that citizen in the vicinity of the terrorist, but rather the terrorist himself, who does so regularly and deliberately? I don't see how the state can convince him that it discharges its moral duties by thus risking him.²⁵

Thus, it is a moral wrong to increase risk to the state's soldiers in order to reduce risk to foreign civilians. This position amounts to prioritizing the former lives over the latter. Kasher and Yadlin do not even entertain the possibility of a different conclusion when the further risk to soldiers would be slight.

These authors defend their position in highly abstract terms, broadly applicable to war in general, purporting to derive that position from the logically necessary relationships they claim exist

22. See Kasher & Yadlin, *Assassination*, *supra* note 17 (arguing that soldiers' lives have priority over noncombatants not under effective state control); Kasher & Yadlin, *supra* note 4, at 17–21 (same).

23. Kasher & Yadlin, *supra* note 4, at 18.

24. Kasher, *supra* note 20, at 66.

25. Kasher, *supra* note 15, at 166.

between a state and three categories of individuals: its civilians, its soldiers, and foreign civilians. Yet these authors acknowledge that their approach chiefly contemplates a particular kind of armed conflict: between a state and a terrorist organization. “[T]he fight against terror has to be new,” they argue, “because it cannot be carried out in a pure, proper and effective way, within any of the traditional paradigms of a state fighting familiar sources of public danger, first and foremost the paradigms of warfare and of law-enforcement.”²⁶

Kasher and Yadlin claim that two factors distinguish the fight against terror from a paradigmatic interstate war. The first is the broad strategy of terrorist organizations: “[P]remeditated killing or otherwise injuring persons *qua* members of a population for the purpose of terrorizing that population, in order to serve some given goals.”²⁷ The second is the sort of tactic terrorist organizations employ: intentionally blurring the distinction between combatants and civilians, such as by refusing to wear uniforms and surrounding themselves by civilians likely to suffer the brunt of any state response. These tactics greatly enhance risks to both foreign civilians and the state’s soldiers.²⁸

*B. All Civilian Lives, Regardless of Nationality, Deserve Priority:
Avishai Margalit and Michael Walzer*

Like Kasher and Yadlin, Margalit and Walzer assume that everyone along the chain of command should assess proportionality in essentially the same way.²⁹ But their reasoning is otherwise very different from that of Kasher and Yadlin. Margalit and Walzer first observe the disparity just mentioned, that Kasher and Yadlin, though confessedly preoccupied with war against terrorist groups, derive their approach from very general premises about the invariant duties of states toward certain types of individuals—regardless of the kind of conflict involved. This abstract reasoning fails to explain why war

26. Kasher & Yadlin, *supra* note 4, at 6–7.

27. *Id.* at 6.

28. *See id.* at 7 (drawing crucial distinctions between the paradigm of fighting terrorism and the paradigms of warfare and law enforcement).

29. *See* Margalit & Walzer, *Israel*, *supra* note 5, at 22 (referring jointly to what Israel should do as a state, how commanders should formulate the rules of engagement for their subordinates, and how Israeli soldiers should behave on the battlefield); *see also* Avishai Margalit & Michael Walzer, *reply to Kasher & Yadlin, Israel & the Rules of War*, *supra* note 17 [hereinafter Margalit & Walzer, *reply to Kasher & Yadlin*] (stating that soldiers “are acting on a battlefield; the risks they accept have to be incorporated into the strategy and tactics of the battle”).

with terrorists uniquely warrants more lenient rules on proportionality than suitable to other armed conflicts.³⁰

Margalit and Walzer further reject Kasher and Yadlin's claim that soldiers retain their right to life once embroiled in armed conflict, arguing that this position is inconsistent with the legal principle of "distinction."³¹ The principle of distinction provides that a belligerent may intentionally target only the other side's combatants (and military installations), not its civilians.³² The *in bello* proportionality principle relies on this demarcation of combatant from civilian when it demands that civilian loss may not be excessive vis-à-vis anticipated military gain, which includes the gain a state obtains by averting harm to its soldiers.

In allowing the intentional killing of soldiers, international law not only discriminates between soldiers and other human beings. It also treats soldiers in an extremely "consequentialist" manner, as means to the end of victory.³³ This understanding of the soldier of course contradicts core deontological notions of how people may be treated, requiring respect for their right to life.³⁴ It is nonetheless

30. See Margalit & Walzer, *Israel*, *supra* note 5, at 21 (concluding that noncombatants should be treated the same regardless of citizenship).

31. *Id.* at 21–22; Margalit & Walzer, *Not the Way*, *supra* note 5 (rejecting the notion that soldiers are civilians in uniform and arguing that a distinction must be made, and between combatant and civilian). Margalit and Walzer do not explicitly refer to international law but instead focus on criticizing the morality of Kasher and Yadlin's position. Others, however, have argued that international law supports their position. See, e.g., Roy Confino & Mordechai Kremnitzer, *The Legitimacy of Harming the Innocent in the Last War in Gaza—A Comment on Moral Priority, Risk, and IDF's Spirit*, ISR. DEMOCRACY INST. (July 27, 2009), <http://www.idi.org.il/BreakingNews/Pages/128.aspx> (Isr.) (explicitly supporting Margalit and Walzer's position); see also Eitan Diamond, *Before the Abyss: Reshaping International Humanitarian Law To Suit the Ends of Power*, 43 ISR. L. REV. 414, 426 n.44 (2010) (citing Kasher and Yadlin's doctrine as an attempt to subvert, reinterpret, and override international humanitarian law (IHL) proportionality norms, and citing Margalit and Walzer, as well as Ray Confino and Mordechai Kremnitzer, as attempts to respond to this doctrine in the philosophical and legal debate instigated by it); Plaw, *supra* note 5, at 8, 15, 17 (stating that his article offers a defense of Walzer's position, and asserting that a balance between states' external obligations (i.e., international law) and their internal moral and constitutional duties leads to the conclusion that soldiers are under a duty to act in a manner identical to the one supported by Margalit and Walzer); Statman, *supra* note 5, at 8 (claiming that international law supports a position similar to that of Margalit and Walzer without explicitly endorsing Margalit and Walzer's position). *But see infra* note 47 and accompanying text.

32. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 48, June 8, 1977, 1125 U.N.T.S. 17512 [hereinafter Additional Protocol I]; HENCKAERTS & DOSWALD-BECK, *supra* note 1, at 3–8; see also Rome Statute of the International Criminal Court, art. 8(2)(a)(i), (b)(i), *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (prohibiting intentionally targeting civilians).

33. Gabriella Blum, *The Laws of War and the "Lesser Evil"*, 35 YALE J. INT'L L. 1, 40 (2010).

34. See IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 36 (James W. Ellington trans., 3d ed. 1993) (1785) (supplying the moral reasoning for the

widely agreed that treating soldiers' lives as "dispensable" instruments to collective ends is inescapable in war.³⁵ If states could not treat soldiers in this way, societies would be unable to defend themselves, even when so doing was clearly justified, as when adversaries seek to exterminate their entire populations.³⁶

International law would fail to limit the horrors of war, moreover, if it did not insist upon discrimination between soldiers and civilians—allowing intentional targeting of the latter as well, when it proves militarily advantageous, or at least necessary to legitimate operational goals.³⁷ Margalit and Walzer reiterate this

deontological prohibition against treating individuals merely as means and not as ends in and of themselves); Re'em Segev, *Well-Being and Fairness*, 131 PHIL. STUD. 369, 372 (2006) (discussing the consensus regarding the significance of the aim of protecting human lives).

35. See Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. LEGAL ANALYSIS 115, 118, 132–36 (2010) (discussing the extensive support among jurists and philosophers for this legal state of affairs).

36. See RUSSELL HARDIN, *COLLECTIVE ACTION* 4–10, 21–28 (1982) (discussing the collective-action problem and using the issue of forming and maintaining a military as a prototypical example of this problem); ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF A NATION* 314 (4th ed. 1786) (stating that the "natural habits of the people [may] render them altogether incapable of defending themselves," and the "tolerable provision" a state should make in order to redress this problem is to make it the duty of some or all citizens to become soldiers and fight when needed); see also Josiah Ober, *From Epistemic Diversity to Common Knowledge: Rational Rituals and Publicity in Democratic Athens*, 3 EPISTEME 214, 217 (2006). Ober shows (using ancient Athens as an example) that members of a society are likely to have mixed interests regarding military service. Each is likely to want the actions of defending her society from enemy attacks to be successful (which will be the case only if a sufficient amount of society members will join the military). Each is also likely, however, to prefer not to risk her own life. As a result, each is likely to be ready to aid in the defense of her society (and not flee or surrender), only if she knows that other society members will similarly commit themselves to join the military and risk their lives. The state, by way of its legal actions, is able to make sure that such joint commitment and social knowledge of it will exist.

37. Blum, *supra* note 35, at 132–36 (discussing the fact that there is a strong consensus for justifying the principle of distinction, although Blum is critical of this consensus). For further criticism of Kasher and Yadlin's position on that basis, see Margalit & Walzer, *Israel*, *supra* note 5, at 21–22 (criticizing Kasher and Yadlin's erosion of the principle of distinction); Margalit & Walzer, *Not the Way*, *supra* note 5 (criticizing Kasher and Yadlin's lack of distinction between combatants and noncombatants); Iddo Porat, *Preferring One's Own Civilians: Can Soldiers Endanger Enemy Civilians More than They Would Endanger Their Own Civilians?* 17–19 (Aug. 7, 2009), available at <http://ssrn.com/abstract=1445509> (criticizing Margalit and Walzer's interpretation of the principle of distinction); Statman, *supra* note 5, at 8. Plaw makes a more comprehensive attempt to respond to Kasher and Yadlin's position based on the commonly accepted moral justifications for the principle of distinction. See Plaw, *supra* note 5, at 9–21 (justifying the distinction between soldiers and civilians). But see Kasher, *supra* note 15, at 163–64 (criticizing the consensual bases of the current interpretation of the principle of distinction). However, Ruvy Ziegler and Shai Otzari suggest that the distinction principle is qualified:

IHL permits an enemy to attack soldiers intentionally; however, such permission does not entail that military commanders have a duty to accept

rationale for the distinction principle and infer from it that, in war, soldiers do not retain any right to life. When people move from the legal status of civilian to that of soldier, they necessarily assume much greater risks to life and limb, as reflected in the permission law affords them to target one another across the battle lines. The duties of states to their citizens—now soldiers—diminish accordingly.³⁸ Margalit and Walzer therefore reason that:

There is nothing [in Kasher and Yadlin's position] that hinges on the word "terrorists." Replace that word with "enemy combatants" and the argument remains the same. . . . [Kasher and Yadlin's] claim, crudely put, is that in such a war the safety of "our" soldiers takes precedence over the safety of "their" civilians.

Our main contention is that this claim is wrong and dangerous. It erodes the distinction between combatants and noncombatants No good reasons are given for the erosion. . . .

Wars between states should never be total wars between nations or peoples. Whatever happens to the two armies involved, whichever one wins or loses, whatever the nature of the battles or the extent of the casualties, the two nations, the two peoples, must be functioning communities at the war's end. The war cannot be a war of extermination or ethnic cleansing. . . .

The main attribute of a state is its monopoly on the legitimate use of violence. Fighting against a state is fighting against the human instruments of that monopoly—and not against anyone else.³⁹

Moreover, Margalit and Walzer's answer to the imaginary soldier's question is very different from Kasher's:

By wearing a uniform, you take on yourself a risk that is borne only by those who have been trained to injure others (and to protect themselves). You should not shift this risk onto those who haven't been trained, who lack the capacity to injure; whether they are brothers or others. The moral justification for this requirement lies in the idea that violence is evil, and that we should limit the scope of violence as much

risks imposed on their soldiers, or that they are always prohibited from shifting some of these risks by choosing a method of attack that may cause unintentional incidental damage to enemy civilians.

Reuven (Ruvi) Ziegler & Shai Otzari, *Do Soldiers' Lives Matter? A View from Proportionality*, 45 *ISR. L. REV.* 53, 64 (2012)

38. Margalit & Walzer, *Israel*, *supra* note 5, at 21–22; *see also* MICHAEL WALZER, *JUST AND UNJUST WARS* 136 (4th ed. 2006) (arguing that "the soldiers who do the fighting, though they can rarely be said to have chosen to fight, lose," "[s]imply by fighting, . . . their title to life and liberty"). Confino and Kremnitzer explain:

[T]he combatant endangers the combatants of the other side, and therefore he carries the burden of accepting the risk that the combatants of the other side confer on him. This is not the case for the civilian, who does not create a risk for anyone, and therefore with regard to him the regular rule applies—the elementary rule of human society—of the prohibition to harm him, due to the sanctity of his life.

Confino & Kremnitzer, *supra* note 31 (Ziv Bohrer trans.).

39. Margalit & Walzer, *Israel*, *supra* note 5, at 21.

as is realistically possible. As a soldier, you are asked to take an extra risk for the sake of limiting the scope of the war.⁴⁰

Like Kasher and Yadlin,⁴¹ Margalit and Walzer⁴² accept that (a) a state has certain responsibilities to civilians on both sides of an armed conflict, and (b) each state has more extensive responsibilities to its own civilians than to foreigners not under the state's control; these more extensive responsibilities include a duty to protect those civilians against others' acts of violence. Margalit and Walzer further argue that the first proposition implies a duty on a state to ensure that its soldiers do not needlessly endanger the lives of civilians, regardless of whether that state or its adversary exercises effective control over them.⁴³ This conclusion reinforces their view that the state's duty to protect its citizens' lives diminishes once they become soldiers.⁴⁴ These conclusions combine to suggest that the principles of distinction and proportionality oblige a state to prioritize civilian lives—regardless of nationality—over those of its soldiers.⁴⁵

Margalit and Walzer then argue that killing civilians is truly incidental, and thus legal and moral, only if soldiers actively seek to avoid civilian deaths, “and that active intention can be made manifest only through the risks soldiers themselves accept in order to reduce the risks to civilians.”⁴⁶ Margalit and Walzer do allow a limited role for force protection, to the extent that soldiers need not take transparently suicidal risks or risks that would make their mission impossibly difficult to achieve.⁴⁷

40. *Id.*

41. *E.g.*, Kasher & Yadlin, *supra* note 4, at 8–9, 16.

42. *E.g.*, Margalit & Walzer, *reply to Kasher & Yadlin, supra* note 29, at 77.

43. *Id.*; Statman, *supra* note 5, at 5; *see also* Luban, *supra* note 6, at 8, 29–35 (discussing civilians in combat); Plaw, *supra* note 5, at 17 (discussing the state's external obligation to uphold *jus gentium* and *jus inter gentes*). Confino and Kremnitzer describe this duty:

[I]f the social contract does supply any privileges to citizens, as Kasher and Yadlin claim, it seems that that is so mainly with regard to civil privileges, such as the right to vote, and not basic privileges such as the right to life. In other words, even if the duty of the state to afford rights to those who are not its citizens is weaker than the duty of the state to afford rights to its citizens, it is doubtful whether the duty of the state not to harm the right to life of those who are not its citizens is weaker from its duty not to harm the right to life of its citizens.

Confino & Kremnitzer, *supra* note 31 (Ziv Bohrer trans.).

44. *See supra* note 38 and accompanying text.

45. Margalit & Walzer, *Israel, supra* note 5, at 21.

46. *Id.*; *see also* WALZER, *supra* note 38, at 155–56 (describing how soldiers must take actions that may risk their own lives to prevent killing innocent civilians).

47. Margalit & Walzer, *Israel, supra* note 5, at 22; *see also* Plaw, *supra* note 5, at 15 (supporting an identical duty to that of Margalit and Walzer). Others, based on similar reasoning to that of Margalit and Walzer, have suggested benchmarks that are somewhat different, but an explanation for that variance is not given in any of these

When applied to the scenario described above (a building occupied by both terrorists and foreign civilians), this position suggests that commanders must usually deploy ground troops rather than air power:

When soldiers in Afghanistan, or Sri Lanka, or Gaza take fire from the rooftop of a building, they should not pull back and call for artillery or air strikes that may destroy most or all of the people in or near the building; they should try to get close enough to the building to find out who is inside or to aim directly at the fighters on the roof.⁴⁸

C. All Lives, Soldier and Civilian, Are of Equal Value: David Luban

David Luban reaches conclusions similar to Margalit and Walzer, but on different grounds.⁴⁹ He accepts three possible bases for giving significant weight to force protection when this goal clashes with that of protecting civilians. He differs in this regard from Margalit and Walzer, who believe that, as a matter of both morality and international law, during an armed conflict, when civilians' safety is at stake, soldiers' lives are virtually of no value. Luban nonetheless concludes that, in practice, force protection must generally give way, its claims overridden in the comparative calculus of competing considerations.

1. The Risk-Transfer Ratio Between Civilians and a State's Soldiers

Like the other two positions here assessed, Luban acknowledges that states have greater duties to their own civilians than to foreign civilians. He nevertheless argues, like Margalit and Walzer, that these greater duties are irrelevant to the proportionality assessment when force protection conflicts with civilian protection. He admits, "[I]n practice we will treat our own people with extra care."⁵⁰ This is appropriate, he continues, "as long as we treat civilians on the other side in a way that would be minimally acceptable even if they were our own."⁵¹ He distinguishes the risks that soldiers impose on foreign civilians from those created for those civilians by enemy forces, such as those caused by the enemy attack to which the state's soldiers are

sources. See Statman, *supra* note 5, at 8 ("[S]oldiers [must] exert all efforts in order not to harm civilians, even at the price of giving up certain missions . . . and even at the price of a certain risk to our forces." (Ziv Bohrer trans.)); Confino & Kremnitzer, *supra* note 31 ("[I]t is inappropriate to place civilians at an equal risk to that of soldiers, and *ipso facto* not at a greater risk." (Ziv Bohrer trans.)).

48. Margalit & Walzer, *Israel*, *supra* note 5, at 22.

49. Luban, *supra* note 6, at 1 ("In this paper I shall defend a version of Walzer's conclusion on grounds somewhat different than his own.").

50. *Id.* at 11 n.14 (internal quotation marks omitted) (quoting an e-mail from Tami Meisels).

51. *Id.* (internal quotation marks omitted).

responding.⁵² Soldiers have a special duty to protect only their own civilians from risks created by the enemy. But they must protect all civilians, regardless of nationality, from the dangers they themselves inflict.⁵³ This is why Luban, like Margalit and Walzer, does not view citizens' nationality as pertinent to proportionality.⁵⁴

In finding all lives of equal value, Luban departs both from Kasher and Yadlin's view that a state must weigh its soldiers' right to life more heavily than that of foreign civilians and from Margalit and Walzer's view that individuals all but abdicate their right to life upon becoming soldiers engaged in combat.⁵⁵ Luban's distinctive contribution is to view proportionality in terms of a "transfer of risk" between soldiers and civilians.⁵⁶ This stance does not invariably prioritize one group over another, as do the other two approaches. Like the other authors, he fixes his attention on the vexing choice commanders face: between face-to-face combat ("close engagement"), with its greater risk to their soldiers, and aerial bombardment ("distant engagement"), with its greater prospect of serious civilian harm:

Each tactic involves risks to soldiers and to civilians

Switching from one tactic to another affects both civilian and military risk. . . . The difference between the risks to soldiers of Close Engagement compared with Distant Engagement is the *marginal risk* to soldiers; the difference between the risks to civilians of the two tactics is the marginal risk to civilians. The ratio of civilian marginal risk to military marginal risk is what I shall call the *risk transfer ratio*. This ratio seems relevant to the choice between Close Engagement and Distant Engagement.

If the risk transfer ratio is greater than one it means that picking Distant Engagement transfers marginal risk to civilians at a greater than one-to-one ratio: soldiers are offloading larger risks to civilians in order to spare themselves smaller risks. And, conversely, a small risk transfer ratio means that soldiers choosing Close Engagement are braving extra risks in order to spare civilians lesser risks.⁵⁷

Because Luban stipulates that all lives are of equal value, it follows that the transfer of risk may be no more than one, i.e., one life at the cost of another. Thus, a soldier may never take steps that would reduce risks to herself by increasing, in greater measure, risks to a foreign civilian. In other words, the reduction of risk to the soldier must be greater than the resulting increase in risk to the

52. See *id.* at 32–33 (discussing the “two senses of ‘protect’: to protect civilians against enemy violence, and to protect civilians from one’s own violence”).

53. See *id.* (arguing the view that there is a greater obligation to avoid killing co-nationals than foreigners is objectionable).

54. *Id.* at 8.

55. See *id.* at 27 (finding that “all lives are created equal”).

56. See *id.* at 19–24 (employing the notion of a risk-transfer ratio).

57. *Id.* at 19–21 (footnotes omitted).

civilian.⁵⁸ That also means that, in a life or death situation, it would be unlawful for the soldier to save the life of X fellow soldiers by means foreseeably causing the deaths of more than that same X amount of foreign civilians.⁵⁹

Luban then describes two approaches to risk transfer that would be legally acceptable. The first suggests that the vocation of soldiering obligates its practitioners to protect others' lives by assuming greater risk to their own. This does not mean, he hastens to add, that the professional duty to safeguard civilians invariably overrides concerns with force protection.⁶⁰ But there is at least a baseline threshold of risk that any soldier must be willing to endure, even if meeting that requirement would not significantly increase the safety of foreign civilians, beyond what some lower level of risk might yield. This approach, in other words, assumes that soldiers should, in light of their professional duties, value their lives somewhat less than they value the lives of civilians. Luban then suggests that a less stringent standard might also be acceptable. International law, he acknowledges, cannot compel soldiers to behave "heroically." And it would require heroism to demand that the soldier assume greater risk to herself than she imposes on someone else. This suggests a second approach to risk transfer, more indulgent than the first. Though the soldier cannot impose any greater risk on a foreign civilian than she herself incurs (by use of a given tactic), neither can she herself be required to accept any greater risk than she imposes on the civilian.⁶¹

Luban offers three examples of how this works. The first concerns a soldier who must capture an occupied cellar possibly housing civilians, enemy combatants, or both. She must tactically decide whether to call out a warning before tossing in a grenade. A warning would presumably save any civilians in the cellar, but might also imperil the soldier and her mission by notifying enemy combatants who may be present.⁶² The second example involves a commander who must choose between close and distant engagement, to gain control of a particular residential area where both foreign

58. *Id.* at 20–21, 44.

59. *Id.* at 24, 27, 35.

60. *Id.* at 28 ("[T]he vocational core of soldiering . . . suggests something different: that, to protect a civilian from their own violence, soldiers must accept risk transfer ratios less than one, perhaps significantly less than one. And that is as true for enemy civilians as their own.")

61. *Id.* at 27; see also Thomas Hurka, *Proportionality in the Morality of War*, 33 PHIL. & PUB. AFF. 34, 63–64 (2005) (discussing the weighing of risks of military tactics against soldier and civilian safety); Ziegler & Otzari, *supra* note 37, at 68–69 ("One possibility, as advocated by Hurka, is that this ratio is 1, namely that a compatriot soldier's life and an enemy civilian's life are equal in worth.")

62. See Luban, *supra* note 6, at 2–3, 22–24, 35 (discussing the precautions soldiers must take to minimize civilian harm).

civilians and enemy combatants reside.⁶³ The third scenario concerns a top leader who must decide, as her state is about to enter armed conflict, between a land and aerial campaign, a decision arising at the strategic level of decision making.⁶⁴ In all three situations, Luban argues that whenever the risk-transfer ratio between the two options considered is greater than one, state actors must select the course of action offering greater civilian protection.⁶⁵

Luban's theoretical perspective differs significantly from that of Margalit and Walzer. The latter argue that soldiers forfeit their right to life,⁶⁶ and therefore hold that there are very few circumstances in which force protection can override safeguarding civilians, i.e., only when prioritizing the latter requires suicidal risks from soldiers or renders their mission virtually impossible.⁶⁷ Luban's theory, on the other hand, ascribes greater value to soldiers' lives. Yet, despite this difference, Luban concludes that, in practice, his position ends up demanding soldiers accept levels of risk similar to those Margalit and Walzer require.⁶⁸ Luban argues that soldiers must accept this level of risk (even though they do not forfeit their right to life) based on an assumption he makes regarding the baseline levels of risk soldiers and civilians experience during fighting; i.e., Luban assumes that in war, soldiers are much better protected from risk than civilians:

[S]oldiers' risks are far less than those of non-combatants. Professional soldiers are better armed and armored, better trained, better disciplined, better conditioned, better able to function in coordinated teams, and better supported . . . , including in the crucial matter of medical care if they are wounded. Everyone in their units is pledged never to leave them fallen on the field; their buddies have their backs. In every respect, they are simply better able to protect themselves than are non-combatants Almost certainly, the risk transfer ratio in choosing Distant Engagement is greater than one, probably far greater, because the systematic advantages of trained modern armies guarantee that the marginal risk they assume by choosing Close Engagement is small relative to the risk they spare civilians.⁶⁹

63. See *id.* at 6, 8–10, 19–21, 25–29, 34–35 (explaining the requirements of close and distant engagement).

64. See *id.* at 39–41 (concluding that the applicability of this ratio at the strategic level is more implicit, which becomes apparent when pages 39–41 are read in light of the discussion at pages 42–47).

65. *Id.* at 24, 27, 34–35, 42–47.

66. See WALZER, *supra* note 38, at 136 (stating that soldiers, “[s]imply by fighting, . . . have lost their title to life and liberty”); Margalit & Walzer, *Israel*, *supra* note 5, at 21 (“By wearing a uniform, [soldiers agree to take on themselves] a risk that is borne only by those who have been trained to injure others (and to protect themselves.)”); *supra* note 38 and accompanying text.

67. See *supra* note 47 and accompanying text.

68. See Luban, *supra* note 6, at 1 (defending “Walzer’s conclusion on grounds somewhat different than his own”).

69. *Id.* at 28–29.

Yet the putative advantages Luban delineates here are misleading or nonexistent. First, his account is self-contradictory. It is true that for soldiers, *ideally*, “[e]veryone in their units is pledged never to leave them fallen on the field.”⁷⁰ Yet this could no longer be the case if the law of proportionality is as Luban understands it.⁷¹ Soldiers could not lawfully rescue a fallen comrade whenever doing so would transfer a risk of greater than one to nearby civilians—a circumstance that could easily arise.⁷²

Second, it is mistaken to assume that combat generally imposes greater risks on civilians than soldiers. Though soldiers are better trained and equipped to defend themselves on the battlefield, they may be intentionally targeted by the other side’s fighters. Civilians, in contrast, may be harmed only incidentally.⁷³ A civilian may lawfully flee a battlefield without risk that soldiers may lawfully pursue her. Any deliberate effort to kill her is criminal.⁷⁴ By contrast, if a soldier seeks to elude the enemy, the other side’s soldiers may hunt her down and kill her. If she flees the conflict entirely, it is likely her superiors will charge her with desertion or at least dereliction of duty—crimes with serious penalties when committed in the midst of combat. For both reasons, soldiers often face greater risk than civilians.

While it is true that soldiers receive health care on the battlefield from military medics, this is also true of civilians. Both international law and codes of professional ethics mandate that scarce medical resources be allocated according to the relative severity of patient condition, irrespective of nationality or status as combatant versus civilian.⁷⁵ Luban is therefore mistaken that a one-to-one risk-transfer ratio will require soldiers to behave as Margalit and Walzer demand. Since Luban’s position attributes a much higher value to soldiers’ lives, the net result is to allow greater weight to force protection than advocated by Margalit and Walzer. This would be especially so whenever the circumstances of combat do not permit accurate prediction of likely civilian casualties, but do allow

70. *Id.* at 29.

71. *See id.* at 43–45 (explaining the proportionality formula).

72. *See id.* at 27–28 (stating that “to protect a civilian from their own violence, soldiers must accept risk transfer ratios less than one” or alternatively equal to one).

73. *See supra* note 32, *infra* notes 94–95, and accompanying text.

74. Rome Statute, *supra* note 32.

75. *See* Additional Protocol I, *supra* note 32, art. 10(2) (“In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.”); *see also* Luban, *supra* note 6, at 32 n.34 (citing a survey that indicates that the majority of U.S. and Israeli military medics and physicians will prioritize treatment based on the severity of the injury irrespective of the wounded’s identity).

prediction of much greater harm to soldiers by adopting certain combat methods over others.

2. Assessing the Value of Soldiers' Lives

Luban rightly observes that there are two senses in which the lives of soldiers may be said to have value. First, there is the moral import of their human status and the measure of dignified treatment this may entail. Second, soldiers are necessary to the conduct of military missions.⁷⁶ A state therefore secures significant military advantage by preserving its soldiers' lives, which can enable them to fight until the battle is won (as well as to fight again another day).⁷⁷ Recall that Luban thinks that soldiers in combat do not entirely forfeit their right to life, a right derived from their intrinsic human dignity, i.e., the first of the two senses in which soldiers' lives have significance.⁷⁸ But this proposition sits very uneasily, he observes, with the second understanding of a soldier's significance. Luban believes that, in determining the proportionality of any given use of force, it is wrong to inject both types of significance into the balance, for this

amounts to a kind of double counting: according to this objection, not only is the soldier's life as valuable as the civilian's, the soldier automatically gets extra credit for being an asset. But to precisely the extent that a soldier is an "asset," that personal interest is set to one side. As a military asset, the soldier can be required to die in the line of duty if necessary. . . . That is precisely what it means to be an asset. Conversely, to give full sway to the soldier's personal interest in survival is to regard him or her as something different in kind from a military asset. To borrow Kant's distinction: as a human being, soldiers are ends in themselves, possessing a dignity not a price; they are intrinsic sources of value. As an asset, a soldier is merely a means,

76. See Luban, *supra* note 6, at 35–37 (“[N]ot only does a soldier have the same fundamental personal interest as the civilian in surviving, the soldier's survival is also crucial to the mission.”); see also Ziegler & Otzari, *supra* note 37, at 60–62 (presuming the existence of military necessity in protecting soldiers).

77. Due to this second kind of value, it cannot be denied that some element of force protection must be taken into account when making a *jus in bello* proportionality assessment, as a consideration that allows putting the civilian population at some risk; otherwise forces would be prohibited from responding to enemy fire if there was even a chance that one civilian would be harmed. See Laurie R. Blank, *The Application of IHL in the Goldstone Report: A Critical Commentary*, 12 Y.B. INT'L HUMANITARIAN L. 347, 370 (2009) (“Stopping mortar fire endangering one's own troops offers clear military advantage. After all, no military force can engage in any military operations if the law does not permit it to take defensive action.”).

78. Compare text accompanying *supra* note 44 (Margalit and Walzer's position), with text accompanying *supra* note 60 (Luban's position).

whose life could be the price paid for victory, and whose value is instrumental, not intrinsic.⁷⁹

This is true, however, only if the matter is considered at so high a level of abstraction, rather than as experienced in war by soldiers and their commanders, when the asset value of particular soldiers will differ from one mission to another. If not isolated from these situation-specific variables, the notion of a one-to-one risk-transfer ratio becomes a poor guide to decision making. To see how this is so, imagine that a state at war has learned that the enemy plans to assassinate the chief of staff of that state's military. The only way to avert this assassination is to preemptively attack the enemy force. Does anyone really think that a state should be prevented from doing so if more than one foreign civilian will die in the anticipatory attack (intended to save a single soldier, after all, albeit a chief of staff)? Because the chief of staff is a major military asset, protecting her should authorize the state to cause significant incidental harm to civilians, when unavoidable.

The asset value of soldiers varies not only with their rank, but also with the circumstances of combat they confront at a given time. Thus, a particular platoon will differ in its asset value if, after its immediate engagement with the enemy, it will shortly thereafter be needed for a second operation. If no second engagement is anticipated to require their services, then these soldiers are of less total value at the time the first operation is decided upon and its proportionality assessed. If the value of soldiers is to be assessed in two ways, this is not "double counting," as Luban critically characterizes it. It is simply that soldiers possess two distinct sources of value—deontological and consequential—and their value in the latter sense must be assessed on a case-by-case basis.

There are times when soldiers' lives will have to be accorded greater value than foreign civilians, and there will be other times when the reverse will be true, depending on the significance of the mission in which the soldiers are to engage.⁸⁰ The only way in which the intrinsic value of soldiers' lives can be respected is if it is treated separately from the advantage attained from protecting them for a particular mission. If it is to acknowledge that their lives have any inherent value at all, the law must, therefore, set a certain minimum standard of protection owed to soldiers, irrespective of that mission. This standard is necessarily a constant, since the intrinsic value of a person's life does not vary from one situation to another.

79. Luban, *supra* note 6, at 36; *see also id.* at 37 (arguing that when soldiers are valued as military assets, adding them to the proportionality calculus as ends in themselves amounts to double counting).

80. *See* Ziegler & Otzari, *supra* note 37, at 61 (discussing different formulas for determining the value of soldiers' lives in different situations).

In short, it is not double counting, for purposes of proportionality analysis, to consider the value of soldiers as military assets in particular missions in addition to the value of their human right to life. None of the authors here assayed reach this conclusion: Luban, for reasons just delineated, and the others because they fail to distinguish between the two distinct types of soldierly significance at all.

3. Force Protection as a Strategic Aim

Luban next examines a third basis for valorizing force protection within proportionality assessment. The extent of a country's military casualties often influences public support for a continuing war effort and for the state's military and civilian leaders.⁸¹ There is no dispute that, as a matter of policy, this casualty concern may legitimately influence the state's decision to continue the fight. The harder question is whether, beyond political considerations, the demoralizing effect of military casualties is relevant to legal assessment of proportionality? Luban argues that it is not. He believes that it is almost never clear enough, on the facts of a given conflict, whether reducing troop casualties will, by sustaining public support for the war, generate "clear and direct" military advantage.⁸² He therefore concludes that a state may not take this possibility into account when evaluating proportionality:⁸³

Further difficult questions are whether the political need for force protection can make it an independent strategic goal of military operations, and whether that confers extra weight to the "concrete and definite military advantage" of reducing your own side's casualties. Governments sometimes face intense casualty-aversion in their electorates. . . .

. . . [A] classic argument [is] that political goals can be military goals as well. From Clausewitz on, we have understood that military victory means breaking the adversary's political will to fight, and losing your own will to fight means military defeat. . . .

. . .

However, this way of thinking ignores the other half of the problem, namely that in order to keep up the public's own morale in a just war, enemy civilians must die in greater numbers. . . . This is why the legal test for proportionality weighs civilian damage against "concrete and direct military advantage," not the indirect and intangible military advantage grounded in civilian morale.⁸⁴

Luban here asks two distinct questions: (1) "whether the political need for force protection can make it an independent strategic goal of

81. See Luban, *supra* note 6, at 39–41, 44 (discussing military force protection agendas).

82. *Id.* at 40–41, 44.

83. *Id.*

84. *Id.* at 40–41.

military operations,”⁸⁵ and (2) whether that “confers extra weight to the ‘concrete and definite military advantage’ of reducing your own side’s casualties.”⁸⁶ A first problem is that Luban answers only the latter query. Second, to reach his conclusion, he applies the standard of “concrete and direct military advantage,” which is, according to international law, an element of *in bello*, but not *ad bellum*, proportionality.⁸⁷ His legal analysis therefore speaks only to the former. Decisions about *ad bellum* proportionality concern strategic issues, however, and are made by high-ranking officials, for they are the only people authorized to establish those comprehensive goals. The conflation of *in bello* with *ad bellum* considerations, further discussed later, also plagues the other assayed authors’ understandings of proportionality. To establish that the political or strategic rationale for force protection is irrelevant to *in bello* proportionality is not to show that it is immaterial to *ad bellum* proportionality, when it sometimes becomes highly pertinent and weighty.

III. PROPORTIONALITY AT WAR'S MULTIPLE LEVELS

A. Disagreement on the Legal Elements of Proportionality

The three sides to the current debate differ greatly on how proportionality should be assessed. The first disagreement concerns the relative priority of civilians’ and soldiers’ lives. Does international law entirely vitiate soldiers’ right to life (Margalit and Walzer)? Or does each soldier’s life retain a value equal to that of any civilian (Luban)? Conversely, may their lives be legitimately accorded priority over the lives of foreign civilians (Kasher and Yadlin)?

The second disagreement concerns the minimum duty of care soldiers owe to foreign civilians: does this entail an obligation to assume major risks so as to reduce danger to those civilians (Luban, Margalit, and Walzer) or does it not (Kasher and Yadlin)? If this obligation exists, how extensive is it? Does it demand that soldiers “minimize” risks to civilians (Margalit and Walzer)? Does it require only that they accept more risk to themselves than they offload to civilians (Luban’s initial position)? Or does it demand, less ambitiously, that they impose neither more nor less than a one-to-one risk-transfer ratio to civilians (Luban’s later and primary stance)?

The third disagreement is about the relative importance of the two types of soldierly significance: the instrumental value of soldiers as military assets and their intrinsic value as human beings with a

85. *Id.* at 39.

86. *Id.*

87. *See infra* Part II.B and II.D.

right to life. Does international law allow taking only one or both of these into account when assessing proportionality?

Fourth, may the “political” concern with demoralizing effects from military casualties be taken into account in assessing proportionality, or is Luban correct that international law forbids this?

Fifth, to what extent must military decision making about proportionality consider factual subtleties specific to a given situation, as required in particular by Luban’s theory of relative risk transfer? Or should international law acknowledge the need for a simpler rule, applicable across the board, such as one that always prioritizes civilians’ lives over soldiers’ lives (Margalit and Walzer) or vice versa (Kasher and Yadlin)?

Finally, are Kasher and Yadlin correct about the necessity of a special rule on proportionality for war against terrorist organizations, a rule that accords greater weight to force protection than suitable to other types of armed conflict?

The only question to which all sides in the debate offer the identical answer—in the affirmative—is whether a single legal standard should govern officials at all echelons along the chain of command, when called upon to resolve the several disagreements just delineated. This Article’s discussion in the preceding section would suggest that this is unlikely to be true. The type of decisions as well as the practical capabilities and background knowledge of officials vary along that chain in ways that international law would be unwise to ignore. The chain is commonly demarcated by three categories: the strategic, operational, and tactical levels of war.⁸⁸ Though in practice there can often be no precise boundary between them, each nonetheless characteristically involves decision making of a different sort, on distinct kinds of issues.⁸⁹ These differences greatly affect the proportionality assessment that international law should demand. The present Part therefore aims to show how proportionality means decidedly distinct things at these three levels. The Article concludes that each of the three approaches examined in Part I prove more appropriate than the other two in one of war’s three levels of decision making.

88. Dep’t of the Army, Operations: FM 3-0, at 7-1 to -5 (2001).

89. See Richard A. Chiloat, *Strategic Art: The New Discipline for 21st Century Leaders*, at iv (1995) (discussing the uniqueness of strategic-level decision making); Dep’t of the Army, *The Operations Process: FM 5-0*, at 2-2 (2010) (discussing differences between operational- and tactical-level decision making); see also Gene C. Kamena, *Mission Orders: Is Intent the Answer?* 5, 27–28 (June 5, 1992) (unpublished M.M.A.Sc. thesis, U.S. Army Command & General Staff College) (on file with author) (emphasizing the need for a decentralized and flexible command system).

B. Jus in Bello Proportionality and Force Protection: Operational Issues

The operational level of war addresses questions about how the broadest strategic goals should be concretized into more specific plans for a delimited spatial and temporal domain.⁹⁰ The lion's share of war-related decision making occurs at the operational and tactical levels.⁹¹ These decisions must be consistent with international law, which imposes a number of constraints.⁹² One of these is *jus in bello* proportionality.⁹³ This norm seeks to reduce harm to civilians in combat zones. It allows that civilians may be harmed,⁹⁴ but only incidental to an attack on a military target, and the harm may not be excessive in relation to the anticipated military advantage.⁹⁵ Because *in bello* proportionality governs war in its tactical and operational respects, the military advantage must be concrete and direct, in this way delimited in scope. Only at the strategic level may a wider set of considerations enter into assessments of proportionality.⁹⁶ At the

90. DEPT OF THE ARMY, *supra* note 89; *see also* U.S. MARINE CORPS, DEPT OF THE NAVY, CAMPAIGNING: MCDP 1-2, at 4 (1997) (stating that “the operational level [is] the link between strategy and tactics”).

91. *See* U.S. MARINE CORPS, *supra* note 90. This manual describes “[t]he tactical level of war [as] the province of combat.” *Id.* at 6. As for the operational level, it states that “[i]n its essence, the operational level involves deciding when, where, for what purposes, and under what conditions to give battle—or to refuse battle—in order to fulfill the strategic goal.” *Id.* at 8. Furthermore, it states that, due to the nature of operational tasks, strategic commanders must accord considerable discretion to operational decision makers to the extent that “[t]he basic concept of a campaign plan should be born in the mind of the man who has to direct that campaign.” *Id.* (quoting ERIC VON MANSTEIN, *LOST VICTORIES* 79 (1982)). Thus, as one may see, most war-related decision making occurs at the operational and tactical levels.

92. *See id.* at 11 (describing international law as a constant strategic constraint on operational decisions).

93. The *jus in bello* proportionality norm equally applies to both sides, since once an armed conflict has begun, international law does not distinguish between aggressors and aggressed. *See* Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 *YALE J. INT'L L.* 48, 49–50 (2009) (explaining *jus in bello*).

94. *See* Additional Protocol I, *supra* note 32 (“[T]he parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”).

95. Rome Statute, *supra* note 32, art. 8(2)(a)(iv), (b)(iv); *see also* Additional Protocol I, *supra* note 32, arts. 51(5)(b), 57(2) (discussing the types of indiscriminate acts and the types of precautions taken regarding attacks); HENCKAERTS, *supra* note 1, at 46–50 (discussing the *jus in bello* proportionality principle in customary international law); Amichai Cohen & Yuval Shany, *A Development of Modest Proportions: The Application of the Principle of Proportionality in the Targeted Killings Case*, 5 *J. INT'L CRIM. JUST.* 258, 311–12 (2007) (discussing the long pedigree in customary international law of the *jus in bello* proportionality principle). The prohibition against disproportional attack applies also to damage to civilian property.

96. *See* COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 683–84 (Yves Sandoz et al. eds., 1987),

lower two levels, the pressing question about force protection is how much greater danger may civilians be exposed to so that soldiers do not suffer death, serious injury, or enemy capture?

At first glance, *in bello* proportionality appears to resonate most strongly with Margalit and Walzer's approach. This legal norm seems to take into account only two factors: military advantage, on one hand, and civilian harm, on the other.⁹⁷ For this reason, some interpret the norm as do Margalit and Walzer:⁹⁸ they allow no legal consideration of soldiers' right to life⁹⁹ and do not recognize a distinction between civilians belonging to the state in question and those belonging to its adversary.¹⁰⁰

Yet it is mistaken to rely entirely on the lack of explicit reference to these latter two considerations (i.e., (a) soldiers' right to life and (b) distinction between civilians belonging to the state in question and other civilians) in most formulations of the *in bello* proportionality norm as the basis for a conclusion that *in bello* proportionality does not allow these considerations to be taken into account. This becomes

available at <http://www.icrc.org/ihl.nsf/WebART/470-750073?OpenDocument> [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS] (stating the *in bello* proportionality norm "is not concerned with strategic objectives" since "[t]he expression 'concrete and direct' was intended to show that the advantage concerned should be substantial and relatively close, and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded").

97. *E.g.*, UNIVERSITY CTR. FOR INT'L HUMANITARIAN LAW [UCHL], REPORT: EXPERT MEETING "TARGETING MILITARY OBJECTIVES" 17–19 (2005), available at http://www.geneva-academy.ch/docs/expert-meetings/2005/1rapport_objectif_militaire.pdf (arguing that only the value of soldiers as military assets can be taken into account); Thomas W. Smith, *Protecting Civilians . . . or Soldiers? Humanitarian Law and the Economy of Risk in Iraq*, 9 INT'L STUD. PERSP. 144, 146–47 (2008) (same).

98. *See supra* text accompanying notes 38–45.

99. *See* Colm McKeogh, *Civilian Immunity in War: From Augustine to Vattel*, in CIVILIAN IMMUNITY IN WAR 62, 80 (Igor Primoraz ed., 2007) (interpreting the law of armed conflict as if it completely forfeits soldiers' right to life); Adam Roberts, *The Principle of Equal Applications of the Laws of War*, in JUST AND UNJUST WARRIORS: THE MORAL AND LEGAL STATUS OF SOLDIERS 226, 250 (David Rodin & Henry Shue eds., 2008) (same); *see also* Smith v. Sec'y of State for Def., [2010] UKSC 29, [142], (U.K.) (ruling that during armed conflicts, soldiers' right to life should not be recognized, since such recognition would reduce the protection afforded to civilians).

100. *E.g.*, Luban, *supra* note 6, at 8. Luban argues that "nothing in the laws of war distinguishes non-combatant civilians into different classes based on nationality, and to give the same legal words different meanings based on a nationality distinction the law does not recognize is dishonest interpretation." *Id.* Luban's statement is, however, misleading. There are some international norms that do only place duties on a state with regard to civilians under its control. *E.g.*, Additional Protocol I, *supra* note 32, art. 58(b) (refraining from locating military targets within densely populated areas). There are also some international norms that only place duties on a state with regard to civilians that are nationals of the belligerent. *E.g.*, Rome Statute, *supra* note 32, art. 8(b)(xv) (compelling the nationals of the hostile party to take part in the operations of war directed against their own country). The accurate statement is that the general *jus in bello* proportionality norm does not explicitly distinguish between these two kinds of civilians. Furthermore, the conclusion reached by Luban from this lack of explicit reference, as discussed in the text, is inaccurate.

apparent once one recalls Margalit and Walzer's claim that killing civilians is truly incidental only if soldiers actively seek to avoid killing them, "and that active intention can be made manifest only through the risks soldiers themselves accept in order to reduce the risks to civilians."¹⁰¹ It is necessary to ask, however, on what basis do they defend this understanding of incidental harm?¹⁰² Similarly, on what grounds do these authors interpret the term *excessive*, to mean that prioritizing a soldier's life over that of a given civilian would invariably warrant classifying any ensuing civilian harm as excessive, hence disproportionate?¹⁰³

In addition to civilian harm and military advantage, a further element is essential to *in bello* proportionality. One must identify the minimum level of protection that soldiers owe to foreign civilians.¹⁰⁴ There is no doctrinal basis for the view that soldiers owe those civilians duties as extensive as Margalit and Walzer wish to impose (and they offer their stance as an interpretation of *in bello* proportionality).¹⁰⁵ Some leading authorities maintain precisely the opposite position, that "[t]he proportionality principle does not itself require the attacker to accept increased risk" in order to reduce civilian danger.¹⁰⁶ This more indulgent view of the minimum

101. Margalit & Walzer, *Israel*, *supra* note 5, at 22; *see also* WALZER, *supra* note 38, at 155–56 (describing how soldiers are expected to take risks to protect civilian lives).

102. Walzer, in fact, has admitted, in the past, that his interpretation of the proportionality norm is based on a proposal to "correct" the moral rationale behind it (which is the Doctrine of Double Effect). WALZER, *supra* note 38, at 154–57.

103. *See* UCHL, *supra* note 97, at 17–19 ("[T]he protection of one's own forces must never be conducted at the cost of the civilian population.").

104. *See* Eyal Benvenisti, *Human Dignity in Combat: The Duty To Spare Enemy Civilians*, 39 *ISR. L. REV.* 81, 82 (2006) ("But what is the meaning of 'excessive' damage? More concretely, is the army required to expose its combatants to life-threatening risks in order to spare enemy civilians?").

105. Supposedly, two articles of Additional Protocol I, *supra* note 32, can be argued to support a position very similar to the one advanced by Margalit and Walzer. Article 57(2)(a)(ii) states that "those who plan or decide upon an attack shall . . . take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects." *Id.* art. 57(2)(a)(ii). Article 57(3) states that "[w]hen a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects." *Id.* art. 57(3). Yet, the terms *possible* (used in Article 57(3)) and *feasible* (used in Article 57(2)(a)(ii)) are extremely vague and thus can be interpreted in a variety of ways. Accordingly, some jurists interpret these terms in ways that far from lead to the placing of soldiers under a duty as demanding as the one supported by Margalit and Walzer. *See, e.g.*, SANDOZ, *supra* note 96, at 681–82 (discussing different interpretations of the term *feasible*); Benvenisti, *supra* note 104, at 88–89 (interpreting the duty to do as much as "possible" in order to protect foreign civilians); *see also infra* notes 182–183 and accompanying text.

106. The Joint Doctrine & Concepts Ctr. [JDCC], Ministry of Defence, The Joint Service Manual of the Law of Armed Conflict: JSP 383, at 25–26 (2004) (U.K.).

standard for safeguarding civilians lets states accord significant weight to their soldiers' right to life, a conclusion Margalit and Walzer reject. And contrary to Luban, that conclusion is defensible because, under this more indulgent interpretation of the law, the two sources of soldiers' significance can simply play different roles within the analysis of proportionality. The soldier's value as a military asset bears on the military advantage anticipated by her deployment in a given tactical situation. Her intrinsic value as a human being, in contrast, may be taken into account to set a limit on the measure of precaution she must take to safeguard civilians; it may establish, in other words, a baseline "floor" of personal safety beneath which soldiers need not descend.¹⁰⁷

Consider now the question of whether the duty owed by soldiers to foreign civilians is any less demanding or extensive than that owed to the state's own civilians. International humanitarian law here clearly embodies, in its very unsettledness, an unresolved struggle between two visions of law's role in armed conflict.¹⁰⁸ The first (or statist) perspective views this law as "a compact between rival armies to coordinate how they can 'conciliate the necessities of war with the laws of humanity.'"¹⁰⁹ The second (or humanist) standpoint understands this body of law as manifesting a commitment to

107. See Benvenisti, *supra* note 104, at 88–90, 93 (stating that the open-ended standard of the term *excessive harm* leaves room for different interpretations, and in light of the need to take into account the soldiers' right to life, the proper interpretation calls for a duty to reduce harm to enemy civilians that does not entail a soldierly obligation to assume personal life-threatening risks); Dale Stephens & Michael W. Lewis, *The Law of Armed Conflict—A Contemporary Critique*, 6 MELB. J. INT'L L. 55, 72 (2005) ("The law of armed conflict does not require that a nation needlessly sacrifice its own military members in order to minimise incidental civilian injury."). Furthermore, the position that the intrinsic value of a soldier's life is not fully derogated during an armed conflict is in accordance with the original philosophical basis for IHL's principle of distinction. This philosophical basis is known as the Rousseau–Portalis Doctrine. See JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 13–15 (Rose M. Harrington trans., 1893) (1761). According to this doctrine, war is not between people but between states (i.e., corporate entities/"property"). The permission to kill a person, when she serves as a soldier, is only a derivative of the conflict between the states. Thus when she does not bear arms, e.g., when she surrenders, she is a person and thus her life cannot be taken. Furthermore, Rousseau seems to hold the view that soldiers retain at least some of their right to life even during the war. He states, in the context of the permission to kill soldiers during war: "Sometimes a State may be killed, without killing a single one of its members: war gives no rights which are not necessary to its object." *Id.* at 15. For the influence of this doctrine on the development of the modern law of war, see Toni Pfanner, *Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action*, 87 INT'L REV. RED CROSS 149, 159 (2005).

108. See Benvenisti, *supra* note 104, at 82–83 ("The evolving claims about the law on the conduct of hostilities betray an apparent cleavage between two visions of the law.").

109. *Id.* at 82. Such a view is in line with the way most other parts of international law are perceived. See MALCOLM SHAW, *INTERNATIONAL LAW* 6 (5th ed. 2003).

universal human dignity.¹¹⁰ In regard to force protection, the first view—implicit in Kasher and Yadlin's position—stresses the responsibility of states to their own citizens, both civilians and soldiers,¹¹¹ whereas the latter stance—embraced by Margalit and Walzer,¹¹² as well as Luban¹¹³—emphasizes the duty of belligerents to protect civilians, regardless of nationality, from war's horrors.

The humanist stance does not invariably result in greater civilian protection than the statist, notwithstanding first appearances. A state continues to owe duties (under both international and domestic constitutional law) to those under its effective control—its own citizen civilians, in most cases—that it does not owe to others.¹¹⁴ Even Margalit and Walzer, as well as Luban, acknowledge that states have a responsibility to protect their own civilians from risks imposed *by others*, a responsibility not owed to foreign civilians.¹¹⁵ Yet these authors fail to see how that duty frequently conflicts with the minimum standard of care they insist that soldiers accord foreign civilians. In many situations, civilians on both sides of the battle lines will be put at risk by a military engagement. Alternative methods of warfare would help or hinder each civilian group. How to balance or adjudicate between those

110. Benvenisti, *supra* note 104, at 82. Such perspective views IHL as being based on a rationale that is different from that of most other parts of international law. See generally *Prosecutor v. Kupreškić (Lasva Valley Case)*, Case No. IT-95-16, Judgment, ¶ 518 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000) (describing the “progressive trend towards the so-called ‘humanisation’ of international legal obligations” in IHL).

111. See Kasher, *supra* note 15 (criticizing the doctrine of forfeiture of the right to life); see also Benvenisti, *supra* note 104, at 82, 87–90 (arguing that soldiers have a dominant duty to “ensure” the rights of their own nationals while under an obligation only to “respect” the rights of enemy nationals); Hurka, *supra* note 61, at 59–63 (criticizing those who claim that states and their soldiers are morally obligated, during war, to accord equal value to the lives of state civilians and the lives of foreign civilians, and also criticizing the claim that the value a state must attribute to the life of a foreign civilian is greater than the value it can attribute to the life of its own soldier); Porat, *supra* note 37, at 18–20 (criticizing Margalit and Walzer's claim that soldiers, during combat, must be equally altruistic in their treatment of all civilians (foreign and co-national)).

112. See *supra* note 43 and accompanying text.

113. See *supra* note 54 and accompanying text.

114. See Benvenisti, *supra* note 104, at 87–88 (distinguishing between a duty to respect rights of civilians and a more extensive duty to *ensure* these rights, and arguing that during warfare, as long as the attacking military lacks effective control over the relevant territory, “there is no basis to impose on [it] an obligation to ensure enemy civilians lives,” but only the more limited duty of respecting their right to life); see also *Island of Palmas (U.S. v. Neth.)*, Hague Ct. Rep. 2d (Scott) 83 (Perm. Ct. Arb. 1928), available at <http://web.archive.org/web/20080528174538/http://www.gwu.edu/~jaysmith/Island.html> (stating that international law “serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian”).

115. See *supra* notes 42, 50 and accompanying text.

competing considerations is a question that cannot be ignored or dismissed.

To flesh out the problem, consider the following scenario, which has commonly arisen in Israel's conflicts with its neighbors.¹¹⁶ A division commander receives an order to seize a suburban neighborhood where both foreign civilians and enemy combatants are present. Violating international law, the enemy launches mortars from the neighborhood toward a town in the commander's country. The commander has the two options before mentioned: seek aerial support to bombard the neighborhood, or order her subordinates to take the neighborhood house by house. The advantage of the first option is not only greater soldier safety—i.e., protection from risk of capture, injury, or death—but also velocity—i.e., more rapidly stopping the mortar attacks that the state's civilians otherwise continue to suffer. In other words, the option best calculated to reduce risks to the enemy's civilians (ground combat), by forcing the state's soldier to adopt a more time-consuming and riskier option, ends up increasing risks to the state's own civilians, who remain subject to enemy mortar attacks for a longer period than if the mortar sites had been immediately destroyed by aerial attack. This would be especially true if mortar firings increase in frequency and intensity; a common response to early stages of land operations.

The Israeli experience thus suggests that requiring soldiers to accept greater risk in order to protect foreign civilians will often greatly increase the risk to the state's own noncombatants and therefore may turn out to implicitly prioritize the safety of foreign noncombatants over the state's own. That result would be inconsistent, in different ways, with the positions of Luban, Margalit, and Walzer on the duties that states owe to each of these three groups. For Luban, it would be incompatible with the duty to treat all lives equally. For Margalit and Walzer, it would be inconsistent with limiting the duty to safeguard foreign civilians so as not to ensure failure of the mission—in this case, to protect domestic civilians from the mortar attacks. One should acknowledge that, sometimes, the result of choosing a ground operation would not lead to complete mission failure, but only to a delay in the attainment of the mission's goal—which places the state's civilians at risk for an extended period of time. Yet, even that result often proves irreconcilable with the views of those three authors; it clashes with their acknowledgment¹¹⁷ that a state owes greater responsibilities of protection to its own

116. See Porat, *supra* note 37, at 17–21 (discussing similar examples); Ziegler & Otzari, *supra* note 37 (same); cf. Blank, *supra* note 77, at 370 (criticizing the Goldstone Report's analysis of a similar situation).

117. See *supra* notes 42–43, 50 and accompanying text.

civilians than to foreigners, and that these duties extend to protecting its civilians from harm by others.¹¹⁸

In other words, an avowedly “humanist” approach to the law of operational proportionality would regularly preclude one belligerent, on account of its duties to an adversary’s civilians, from employing methods of warfare that would block the latter belligerent from inflicting still greater losses on its own civilians.¹¹⁹ In these ways, prohibiting states from prizing force protection, through unduly stringent interpretations of *in bello* proportionality, prevents them from honoring their responsibility to protect their own civilians from a violent attack. Fulfilling this duty to those dwelling within its territory (and therefore subject to its authority) is generally the state’s chief strategic goal in responding to an unlawful enemy attack. A state’s ability to offer that protection, in exchange for the loyalty of its citizens, acts as the centerpiece of any acceptable social contract.¹²⁰

Thus, even if one rejects the view that citizens turned soldiers retain any right to life, and instead understands their value in purely instrumental terms, protecting their lives remains of central interest to *in bello* proportionality. Soldiers should therefore continue to enjoy some protection based on this legal norm, if one wishes them to be able to properly protect the lives of the state’s own civilians from the threats posed to them by the enemy’s actions. This interpretation does not entirely deny protection to foreign civilians: when their harm is likely to prove excessive in relation to any pertinent military advantage from a given use of force, that exercise of force remains inconsistent even with this interpretation of the requirements of *in bello* proportionality.¹²¹

Moreover, there are good reasons for international law to let states acknowledge that their soldiers retain a right to life. For this is a fundamental human right, one not easily devalued even when

118. See Ziegler & Otzari, *supra* note 37; see also Hurka, *supra* note 61, at 60–61 (explaining that a government should afford greater weight to the lives of its own citizens than the lives of foreign enemy civilians).

119. Some further argue that the humanist approach to the law of war, due to the limits it places on the conduct of states, may ultimately, in some situations, lead to greater civilian loss than its interpretive alternative. See YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 225–26 (2004) (arguing that a prohibition of belligerent reprisals does not accord with the actual state practice and prevents significant deterrence of illegal attacks); see also Kasher, *supra* note 15, at 166 (“Those who call for a ban on cluster bombs . . . tell the belligerent party . . . that uses cluster bombs to use other means instead. Assuming that those alternative means are less effective, a ban would result in risking . . . civilians, against whom enemy combatants . . . continue to be a threat.”).

120. See Benvenisti, *supra* note 104, at 89–90 (“The juxtaposition of these two obligations suggests that each of the armies has a dominant goal, even a duty, to protect its civilians, their rights and interests in the pursuit of the war efforts.”).

121. JDCC, *supra* note 106, at 26.

individuals voluntarily agree to forfeit it¹²²—the argument Margalit and Walzer advance with regard to soldiers.¹²³ Moreover, though it is axiomatic that war, and the law of war, treats individual soldiers as instruments to collective ends,¹²⁴ this does not mean that, in becoming soldiers, people abdicate or waive their right to life.¹²⁵ For

122. *E.g.*, TERRANCE C. MCCONNELL, *INALIENABLE RIGHTS: THE LIMITS OF CONSENT IN MEDICINE AND THE LAW* 12–13 (2000) (discussing the difficulty to morally justify infringement of inalienable rights, such as the right to life, simply based on the fact that the possessor of the right consented); *see also* Kasher, *supra* note 15, at 164 (“There is, however, a conceptual gap between undertaking jeopardy and forfeiting some of one’s very basic rights.”). Moreover, one must admit that this voluntary-acceptance argument is even less convincing where (as in Israel) the soldier is conscripted, and generally does not voluntarily seek a military career. *See* Smith v. Sec’y of State for Def. [2010] UKSC 29, [100] (U.K.) (implying that soldiers’ right to life should be recognized when the soldiers are conscripts); Plaw, *supra* note 5, at 12 (admitting the greater weakness of this argument in the context of conscripts); Porat, *supra* note 37, at 16.

123. *See supra* notes 38–40 and accompanying text; *see also* Luban, *supra* note 6, at 26–29 (arguing that soldiers have a professional duty to risk their lives in order to reduce the risk for civilians).

124. *See* Blum, *supra* note 35, at 118, 132–36 (discussing the extensive support amongst jurists and philosophers for this legal state of affairs, although Blum is critical of this consensus); Blum, *supra* note 33, at 40 (explaining the theory that soldiers are tools of war “made to be killed”); *see also supra* notes 33–37 and accompanying text.

125. *See* International Covenant on Civil and Political Rights, arts. 4, 6, 8(3), *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (asserting all peoples’ right to life). Different international tribunals, notably the International Court of Justice (ICJ) in its advisory opinion regarding the legality of nuclear weapons, ruled that human rights, such as the right not to be arbitrarily deprived of one’s life, apply during armed conflicts. The courts further ruled that what should count as an arbitrary deprivation of life must be determined on the basis of the relevant *lex specialis*—here the law of armed conflict. *See, e.g.*, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8) (asserting the continued validity of human rights during armed conflicts); *see also, e.g.*, *Isayeva v. Russia*, App. No. 57950/00, 41 Eur. H.R. Rep. 791, 832–38 (Eur. Ct. H.R.) (2005) (finding that the military was still bound to respect the right to life of the applicant during the armed conflict by minimizing the risk to life posed by the military’s actions). The ICJ, and these other tribunals (such as the European Court of Human Rights), most likely had in mind the right of civilians, not combatants. These courts nevertheless did not expressly limit this right to the former category. Some have interpreted the right to life, in light of the relevant *lex specialis*, so as to derogate this right with regard to combatants. *See, e.g.*, Noam Lubell, *Challenges in Applying Human Rights Law in Armed Conflict*, 87 INT’L REV. RED CROSS 737, 745, 748–49 (2005) (arguing that the human rights law’s right to life translates in light of the law of war to the duty not to intentionally target *civilians*, while the permission to target combatants, constitutes a case in which law of war as *lex specialis*, overrides the obligation (which otherwise exists based on human rights law) to protect the right to life). Others contend that, because the right to life pertains even in war, soldiers too retain this right, to some extent. *E.g.*, Benvenisti, *supra* note 104, at 83–84, 86, 90 (highlighting tensions between human rights law and *jus in bello*, while assuming that the principles that inspire human rights law continue to apply during armed conflicts, to an extent that even soldiers retain (at least to a certain degree) their right to life); Ziegler & Otzari, *supra* note 37, at 63 (citing the core documents of human rights law and stating, in light of these sources, that to adopt an interpretation of IHL norms that

most of modern legal history, people were generally deemed to lose most of their constitutional rights upon becoming soldiers.¹²⁶ Today, the “civilianization” of military law in many democracies reflects the view that soldiers are simply “civilians in uniform,” retaining all rights that can be construed as compatible with the demands of their new legal status.¹²⁷ These rights may have to be interpreted more narrowly when public policy so requires, as during armed conflict.¹²⁸ Even so, international law should be interpreted as to allow states to acknowledge and respect their soldiers’ right to life, to the extent

“assign[s] no intrinsic value to the lives of compatriot soldiers seems to be incompatible with their universal rights to life and human dignity”). For example, Dale Stephens and Michael Lewis indicate:

The law of armed conflict does not require that a nation needlessly sacrifice its own military members in order to minimise incidental civilian injury. Indeed, while the ICJ has expressly asserted the precedence of the law of armed conflict as the *lex specialis* over human rights norms during a war, this still allows for the application of human rights norms where the *jus in bello* is silent. One obvious area of intersection concerns the rights of a nation’s own military members and the risks to which they must be exposed to preserve the lives of civilians of the enemy nation.

Stephens & Lewis, *supra* note 107, at 72 (footnotes omitted). The British Supreme Court had a recent opportunity to rule on this question. The court’s majority chose to resolve the case, however, entirely on a jurisdictional issue. This has led to the odd result that British soldiers retain a right to life only in the unlikely event that war occurs within Europe, where the European Convention on Human Rights applies, but not when the conflict occurs elsewhere, where British troop engagement is more probable. See *Smith*, [2010] UKSC 29 [56] (deciding whether British soldiers enjoy a right to life under the European Convention of Human Rights).

126. See G.R. Rubin, *United Kingdom Military Law: Autonomy, Civilianization, Juridification*, 65 MODERN L. REV. 36, 36–42 (2002) (describing the increased “civilianization” of UK military law); see also Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3, 3–7 (1970) (describing the increased “civilianization” of military law in the United States).

127. See *Chappell v. Wallace*, 462 U.S. 296, 304–05 (1983) (declining to hold that military personnel are barred from bringing constitutional claims in civil court “simply because they have doffed their civilian clothes”); H CJ 6055/95 *Zemach v. Minister of Def.* 53(5) PD 241, ¶¶ 19, 22 [1999] (Isr.); *Engel v. Netherlands*, App. No. 5100/71, 22 Eur. Ct. H.R. (ser. A) at 23, ¶ 54 (1976) (stating that the Convention applies to members of the armed forces and not just civilians); Eur. Parl. Ass., *Recommendation*, Doc. No. 1742 (2006), available at <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta06/erec1742.htm> (“[M]embers of the armed forces are citizens in uniform who must enjoy the same fundamental freedoms . . . and the same protection of their rights and dignity as any other citizen, within the limits imposed by the specific exigencies of military duties.”); DEP’T OF THE ARMY, ARMY LEADERSHIP: FM 6-22, at 2-9 (2006) (“[S]erving as a Soldier of the United States does not mean giving up being an American citizen with its inherent rights and responsibilities.”); OSCE, HANDBOOK ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF ARMED FORCES PERSONNEL 32 (2008).

128. See, e.g., *Scott v. R.*, [2004] C.M.A.R. 2 (Can.) (stating that soldiers’ constitutional rights can be more greatly infringed during war); Peter Rowe, *The Soldier as a Citizen in Uniform: A Reprisal*, 7 N.Z. ARMED FORCES L. REV. 1, 7, 10, 16 (2007) (discussing considerations which allow a greater infringement of soldier’s rights, most notably the existence of an emergency or armed conflict).

consistent with those soldiers' duties to others.¹²⁹ Whatever international law may permit in this regard, many democratic states also require as much through their constitutional law.¹³⁰

A state that utterly ignored the human status of its soldiers would also greatly reduce their motivation to fight—even when national security genuinely so requires.¹³¹ Thus, even a consequentialist standpoint would lead states to respect their soldiers' right to life in a manner that limits the risks they impose on these soldiers in the interests of safeguarding the enemy's civilian population.

Weighty implications follow from allowing proportionality assessment to consider both the instrumental value of the soldier's life and its intrinsic deontological import. The positions of Margalit, Walzer, and Luban become unsustainable. Their approaches treat the value of soldiers' lives as a "constant," mathematically speaking, according it a weight logically invariant from one empirical circumstance to another. Yet, once the law of proportionality acknowledges the significance of soldiers as military assets, it is no longer possible to treat their value as invariant.

This is clear upon consideration of the second element of Margalit and Walzer's test, their concession that international law cannot require soldiers to accept a particular risk if so doing will guarantee the failure of their mission. This standard is a mathematical constant, because it is held to be equally applicable in the same way at all times and places in war. For that reason, it makes little sense. There are many potential missions that must be aborted on account of the high risk they place on large numbers of foreign civilians—the rationale being that the military advantage to be gained from the contemplated mission simply could not remotely approximate the likely extent of unintended civilian harm.

It is not the number of soldiers who will be put at risk (Luban's concession) that is decisive here, nor the fact that such risk would be

129. *E.g.*, Stephens & Lewis, *supra* note 107, at 72 (explaining that international law allows states to interpret the *in bello* proportionality norm in a manner which permits them to take into account the right to life of their own soldiers).

130. *Cf.* Kasher, *supra* note 15, at 164 (“[W]ithin the framework of a democratic regime, a combatant has the right to be appropriately protected by the state . . .”).

131. *See* LEONARD WONG ET AL., WHY THEY FIGHT: COMBAT MOTIVATION IN THE IRAQ WAR 11 (2003), available at <http://www.strategicstudiesinstitute.army.mil/pdffiles/pub179.pdf> (explaining the effect of the protection of soldiers' right to life on their motivation to fight). Wong and his partners suggest that a main motivator for soldiers to fight is the reassurance that their comrades will “have their back,” since “[o]nce soldiers are convinced that their own personal safety will be assured by others, they feel empowered to do their job without worry.” *Id.* Adopting rules of engagement that treat soldiers' lives as simply expendable means to war-related aims (i.e., as having no intrinsic value) would weaken soldiers' belief that their superiors have their safety at heart, which in turn is likely to diminish their motivation to follow those superiors' orders that would put these soldiers in grave danger.

virtually suicidal or lead the mission, however important, to fail of its purposes (Margalit and Walzer), but rather the value of the military objective to be secured or destroyed. And the measure of military significance will differ greatly from one operational and tactical context to the next.¹³² As the military significance of a given objective varies, so will the asset value of the particular soldiers (of different experience levels and varieties of expertise) necessary to achieve it.¹³³

Despite their grave debilities, the efforts of Margalit, Walzer, and Luban to set an invariant risk-taking duty for soldiers reflect a laudable, even essential, concern: the danger that commanders will discount likely civilian losses if international law lets them include, without limit, the asset value of their forces when assessing proportionality.¹³⁴ Nevertheless, this legitimate concern must not be allowed to banish from legal consideration the other side of the perennial dilemma. After all, commanders must simultaneously assess a number of relevant variables in the particular circumstances before them, including often conflicting considerations on both sides of the proportionality equation—both those that bear on civilian losses and those that influence anticipated advantage from a given exercise of force. The frequent complexity of this factual assessment (and the ensuing weighing of competing normative considerations) suggests a need for considerable decisional latitude and hence for a legal test acknowledging this fact.¹³⁵

International humanitarian law often strikes a compromise between the opposing concerns, and this is certainly the case with respect to *in bello* proportionality.¹³⁶ It steers a middle course, allowing states considerable but not unlimited discretion in how much weight they give to force protection within proportionality

132. This point was acknowledged in WALZER, *supra* note 38, at 156 (“[T]he degree of risk that is permissible is going to vary with the nature of the target, the urgency of the moment, the available technology, and so on.”). See also *supra* Part I.C.2 (discussing the fact that the asset value of soldiers is a context-dependent variable).

133. See Ziegler & Otzari, *supra* note 37, at 61 (showing that the ratio between the averted foreign-civilian loss and the expected loss of state soldiers’ asset value “cannot be *a priori* assumed to be linear”).

134. See, e.g., Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* 285 (2010).

135. E.g., Stefan Oeter, *Methods and Means of Combat*, in *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT* 105, 173 (D. Fleck ed., 1999) (“[T]he intellectual process of balancing the various elements is so complicated, needs to take into account such a huge amount of data and so many factors, that any attempt to design a formula which is both comprehensive and precise would be ridiculous.”); see also Stephens & Lewis, *supra* note 107, at 74 (describing proportionality assessment factors).

136. See Benvenisti, *supra* note 104, at 83 (acknowledging the internal tension in *jus in bello* law). This is not to say, of course, that this law does not suffer from a problem of uncertainty. See Blum, *supra* note 33, at 56 (“[T]he exact scope of the protection accorded to civilians under IHL is unclear. In particular, the degree to which state *A* must sacrifice some of its soldiers in order to minimize harm to state *B*’s civilians is debatable.”).

assessment made by their military commanders.¹³⁷ The current customary law on the subject can fairly be described as follows:

In taking care to protect civilians soldiers must accept some element of risk to themselves. The rule [of proportionality] is unclear as to what degree of care is required of a soldier and what degree of risk he must take. Everything depends on the target, the urgency of the moment, the available technology and so on.¹³⁸

This approach strikes a compromise: requiring that soldiers always accept some nontrivial risk in order to protect civilians, but allowing the degree of that risk to vary in light of circumstances (which no legal rule can fully cognize and codify). This approach also implicitly grants discretion to states to valorize risk reduction more heavily with respect to their own civilians than to foreign civilians. To protect members of the latter group, states are not required to expose their soldiers to risks beyond a certain level (i.e., beyond a duty to always accept some nontrivial risk in order to protect civilians, even if foreign). That standard is less demanding than placing soldiers under a duty to always accept additional risk whenever so doing will enhance civilian protection (Margalit and Walzer's standard). Thus, leeway remains that allows states to place their soldiers under a more demanding risk-taking duty, which would apply only with regard to the protection of their own civilians.

By *only* demanding that soldiers accept *some* nontrivial level of risk in order to protect civilians (even if they are foreigners), international law also gives states leeway that allows each state to set a morally acceptable "ceiling" of maximally acceptable risk that its soldiers must take, even to protect that state's own civilians. Such a

137. See Final Rep. to the Prosecutor by the Comm. Established To Review the NATO Bombing Campaign Against the Fed. Republic of Yugoslavia, June 13, 2000, ¶¶ 49–50, available at http://www.icty.org/x/file/About/OTP/otp_report_nato_bombing_en.pdf [hereinafter NATO Bombing Report] (providing legal basis for proportionality assessments); Aaron Xavier Fellmeth, *Questioning Civilian Immunity*, 43 TEXAS INT'L L.J. 453, 487 (2008) (explaining that the proportionality principle leaves much discretion to belligerents); Stephens & Lewis, *supra* note 107, at 74 (describing how soldiers' lives are considered in proportionality assessments and stating that "[d]iscretions are broad and the factors which apply to determine [the] respective values are a product of judgment"); see also SANDOZ, *supra* note 96, ¶ 1835 (explaining that it was necessary to leave a margin of appreciation to those who have to apply the proportionality norm, and therefore this norm's effectiveness will depend on the good faith of the belligerents and their wish to conform to principles of humanity); Diamond, *supra* note 31, at 428–29 (explaining that IHL has given belligerents a great amount of discretion with regard to proportionality assessments).

138. A.P.V. Rogers, *Conduct of Combat and Risks Run by the Civilian Population*, 21 MIL. L. & L. WAR REV. 293, 310 (1982) (citation omitted). See also the following sources, all citing Rogers's position as authoritative: IAN HENDERSON, *THE CONTEMPORARY LAW OF TARGETING* 204–06 (2009); William J. Fenrick, *The Law Applicable to Targeting and Proportionality After Operation Allied Force: A View from the Outside*, 3 Y.B. INT'L HUMANITARIAN L. 53, 78 (2001); Alexandra Boivin, *The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare* 45 (UCL Research Paper Series No. 2/2006).

ceiling remains essential if international law is to allow states to accord any significance to the deontological value of their soldiers' lives.

Yet, international law also explicitly sets a "floor" for the minimally acceptable risk-taking duty that soldiers must shoulder in order to protect even foreign civilians, no matter how significant the military advantage of their mission. Commanders who invariably prioritize the intrinsic value of their soldiers' lives over those of foreign civilians (as Kasher and Yadlin argue they must do) therefore violate international law, since they do not demand that, to protect civilians, soldiers always accept nontrivial risk.¹³⁹ Above this acceptable floor of risk taking by soldiers, the level of protection civilians enjoy will be considerably influenced by the expected military advantage of the specific mission. As the significance of the mission decreases, the risk-taking duty of the soldiers must increase, beyond the above-mentioned floor, if their state still wishes the mission to be performed. Yet, since this level of protection is influenced by the expected military advantage of the specific mission (above the acceptable floor of soldiers' risk-taking duty), it is strongly influenced by the fact that international law lets national military commanders give serious consideration to the mission-specific advantages of protecting their forces. In deciding how much weight to grant this variable, commanders have considerable legal discretion. That discretion may be (and is likely to be) exercised in light of the shifting value of particular soldiers as military assets in various tactical and operational circumstances. Even so, when commanders clearly exaggerate the value of protecting their troops and thereby cause excessive civilian casualties, their conduct violates international law and warrants sanction.¹⁴⁰ Accordingly, commanders who systematically prioritize their soldiers' lives over those of foreign civilians—because they exaggerate the soldiers' value as assets—violate the law of *in bello* proportionality.¹⁴¹

To what extent do the three positions in current debate respect these legal standards?

139. See also Blum, *supra* note 33, at 59 ("I am willing to expand the humanitarian motivation to a mixed concern for the enemy as well as one's own nationals but exclude a sole or overriding concern for one's own combatants or civilians.")

140. See NATO Bombing Report, *supra* note 137, ¶¶ 49–50 (stating that the values of a "reasonable military commander" must be used in proportionality assessments).

141. See HENDERSON, *supra* note 138, at 204–05 (noting that an argument that security of the attacking force takes priority over collateral damage amounts to the weighing of military advantage more heavily than collateral damage); SOLIS, *supra* note 134, at 27; Yves Sandoz, *Commentary*, 78 INT'L L. STUD. 273, 277 (2002); see also Ziegler & Otzari, *supra* note 37, at 65 (assessing how to value soldiers' lives).

Even Kasher and Yadlin sometimes acknowledge that their stance is at odds with current international law:¹⁴²

[The Principle of Distinction] usually . . . introduces a crude distinction between combatants and noncombatants. . . . The moral aspiration is clear, but the distinction itself remains crude and morally problematic. We propose to *replace* it, for circumstances of fighting terror, by the cluster of distinctions and norms.¹⁴³

When specifically asked whether their position violates international law, Kasher replied:

There is a lack of understanding in the media as to the nature of international law. These are not strict traffic laws. Much of it is customary law. The decisive question is how civilized states behave. We, in Israel, have a central role in the development of this law, since we are at the forefront of the fight against terror. . . . What we do becomes the law. These are positions that are not purely legal; a strong moral element exists in them.¹⁴⁴

This is a serious mischaracterization. Most states, and certainly most of those deeply affected by a change, must concur before an existing norm of customary international law can be replaced by another.¹⁴⁵ Israel is not the only state seriously threatened by terrorism, and other states have not endorsed Kasher and Yadlin's insistence on the invariable supremacy of force protection. The United States, for instance, clearly disavows this view of current

142. See Diamond, *supra* note 31, at 426–28. Diamond criticizes Kasher and Yadlin with regard to this issue and generally discusses the tendency of those who wish to reduce the restrictions legally placed on a state to advocate that considerations that are only relevant in the context of *jus ad bellum* proportionality should also be allowed to influence the *jus in bello* proportionality assessment.

143. Kasher & Yadlin, *supra* note 4, at 15 (emphasis added). The “cluster” they refer to mainly means the set of priorities previously presented.

144. Amos Harel, ‘Cast Lead’ Operation, HAARETZ (Feb. 06, 2009, 1:17 PM), <http://www.haaretz.co.il/news/politics/1.1244279> (Ziv Bohrer trans.) (Isr.). A greater respect for international law is claimed to be afforded in Kasher, *supra* note 20, but that is not truly the case. There, Kasher attempts to assess and justify Israel's actions during its operation in Gaza (Operation Cast Lead). He claims that a proper examination needs to review the validity of these actions according to (a) moral principles that a democratic state needs to uphold, (b) the ethical codes of Israel's armed forces, and (c) international law. *Id.* at 45. With regard to the principle of distinction, he states: “Even those—and I am among them—who hold that the standards of conduct delineated by the principle of distinction do not offer an ideal moral solution to the problem, will nevertheless respect them, and seek to replace them with arrangements that are better in both theory and practice.” *Id.* at 60. Yet, when he reviews the appropriateness of his complete preference of force protection over the lives of foreign civilians, he justifies his position based on moral and ethical norms without reference to the *lex lata* of international law. *Id.* at 60–69.

145. *E.g.*, HELEN DUFFY, THE “WAR ON TERROR” AND THE FRAMEWORK OF INTERNATIONAL LAW 7–8 (2005) (stating further that “[i]n most cases, not even consistent patterns of violations by a number of States imply that a rule has been superseded”).

law.¹⁴⁶ In fact, contrary to accusations by some,¹⁴⁷ Israel denies that it adopted Kasher and Yadlin's standard during its 2008–2009 Gaza operation.¹⁴⁸ Israel's position, like that of the United States, is that soldiers have a duty to accept some nontrivial risk to safeguard foreign civilians.¹⁴⁹

146. Paragraph 7-23 of the Army's *Counterinsurgency Field Manual* at first glance seems to adopt a position similar to that of Margalit and Walzer, stating that "[l]imiting the misery caused by war requires combatants to . . . restrain the amount of force they may apply," while "[a]t the same time, combatants are not required to take so much risk that they fail in their mission or forfeit their lives." See DEP'T OF THE ARMY, COUNTERINSURGENCY FIELD MANUAL: FM 3-24, ¶ 7-23 (2006); see also Plaw, *supra* note 5, at 15 (interpreting that paragraph in the manual). Yet, other paragraphs in that manual seem to allow soldiers to take less risk in order to protect civilian lives. DEP'T OF THE ARMY, *supra*, ¶¶ 7-21, -30; see also, e.g., Charles Dunlap, *Kosovo, Causality Aversion, and the American Military Ethos: A Perspective*, 10 U.S. AIR FORCE ACAD. J. LEGAL STUD. 95, 99 (2000). Dunlap discusses the U.S. practice in Kosovo and claims that the U.S. position views the lives of American soldiers as having an equal value to the lives of foreign civilians. Smith, *supra* note 97, at 157–61. Smith argues that, in practice, U.S. forces in the second war in Iraq adopted a policy of prioritizing their soldiers' lives over the lives of local civilians. Such positions seem to be both in violation of international law and of the U.S. manual, but they do indicate that the U.S. position is less restrictive than Plaw's interpretation of it. See also Luban, *supra* note 6, at 17–19 (citing views of American officers he interviewed).

Furthermore, military manuals and codes of many different countries explicitly state that force protection can be taken into account as part of the *jus in bello* proportionality assessment. See, e.g., 2 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL LAW: PRACTICE 184–85 (2005) (citing the manuals of the United States, Ecuador, Australia, and New Zealand). Yet, to our knowledge, the only Western country that has explicitly adopted a position that is similar (but not identical) to that of Kasher and Yadlin is the United Kingdom. For further discussion on this issue, see *infra* Part III.

147. See *supra* note 5 and accompanying text; see also *infra* note 204 and accompanying text.

148. Israeli officials did not explicitly refer to Kasher and Yadlin's position. They did, however, assert that Israel's policy does not prioritize soldiers' lives over the lives of Palestinians. See STATE OF ISR., THE OPERATION IN GAZA: 27 DECEMBER 2008–18 JANUARY 2009: FACTUAL AND LEGAL ASPECTS 32, 46 (2009) ("[T]he extensive precautions adopted by Israel to protect civilians during this conflict—often at the expense of military advantage and at the risk of Israeli soldiers—sought to meet the most demanding standards of modern military operations."); Gabriela Shalev, Isr. Ambassador to the United Nations, Statement to the U.N. Security Council (June 6, 2008), transcript available at http://www.mfa.gov.il/MFA/Foreign+Relations/Israel+and+the+UN/Speeches+-+statements/Statement_Amb_Shalev_UN_Security_Council_6-Jan-2009.htm ("In responding to terrorist attacks that show no respect for human life—either Israeli or Palestinian—Israel takes steps to protect both. It takes every possible measure to limit civilian casualties—even where these measures endanger the lives of our soldiers or the effectiveness of their operations.").

149. See HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr. [2006](2) IsrLR 459, ¶¶ 40, 46 (Isr.), translated at http://elyon1.court.gov.il/files_eng/02/690/007/e16/02007690.e16.pdf ("A balance should be struck between the duty of the state to protect the lives of its soldiers and civilians and its duty to protect the lives of innocent civilians who are harmed when targeting terrorists."); Shalev, *supra* note 148 (noting that Israel has often put its soldiers in increased risk as part of taking measures to protect civilian lives, both Israeli and Palestinian). Furthermore, the IDF's ethical code states that an IDF "soldier shall . . . do all he can to avoid

As rehearsed above, then, current international law conflicts with Kasher and Yadlin's position both in declining to require any significant risk taking by soldiers (to prevent incidental civilian harm) and in denying the need for soldiers to exercise situational judgment of the proportionality of their actions, on a case-by-case basis. Similarly, neither Margalit and Walzer's¹⁵⁰ nor Luban's position¹⁵¹ accords with the law of *in bello* proportionality, because it fails to take proper account of the contingent value of soldiers as military assets.¹⁵²

In bello proportionality also does not require, as Margalit and Walzer would like it to, that states treat their soldiers as having simply "waived" the human right to life. On the other hand, in assuming the lives of soldiers and foreign civilians to be always of equal value, Luban's notion of a one-to-one risk-transfer ratio ascribes greater value to the soldiers' right to life than international law allows.¹⁵³ Placing soldiers under a duty to accept some nontrivial level of risk in order to safeguard civilians differs from the notion of a one-to-one risk ratio because it implies that the lives of civilians are of greater deontological value than those of soldiers. As such, Luban's initial position, just briefly entertained,¹⁵⁴ is the only one compatible with the law's acceptance that soldiers retain a right to life, even in war, to the extent consonant with their bearing some nontrivial level of risk to safeguard foreign civilians.

harming [non-combatants' and prisoners of war's] lives, bodies, honor and property." See THE SPIRIT OF THE IDF (Isr.), translated at http://www.aka.idf.il/SIP_STORAGE/FILES/4/47634.pdf. Kasher's current position has led to a dispute amongst different members of the committees that have formulated this document for the IDF. On the one hand, Kasher (who was a member of the first committee to formulate this document) argued that his position is in accordance with this ethical code. Kasher, *supra* note 20, at 68. On the other hand, three members of a second committee that revised the code a few years after the first committee (Daniel Statman, Avi Sagi, and Moshe Helbertal) argued that Kasher's position is in violation of this ethical code. Statman, *supra* note 5, at 5–8; Avi Sagi & Moshe Helbertal, *What Is the Ethical Code of the IDF*, YEDIOT AHARONOT, May 01, 2009 (Isr.). Their position was that, according to this code, IDF soldiers are required to at least take some risk in order to reduce the risk to civilians (even if these civilians are not under Israeli control).

150. See *supra* note 31 and accompanying text (discussing claims by supporters of their positions who argue that their position is the correct interpretation of the relevant international law). *But see supra* note 47 (showing that some such supporters advance a less harsh risk-taking duty than the one supported by Margalit and Walzer).

151. Luban, *supra* note 6, at 45 (arguing explicitly that his position is the correct application of international law).

152. See text accompanying *supra* note 132.

153. See *supra* note 61 and accompanying text.

154. See *supra* note 60 and accompanying text.

C. Proportionality at the Tactical Level

Because war is littered with imponderables, it is often impossible to predict either the civilian harm or military advantage.¹⁵⁵ Even when the facts are relatively clear, reasonable commanders will many times differ in the relative weight they ascribe to the competing considerations.¹⁵⁶ The international law of *in bello* proportionality clearly opts for flexibility rather than invariant consistency—for a standard allowing situational discretion over any bright-line rule, whether stringent or indulgent.¹⁵⁷ Choosing a discretionary standard over a bright-line rule requires trust in the capabilities of the relevant actors; it also implies that a more precise norm would fail to capture the relevant situational complexities, leaving the rule either over- or under-inclusive of its purpose.¹⁵⁸ In the case of *in bello* proportionality, sweeping rules like those of Margalit and Walzer or Kasher and Yadlin cannot conceptually accommodate the need for “all things considered” judgment of the sort required by much military decision making.¹⁵⁹

155. See Diamond, *supra* note 31, at 450–51 (discussing difficulties in making exact proportionality assessments).

156. See SOLIS, *supra* note 134, at 273 (acknowledging that “reasonable military commanders” may vary in their proportionality assessments).

157. Eitan Diamond has stated:

IHL has deliberately been designed to allow belligerents considerable leeway to respond appropriately to the exigencies of battle. This is achieved by the inclusion of many broad standards, using open ended terms like “proportionality” Where it employs standards, as opposed to black and white rules, the law creates . . . a grey area in which different courses of action are tolerated.

Diamond, *supra* note 31, at 428–29 (footnotes omitted). In order to reduce the concerns that exist from the application of the discretionary proportionality norm, however, international law does impose certain sweeping, bright-line rules with no exceptions—notably, the duty to never intentionally target civilians—even when so doing would advance mission objectives or enhance force protection. See Benvenisti, *supra* note 104, at 100–05 (describing the role of the absolute prohibitions of IHL); Blum, *supra* note 33, at 9 (“The intentional (as distinguished from foreseen-yet-unintended) killing of a civilian is always prohibited.”); Diamond, *supra* note 31, at 415, 429, 436–38, 451–52 (explaining the prohibition on targeting civilians).

158. FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 152–55 (1991) (discussing agents’ capabilities and the manner in which they influence lawmakers’ choice between discretionary standards and bright-line rules); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1127–31 (2003) (discussing the difficulty in regulating emergencies through the *ex ante* legislation of legal rules due to the situational complexities and consequent unpredictability of such situations).

159. See Cohen & Shany, *supra* note 95, at 316 (stating that the “very nature of the principle of proportionality” is of “an open-ended legal standard designed to accommodate an indefinite number of changing circumstances”); see also NATO Bombing Report, *supra* note 137, ¶¶ 49–50; Diamond, *supra* note 31, at 428–29, 450–

Margalit and Walzer,¹⁶⁰ as well as Kasher and Yadlin,¹⁶¹ doubt whether, in the face of war's ineradicable uncertainties, complex situational judgment by commanders can often be very accurate. There is hence little need, in their view, for international law to accord their judgment so wide a berth. Both approaches therefore implicitly seek to replace complex balancing with a simpler exhortation: always prefer the lives of your soldiers over foreign civilians (Kasher and Yadlin), or almost always prefer the lives of foreign civilians over your soldiers (Margalit and Walzer). Luban, too, knows that precise numerical calculation of military gains and civilian losses is usually impossible *ex ante*, but nonetheless thinks that it is realistic to expect soldiers in combat, despite its stresses and epistemic limits, to apply his theory, limiting the risk they transfer onto civilians to a ratio of one-to-one.¹⁶² Unlike the other authors, Luban thus believes that soldiers can reliably assess risks to themselves and others, i.e., they have the capacities that *in bello* proportionality indeed requires of them.¹⁶³

This assumption, however, makes considerable sense only at the operational level, as will now be demonstrated. At war's tactical level, the pessimism of the other authors is, in fact, well warranted, and the applicable law must be construed to accommodate this reality, as it in fact seeks to do.

The law generally cannot expect low-echelon soldiers, making tactical decisions in battle, to fully assess *in bello* proportionality. That would require more expertise and knowledge than they possess. It would demand, in particular, considerable familiarity with the larger attack to which their particular battle, and their role within it, was designed in small measure to contribute. Uses of force that may appear indefensible from their local standpoint may be eminently justified from a broader perspective and vice versa.¹⁶⁴ The time

51; Fellmeth, *supra* note 137, at 487; Oeter, *supra* note 135, at 173–75; Stephens & Lewis, *supra* note 107, at 74.

160. See MICHAEL WALZER, ARGUING ABOUT WAR 89 (2006) (“[P]olitical and military leaders [ought] to worry about costs and benefits. But they have to *worry*; they can’t calculate”); Margalit & Walzer, *Israel*, *supra* note 5, at 22 (“What degree of risk should . . . soldiers assume . . . ? We can’t answer that question with any precision.”).

161. Kasher & Yadlin, *supra* note 4, at 22 (referring to *in bello* proportionality); Kasher, *supra* note 20, at 53 (stating, in the context of *ad bellum* proportionality, that “no principle of proportionality entails a demand for numerical equivalence”).

162. See Luban, *supra* note 6, at 21 (arguing in favor of soldiers applying value assessments in combat).

163. Compare Luban, *supra* note 6, at 21 (“Sometimes, therefore, it may be possible to quantify the risk troops face”), with *supra* notes 157–159 (discussing the position of current *in bello* international law).

164. See MARK J. OSIEL, OBEYING ORDERS: ATROCITY, MILITARY DISCIPLINE AND THE LAW OF WAR 64 (1998) (“If the law requires [a soldier] to make an independent legal judgment whenever he receives an order, it also risks eliciting his disobedience to orders that appear wrongful from the soldier’s restricted perspective but which are

available for tactical decision making, moreover, is usually much shorter than for an operational one.¹⁶⁵ Evidence also suggests that soldiers tend not to be very good at accurately assessing benefits and harms from their immediate actions. Low-ranking soldiers often get caught up in and carried away by the momentum of events.¹⁶⁶ This frequently leads them to overvalue the military advantage likely to result from their battlefield behavior—and hence also to undervalue the moral significance of the civilian harm likely to ensue.¹⁶⁷ These problems are much less acute at the operational level, where decision makers enjoy a wider frame of reference, both temporally and spatially.¹⁶⁸

actually justified by larger operational circumstances.”); Richard A. Wasserstrom, *Individual Responsibility in Warfare*, in *LAW AND RESPONSIBILITY IN WARFARE*, 194, 195, 202 (Peter D. Trooboff & Arthur J. Goldberg eds., 1975) (arguing that the limited perspective of soldiers on the battlefield makes it almost impossible for them to determine whether an order is legal or not); see also Barak Medina, *Political Disobedience in the IDF*, 36 *ISR. L. REV.* 73, 82 (2002) (Isr.) (making a similar argument with regard to *ad bellum* issues).

165. Geoffrey S. Corn & Gary P. Corn, *The Law of Operational Targeting: Viewing the LOAC Through an Operational Lens*, 47 *TEX. INT'L L.J.* 337, 342 (2012) (describing the decision-making process involved in selecting military targets and stating that “[t]his process can be extremely complex and time consuming at very high levels of command, or very brief and ad hoc at low levels of command”).

166. See Dave Grossman, *Aggression and Violence*, in *THE OXFORD COMPANION TO AMERICAN MILITARY HISTORY* 9, 9–10 (John Whiteclay Chambers ed., 2000) (describing the psychological effects of combat on field soldiers’ decision-making process); Dave Grossman & Barry Molloy, *Why Can’t Johnny Kill? The Psychology and Physiology of Interpersonal Combat*, in *THE CUTTING EDGE: STUDIES IN ANCIENT AND MEDIEVAL COMBAT* 188, 193–201 (Barry Molloy ed., 2007) (same).

167. Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 142 *MIL. L. REV.* 1, 88 (1994). This military phenomenon is not only the result of the stressful conditions of combat. At least to a certain degree, it is an expression of a more general psychological process. Decision making that is made by a person close to the event, especially when the event is temporal and small in scale, often leads such a person to act not based on a “cold” assessment of all the costs and benefits of the different alternatives for actions, including long-term effects. Instead, individuals tend to act based on an incentive to prevent harm to a certain consideration that they especially value, and they do so without assessing the relative probability of the occurrence of the harm to this consideration in comparison to other harms. See LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW* 56, 155–56 (2001) (discussing errors of reasoning resulting from the conflict between short- and long-term reasons for action); Emily Sherwin, *Rule-Oriented Realism*, 103 *MICH. L. REV.* 1578, 1593 (2005) (explaining the limits of human reasoning and the distracting effects of salient and appealing facts); Tanya R. Ward, *Act-Consequentialism and Permitting Too Much*, 3 *PHIL. FRONTIERS* 123, 126–30, 133 (2008) (arguing the moral demand to assess long-term effects of an action depends on the extent in which we can reasonably expect the relevant agent to be able to assess such effects with sufficient accuracy).

168. See DEP’T OF THE ARMY, *supra* note 89 (discussing differences between operational- and tactical-level decision making); see also Luban, *supra* note 6, at 6–7 n.10 (indicating that it makes more sense for an officer to be the decision maker “because the officer in headquarters is in a calmer environment for reflection” and because “[p]lacing the decision in the hands of a third party takes the structurally built-in first personal reason out of the equation”).

At the same time, completely absolving low-ranking agents from any duty to assess proportionality could lead to horrific results.¹⁶⁹ Under that legal arrangement, low-ranking soldiers would be duty bound to obey any order no matter how clear and grave the disproportionality of the harm expected from the action ordered.¹⁷⁰ International law seeks to strike a balance between these competing concerns and expresses recognition to capability differences between those at various levels in a chain of command. Consistent with those vagaries, the proportionality assessments required of lower ranking soldiers, in practice, are much less comprehensive and precise than those suited to the strategic and operational levels of warfare. To date, however, doctrinal articulation of the distinct expectations applicable to soldiers at each rung suffers from severe vagueness. According to current international law, lower ranking soldiers are only demanded to “be thoroughly aware, in carrying out [their] task, of [their] basic obligation to spare the civilian population as much as possible.”¹⁷¹ Among the authors this Article surveys, Margalit and Walzer best capture and defend this understanding of tactical-level, *in bello* proportionality.

So imprecise a formulation of tactical-level proportionality provides little effective guidance to even the most conscientious soldier. Standing alone, the injunction to spare the civilian population “as much as possible” could, for example, plausibly be interpreted as authorizing soldiers to override decisions made at much higher echelons, i.e., whenever they think fewer civilians might be harmed by pursuing the designated mission in some other fashion. The law must not be understood to authorize this.

Given the disorienting experience of tactical combat, low-ranking soldiers inevitably make decisions that prove mistaken, and on many matters besides how to apply the law of proportionality. National

169. Some have argued that due to the limited capabilities of low-ranking soldiers, the legal rule prohibiting disproportional attacks should be interpreted as addressing only commanders of a sufficiently high rank. See HENCKAERTS & DOSWALD-BECK, *supra* note 1, at 54 (describing the views of Switzerland, Austria, and the United Kingdom); William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91, 102, 109 (1982) (arguing that only those with “sufficient information” and capabilities are obligated under Additional Protocol I to make an *in bello* proportionality assessment). Yet, as discussed in the text, such a position is likely to lead to horrific results.

170. See JDCC, *supra* note 106, at 87 (stating that even though “[i]n assessing whether the proportionality rule has been violated, the effect of the whole attack must be considered,” it does not require “that an entirely gratuitous and unnecessary action within the attack [should] be condoned”).

171. Frits Kalshoven & Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* 109 (2001); see also JDCC, *supra* note 106, at 87 (viewing soldiers who commit actions that are only part of an “attack” as criminally violating the proportionality norm only if their actions are “entirely gratuitous and unnecessary”).

military law, rules of engagement, and “military doctrines”¹⁷² all seek to cabin discretion and accord greater decision-making authority to higher ranking personnel.¹⁷³ Rules of engagement, for instance, generally permit upper echelon soldiers to depart from their particular strictures when circumstances reasonably seem to so require; low-ranking soldiers may not.¹⁷⁴ The need for differential norms follows from concern both with fairness to soldiers, given their limited knowledge or expertise, and with preventing decisional blunders certain to result from imposing expectations inconsistent with cognitive debilities.¹⁷⁵

172. A military doctrine consists of “[f]undamental principles by which the military forces guide their actions in support of objectives. It is authoritative but requires judgment in application.” NATO STANDARDIZATION AGENCY, NATO GLOSSARY OF TERMS AND DEFINITIONS (ENGLISH AND FRENCH) 2-D-9 (2008).

173. The levels-of-war doctrine, for example, explicitly demands affording a soldier making operational decisions greater discretion than that afforded to a soldier making tactical decisions. U.S. MARINE CORPS, *supra* note 90, at 8 (“The nature of these tasks requires that the operational commander retain a certain amount of latitude in the conception and execution of plans. . . . If higher authority overly prescribes the concept of operations, then the commander becomes a mere executor of tactical tasks. . . .”). See also, for example, the discussions in the sources cited hereinafter in this footnote regarding the “Mission Orders Doctrine.” This military doctrine, which has been assimilated into the law and policies of many armed forces, demands affording extensive discretion to the subordinate receiving a “mission order.” Yet, due to the harm that might be caused when discretion is delegated down the chain of command, the use of mission orders is not common at the lower levels of the chain of command; often, a division commander is the lowest level to commonly receive such orders. David M. Cowan, *Auftragstaktik: How Low Can You Go?* 5–6, 17–20, 26–27, 32–37 (Dec. 1, 1986) (monograph, U.S. Army Command & General Staff College) (discussing how low in the chain of command the use of mission orders may still be beneficial to the military); see also Robert Egnell, *Civil-Military Aspects of Effectiveness in Peace Support Operations*, in *THE TRANSFORMATION OF THE WORLD OF WAR AND PEACE SUPPORT OPERATIONS* 122, 127 (K. Michael et al. eds., 2009) (discussing the adoption of the Mission-Orders Doctrine in most armed forces). For the use of rules of engagement in the context of low-ranking soldiers to displace most needs for immediate soldierly assessment, including those of proportionality, with stricter clear-conduct rules, see Kiron Reid & Clive Walker, *Military Aid in Civil Emergencies: Lessons from New Zealand*, 27 *ANGLO-AM. L. REV.* 133, 163–65 (1998) (describing the purpose behind the adoption of rules of engagement); Kurt Andrew Schlichter, *Locked and Loaded: Taking Aim at the Growing Use of the American Military in Civilian Law Enforcement Operations*, 26 *LOY. L.A. L. REV.* 1291, 1309–10, 1312 (1993) (same); Aziz Mohammed, *Military Culture, War Crimes, and the Defence of Superior Orders* 80–81 (J.S.D. thesis, Bond University) (explaining the adoption of specific rules of engagement).

174. See, e.g., Corn & Corn, *supra* note 165, at 369 (discussing artillery-related rules of engagement and stating that “almost all such [rule-of-engagement] controls permit” upper echelon soldiers to act in ways otherwise prohibited by these rules of engagement (but permitted according to IHL), when such actions have been “authorized by a certain level of command”).

175. See *id.* at 354–57, 369 (noting that, ideally, rules of engagement allow the implementation of the law of armed conflicts, while giving “operational and tactical military leaders greater control over the execution of combat operations by subordinate forces”); Kenneth Watkin, *Warriors, Obedience and the Rule of Law*, 3/4 *ARMY DOCTRINE & TRAINING BULL.* 24, 27–29 (2000–2001) (discussing reasons for choosing between bright-line rules and discretionary norms in the context of military rules of

International law should not be interpreted as requiring subordinates to override any superior's order on the basis of their own judgment of *in bello* proportionality. The law is thus right to let subordinates defer to their superior in most circumstances.¹⁷⁶ It would be preposterous, in fact, to insist that low-ranking soldiers make de novo proportionality assessments from each bullet to the next, or to demand that they accurately assess the proportionality of the attack as a whole. To be sure, the law rightly expects even the lowliest subordinate to be able to identify and disobey orders that are "manifestly illegal," which would in principle include an order to inflict blatantly disproportionate civilian harm.¹⁷⁷ But the law of tactical proportionality can demand no more in efforts to safeguard civilians than consistent with the measure of discretion that soldiers of lower rank, in those circumstances, actually possess.

Even low-ranking soldiers generally have some discretion about how to perform a given order, because virtually no order can possibly specify every conceivable aspect of its possible implementation.¹⁷⁸ At the tactical level, ground troops have a natural inclination to exaggerate the larger military advantage to be gained from saving themselves (by minimizing their risks) at the expense of transferring that risk onto the shoulders of others, notably the enemy's civilian population.¹⁷⁹ This problem is exacerbated by the tendency for grueling combat over a sustained period to sap soldiers' natural human decency, making them indifferent to the civilian suffering they unintentionally inflict.¹⁸⁰ The tactical-level proportionality norm

engagement (that, among other things, implement IHL), as well as the difference in the extent of discretion afforded to low-ranking and high-ranking soldiers).

176. See Watkin, *supra* note 175, at 27–29 (stating that under IHL, "there is an obligation to disobey manifestly unlawful orders"; yet, "[i]n assessing this issue it should be noted that statements by senior officers regarding disobedience should be viewed in the context of the greater degree of freedom that commanders often enjoy to debate and influence the direction they are given" while "the lower the rank of soldier the less likely that individual will enjoy moral choice to question orders"); see also R. v. Finta, [1994] 1 S.C.R. 701, 777–78 (Can.) (noting that the defense of superior orders is available under customary international law so long as the act is not manifestly unlawful and stating that the subordinate's rank affects the question of culpability for the crime committed under orders).

177. Rome Statute, *supra* note 32, art. 33. The writers of this Article have made in the past different attempts to further clarify the law regarding when illegal orders should be disobeyed, while taking special notice to the issue of the rank of the subordinate soldier, as well as the vagueness of the proportionality norm. OSIEL, *supra* note 164, at 325, 346–47 n.19, 357–66; Ziv Bohrer, *The Superior Orders Defense—A Principal-Agent Analysis*, 41 GA. J. INT'L & COMP. L. (forthcoming) (manuscript at 49–64) (on file with the author).

178. Watkin, *supra* note 175, at 27–29 (discussing the fact that low-ranking soldiers often have discretion, and that the discretion is usually narrower than that of high-ranking soldiers).

179. See *supra* note 167 and accompanying text.

180. See Daniel Muñoz-Rojas & Jean-Jacques Frésard, *The Roots of Behavior in War: Understanding and Preventing IHL Violations*, 86 INT'L REV. RED CROSS 189,

therefore imposes (in addition to the duty to disobey manifestly unlawful orders of the kind mentioned above) a hard-and-fast rule aimed at counteracting these potent temptations. It instructs that within the strict limits of the discretion you may possess, seek to spare the civilian population as much as circumstances permit.¹⁸¹

This legal duty, however, as stated earlier, remains extremely vague. That vagueness is what lets both Kasher and Yadlin,¹⁸² as well as Margalit and Walzer,¹⁸³ suggest that their position provides the proper interpretation of this duty, i.e., the duty to attempt to spare the civilian population as much as possible. Margalit and Walzer's stance in this regard is defensible. The admonition to prioritize civilian life above all could certainly lead to situational misjudgments that cause either mission failure or expose the soldier to suicidal risks.¹⁸⁴ Yet, by allowing soldiers to take force protection into account, when not doing so will lead to mission failure, Margalit and Walzer's approach is, in fact, able to acknowledge that low-

197–99 (2004) (describing moral disengagement). To a certain degree, such a countering message is needed at the strategic levels and the operational levels as well. See Blum, *supra* note 33, at 55, 58 (noting that IHL “assign[s] different rights and protections to different categories of individuals, in part to correct the biases that fighting states have toward each other’s nationals”); Plaw, *supra* note 5, at 18 (arguing that because states have a strong interest in protecting soldiers, requiring careful protection of the interests of foreign civilians is necessary to preserve an equilibrium). However, the need is greater in the context of the soldiers on the field. See Luban, *supra* note 6, at 6–7 n.10 (describing how combat stresses lead to strong “first-personal” reasons for self-preference, creating a need for third parties to correct this structural problem through rules of engagement).

181. For implied support for this interpretation of the law, see OFFICE OF THE JUDGE ADVOCATE GEN., CODE OF CONDUCT FOR CF PERSONNEL 2-3 (2005) (Can.) (limiting the soldier's permission to perform an independent proportionality assessment by confining the assessment to the bounds of the discretion given to her by her commanders who determine her personal orders, mission orders, and rules of engagement); see also *id.* at 2-18 (discussing the duty of soldiers of all ranks to disobey a manifestly unlawful order).

182. This duty of international law has been enshrined in the IDF's ethical code, which states: “[An IDF] soldier shall . . . do all he can to avoid harming [noncombatants' and prisoners of war's] lives, bodies, honor and property.” THE SPIRIT OF THE IDF, *supra* note 149. Kasher argued that his position is the proper interpretation of this duty as it is set forth in the Spirit of the IDF. Kasher, *supra* note 20, at 68. For further discussion of this issue, see *supra* note 149.

183. As discussed *supra* note 31, Margalit and Walzer do not explicitly refer to international law. They do, however, claim that their position is based on a proper interpretation of the *moral* duty to do as much as possible to protect civilians. Margalit & Walzer, *Israel*, *supra* note 5, at 21; see also WALZER, *supra* note 38, at 155–57 (arguing that soldiers have a duty to go “as far as possible” to reduce the risk to civilians, and stating that due to this duty, “[t]he limits of risk [soldiers must shoulder in order to reduce civilian risk] are fixed, then, roughly at that point where any further risk-taking would almost certainly doom the military venture or make it so costly that it could not be repeated”); Plaw, *supra* note 5, at 6, 14–15, 17–18 (arguing that soldiers have a duty to “assume some additional risk where possible to reduce harms to noncombatants” and interpreting this duty as demanding from soldiers to act in a manner similar to that supported by Margalit and Walzer).

184. See *supra* note 171 and accompanying text.

ranking soldiers can safeguard the enemy's civilian population only within the scope of a discretion necessarily limited by their place at the bottom rungs of a long chain of command.¹⁸⁵ Margalit and Walzer's stance, properly understood, aids in clarifying the way in which the duty set by the norm of tactical-level proportionality should be interpreted. This duty (in cases in which the order given is not manifestly unlawful) should be interpreted as requiring that soldiers risk their lives as much as is needed in order to maximize protection to civilians unless (1) their superiors' concern with either mission goals or force protection (or both) demands otherwise, or (2) the risk they need to take in order to further protect civilians is a suicidal one.¹⁸⁶ In other words, their position transforms the flexible legal standard for tactical-level proportionality into a bright-line rule instructing low-ranking soldiers to maximize civilians' protection up to the point of assuming suicidal risks or violating a superior's orders (not manifestly illegal) and mission aims.

The defensibility of Margalit and Walzer's claim (that their position is the correct interpretation of the duty to attempt to spare civilians as much as possible) reveals the problems with the opposite claim, posited by Kasher and Yadlin. In fact, the latter position proves particularly ill suited to the tactical level, and especially in armed conflicts against a nonstate actor—the very conflicts for which Kasher and Yadlin think their position is most appropriate.¹⁸⁷

Proportionality at the tactical level, as just delineated, fits neatly alongside the principle of distinction, which humanitarian law equally embodies.¹⁸⁸ The latter instructs soldiers to target only combatants, not civilians.¹⁸⁹ The former demands that when they fire on combatants (and other military objectives), they must confine incidental civilian harm insofar as circumstances (including their limited discretion) reasonably permit.¹⁹⁰ These legal duties, though morally felicitous on their face and easy enough to formulate in general terms, become extremely demanding, even insuperably beyond reach, when it is virtually impossible to tell the enemy

185. See *supra* notes 171, 181 and accompanying text.

186. The fact that Margalit and Walzer's position is appropriate mainly at the tactical level is in accordance with one of Walzer's main philosophical contributions to the moral discourse regarding war-related proportionality. See Plaw, *supra* note 5, at 5–6 (explaining Walzer's philosophical contribution and its effect in extending the applicability of the principle of proportionality—a principle traditionally considered only applicable with regard to operational decisions—to tactical decisions).

187. See *supra* notes 26–28 and accompanying text.

188. Kristen Dorman, *Proportionality and Distinction in the International Criminal Tribunal for the Former Yugoslavia*, 12 AUSTL. INT'L L.J. 83, 84 (2005) (“[I]n combat situations, the entire body of international humanitarian law can be reduced to the obligation to observe the principle of distinction.”).

189. See *supra* notes 32, 95 and accompanying text.

190. See *supra* note 171 and accompanying text.

combatants apart from civilians.¹⁹¹ The problem arises with a vengeance when states must fight nonstate actors such as terrorist groups.

In conflicts with nonstate actors, if soldiers wish to limit civilian harm, they must incur great personal risk, because their adversary makes no effort to separate its combatants from the surrounding population. Nonstate belligerents often deliberately seek, for that matter, to intersperse the two.¹⁹² The now-familiar practices of “human shielding” and wearing no uniforms reflect this willful refusal to respect the legal requirements of distinction. Both practices aim to induce greater hesitation among soldiers about opening fire, by creating situations in which they cannot be entirely confident that they are successfully discriminating between combatants and others. Some contend that only those involuntarily enlisted as shields should count as civilians for proportionality purposes.¹⁹³ Yet it is usually impossible to distinguish those persons from voluntary participants. This difficulty is especially acute in areas of high population density, where there is simply no place to which civilians may safely flee if they do not wish to function as shields for neighboring fighters. And even if only those coerced into shielding service should matter for legal purposes, they may well be numerous enough to render their deaths disproportionate to the anticipated military gain, thereby barring the targeting of enemy combatants in their midst in any way other than fighting from house to house. Many have observed that this intentional amalgamation of civilians and combatants increases danger to the civilians among whom fighters conceal themselves. Risks increase no less for soldiers whose state must then compel them to fight from house to house.¹⁹⁴

191. E.g., Michael Newton, *Unlawful Belligerency After September 11: History Revisited and Law Revised*, in *NEW WARS, NEW LAWS? APPLYING LAWS OF WAR IN 21ST CENTURY CONFLICTS* 75, 82 (David Wippman & Matthew Evangelista eds., 2005) (stating that September 11 “destroyed the naive notion that there is a bright legal line that neatly divides a combat zone into innocent civilians (who of course are legally protected from deliberate hostilities) and combatants who may lawfully be targeted and killed”).

192. See, e.g., Hilly Moodrick-Even Khen, *Children as Direct Participants in Hostilities: New Challenges for International Humanitarian Law and International Criminal Law*, in *NEW BATTLEFIELDS, OLD LAWS: CRITICAL DEBATES ON ASYMMETRIC WARFARE* 133, 136 (William C. Banks ed., 2011) (describing the intentional attempt of terrorists to blur the distinction between civilians and combatants, which manifests in the use of even children as human shields and active participants in conflict).

193. Matthew V. Ezzo & Amos N. Guiora, *A Critical Decision Point on the Battlefield—Friend, Foe or Innocent Bystander*, in *SECURITY: A MULTIDISCIPLINARY NORMATIVE APPROACH* 91, 95–102 (Cecilia M. Bailliet ed., 2009).

194. See *id.* at 103, 108 (stating that the use of human shields by terrorists increases civilian casualties, as well as harms military efficiency when the military attempts to reduce the amount of such civilian casualties); see also Int'l Comm. of the Red Cross, 30th International Conference of the Red Cross and Red Crescent, Geneva, Switz., Nov. 26–30, 2007, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, at 15, Doc. 30IC/07/8.4 (Oct. 2007) (indicating that as a

Soldiers are understandably dissatisfied with, even incensed by, the legal and factual uncertainties just described. They feel victimized no less by the law itself than by the unscrupulous adversaries who exploit its moral frailties in this regard.¹⁹⁵ It is an understandable sympathy for their plight that prompts scholars like Kasher and Yadlin¹⁹⁶ to “clarify” the applicable law so as to recalibrate its moral valence in ways more responsive to these particularly vexing circumstances.¹⁹⁷ The objective of these authors is to find a defensible way for these soldiers to hold their unscrupulous enemy entirely responsible for the increased risk to its civilians that its methods create—risks that admittedly materialize only through the gun barrels of those soldiers themselves.¹⁹⁸

The unwitting result, however, is effectively to eviscerate the duties of both distinction and proportionality. For whenever it becomes difficult and dangerous for soldiers to discriminate between fighter and nonfighter, the choice to prioritize force protection can only lead to many more civilian deaths.¹⁹⁹ Rather than counteracting the temptation of ground troops to exaggerate their own military value (and accordingly avert personal risk), Kasher and Yadlin’s approach ends up indulging these powerful tendencies.²⁰⁰ At the

result of “the increasingly blurred distinction between civilian and military functions,” which is “aggravated wherever armed actors do not distinguish themselves from the civilian population,” “peaceful civilians are more likely to fall victim to erroneous, unnecessary or arbitrary targeting, while members of the armed forces, unable to properly identify their adversary, run an increased risk of being attacked by persons they cannot distinguish from peaceful civilians”).

195. See Samy Cohen, *Introduction: Dilemmas in the War Against Terrorism*, in *DEMOCRACIES AT WAR AGAINST TERRORISM: A COMPARATIVE PERSPECTIVE* 1, 9 (Samy Cohen ed., 2008) (describing the frustration with the legal situation and stating that democracies must prevent their armed forces from acting based on this frustration); Lisa Hultman, *COIN and Civilian Collaterals: Patterns of Violence in Afghanistan 2004–2009*, 23 *SMALL WARS & INSURGENCIES* 245, 258 (2012) (describing the frustration with the factual situation); see also *supra* note 10 and accompanying text.

196. See, e.g., Kasher, *supra* note 15, at 166 (“[T]he principle of distinction, which is of great moral significance . . . , has to be reinterpreted in a way that respects the human dignity of persons in military uniform in general, as well as combatants, more than they have been respected . . .”).

197. See Noëlle Quéniévet, *The “War on Terror” and the Principle of Distinction in International Humanitarian Law*, 3 (Especial) *COLOM. Y.B. OF INT’L L.* 155, 158–59 (2010) (describing the IHL principle of distinction as an example of an outdated principle, in need of redefinition).

198. See MARK J. OSIEL, *THE END OF RECIPROCITY: TERROR, TORTURE, AND THE LAW OF WAR* 7–9, 23–25 (2009) (discussing this tendency); Smith, *supra* note 97, at 157–61 (discussing this issue in the context of the second war in Iraq); see also Hurka, *supra* note 61, at 48 (“The question of whether others’ wrongful choices can reduce our responsibility for bad outcomes is vital for the analysis of just war proportionality, but it is very difficult to answer decisively.”).

199. Cf. Hurka, *supra* note 61, at 49 (“One extreme view says another’s wrong choice always completely removes our responsibility for resulting evils, but this in effect eliminates proportionality as an independent just war condition.”).

200. Confino and Kremnitzer state:

tactical level, that approach to proportionality is therefore profoundly perilous and must be rejected, especially in armed conflicts with nonstate actors. It is misguided to let sympathy for soldiers' plight to allow them to override their duties to assume risk when necessary to protect weighty civilian interests.

Soldiers sometimes react to an enemy's refusal to separate its fighters from its populace by responding in kind. This is a more visceral, inarticulate response to their enemy's legal violations than that of Kasher and Yadlin, but operates to much the same effect.²⁰¹ One incident became public through the WikiLeaks revelations.²⁰² In Iraq, an American helicopter crew shot at civilians, mistaking a civilian photographer for an irregular combatant. He appeared to be holding a weapon, which proved to be only his camera. Two children were seriously injured. The helicopter crew could not have seen the children, for they were inside a car; the crewmembers shot at the car because its driver was trying to rescue people whom the crew mistakenly believed were combatants. After learning that they had injured children, one crewmember responded (while still believing the adult civilians were combatants): "[I]t's their fault for bringing kids in to a battle."²⁰³ That displacement of responsibility reflects the indifference to civilian harm that easily develops among those exposed to sustained combat. The crew's seeming indifference to

It is important also to ask what happens to the military system when it has conveyed the message that there is an absolute priority to the lives of soldiers over the lives of civilians. It seems that the natural tendency of the military system is to minimize the harm to soldiers, even at the price of a disproportional incidental harm to those not involved in the fighting. With this taken into consideration there is a need to specifically try and stress to the military the price paid by the other side, and not to supply it with moral backing to its natural tendencies, a backing that may lead to an increased and disastrous risk to civilians.

Confino & Kremnitzer, *supra* note 31 (Ziv Bohrer trans.).

201. See SOLIS, *supra* note 134, at 276; Hultman, *supra* note 195, at 258 ("Taking on higher losses may lead to . . . compensat[ing] by more indiscriminate, or less precise, attacks against the Taliban, which in turn causes higher levels of collateral deaths. This might be a result of having a strong focus on force protection, leading to frustration when failing to achieve this goal."); see also Rebecca J. Wolfe & John M. Darley, *Protracted Asymmetrical Conflict Erodes Standards for Avoiding Civilian Casualties*, 11 PEACE & CONFLICT: J. PEACE & PSYCHOL. 55, 56–57 (2005) ("Although the structure of these types of conflicts make it difficult to avoid collateral casualties, there are also psychological processes that only exacerbate this problem."); Richard R. Baxter, *The Geneva Conventions of 1949 and Wars of National Liberation*, 57 RIVISTA DIRITTO INTERNAZIONALE 193, 202 (1974) (noting that combatants passing themselves off as civilians "can readily change the [other side's] presumption that a person not in uniform is a peaceful non-participant to a presumption that such an individual is or may be a combatant").

202. Chris McGreal, *Wikileaks Reveals Video Showing US Air Crew Shooting Down Iraqi Civilians*, GUARDIAN (Apr. 5, 2010, 3:52 PM), <http://www.guardian.co.uk/world/2010/apr/05/wikileaks-us-army-iraq-attack> (U.K.).

203. *Id.*

distinguishing combatants from civilians is reflected as well in its decision to fire at all, for the images on its video screen were decidedly ambiguous (as one may see from the video disclosed by WikiLeaks). The actions of the perceived combatants did not constitute any immediate danger to friendly forces, since no ground forces were nearby. Therefore, were the soldiers not indifferent to distinguishing combatants from civilians, they would have waited, in light of the images' ambiguity, for further confirmation before deciding to open fire.

Similar incidents arose during Israel's Cast Lead operation, according to news reports. A few commanders apparently instructed their soldiers to spend little time ascertaining whether those encountered on the battlefield constituted combatants. Unless their noncombatant status was immediately clear, soldiers were to open fire. These instructions were admittedly somewhat vague in key respects, as is frequently the case when subordinates claim that the atrocities they committed were conducted pursuant to superior orders. The orders stated:

Instead of using intelligence to identify a terrorist . . . here you do the opposite: first you take him down, then you look into it. . . . This doesn't mean that you need to disrespect the lives of Palestinians but our first priority is the lives of our soldiers. That's not something you're going to compromise on.²⁰⁴

Some claim that commanders issuing those orders drew direct inspiration from Kasher and Yadlin's proffered code of military ethics.²⁰⁵ These incidents at least suggest what might ensue if that

204. Anshel Pfeffer, *IDF Officer: Gaza Civilians Risked To Protect Israel Troops During War*, HAARETZ (Feb. 3, 2010, 9:24 AM), <http://www.haaretz.com/news/idf-officer-gaza-civilians-risked-to-protect-israel-troops-during-war-1.262686> (Isr.) (quoting two soldiers).

205. See *supra* note 5 and accompanying text. Subsequent to Operation Cast Lead, due to strong international pressure, Israel has conducted extensive administrative and criminal investigations into the actions of its soldiers. Among other actions taken by Israel, forty-seven criminal investigations have been opened, and several of them have resulted in trials. STATE OF ISR., GAZA OPERATION INVESTIGATIONS: SECOND UPDATE 3 (2010). Based on this inquiry, Israel denied that disproportional attacks occurred during this campaign due to a complete preference of soldiers' lives over the lives of Palestinians. See STATE OF ISR., *supra* note 148, at 1–4, 32, 46 (discussing Israel's response and finding that the casualties were not caused by a disrespect for civilians' lives). Furthermore, to the best of our knowledge, no evidence was found of an explicit adoption of Kasher and Yadlin's position. Yet, some news reports do seem to indicate that at least a few units have acted improperly during the operation by adopting a position similar to that advanced by Kasher and Yadlin. Where sufficient evidence of such abusive conduct can be found, Israel must prosecute or otherwise discipline those responsible for it. Yet, one should acknowledge that this may not be a simple task. First of all, it is generally difficult to collect evidence of war crimes sufficient for criminal conviction. See generally Patricia M. Wald, *To "Establish Incredible Events by Credible Evidence": The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings*, 42 HARV. INT'L L.J. 535 (2001) (illustrating this difficulty). This difficulty is, many times, especially severe in the context of the crime of

approach to proportionality and discrimination were to govern tactical decision making. Rather than countervailing soldiers' impulses to become indifferent to civilian lives, Kasher and Yadlin's position supplies that indifference with a convenient rationalization.

In sum, though Margalit and Walzer's position fares worse at war's operational level than Luban's, it makes considerable sense at the tactical level. Kasher and Yadlin's position, however, clearly violates the law of proportionality when applied to war's operational level, and its tactical application could lead to extremely dangerous results.

D. Jus ad Bellum Proportionality and Force Protection as a Strategic Concern

Strategy involves formulating general national security policies at the highest levels, both military and civilian,²⁰⁶ including the decision to take up arms against a military adversary. These decisions, which establish the state's overall goals in the armed conflict it is about to enter,²⁰⁷ are constrained by the international law of *ad bellum*.²⁰⁸ That body of law prohibits recourse to force

disproportionate attack. See Blank, *supra* note 77, at 373 (stating that “[m]erely adding up the resulting civilian casualties and injuries and assessing the actual value gained from a military operation” “does not do justice to the complexities inherent in combat”); Joseph Holland, *Military Objective and Collateral Damage: Their Relationship and Dynamics*, 7 Y.B. INT’L HUMANITARIAN L. 35, 47 (2004) (discussing difficulties in proportionality analysis). Second, that is also because the proportionality-related norms dealing with the attribution of individual criminal liability are more demanding than the norms that deal with the actions of states. Compare Additional Protocol I, *supra* note 32, arts. 51(5)(b), 57(2) (defining an indiscriminate attack as one “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” and requiring precautionary measures for attacks), with Rome Statute, *supra* note 32, art. 8(2)(a)(iv), (b)(iv) (stating that war crimes include “[e]xtensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully or wantonly” and that other serious violations of the laws of armed conflict include “[i]ntentionally launching an attack [knowing it] will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated”). Lastly, one should acknowledge that there is some legal uncertainty with regard to the issue of proportionality and force protection, and this can affect the ability to convict. See Albin Eser, *Mental Elements—Mistake of Fact and Mistake of Law*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 889, 924–25 (A. Cassese et al. eds., 2002) (discussing the mistake-of-law defense that should be afforded in international criminal law when the relevant norm is unclear).

206. See DEP’T OF THE ARMY, *supra* note 88, at 2-2 to -3 (discussing military and civilian coordination and goals with regard to strategy-related decision making).

207. *Id.*

208. See, e.g., JDCC, *supra* note 106, at 26 (stating that the legal basis on which force is exercised in a specific armed conflict, which is determined by the overall legally

except in self-defense against armed attack.²⁰⁹ *Ad bellum* proportionality also limits the scale of violence to that needed for overcoming the threat posed by the attack.²¹⁰ This correspondence between the scale of the counterattack and the threat posed by the enemy attack is essential; states might otherwise use even a small-scale attack as an excuse to pursue aims unconnected with meeting that attack, in which case *jus ad bellum* would fail to constrain the escalation of violence.²¹¹ How might force protection come into play, at this level of decision making, in assessing proportionality?

The process involved is quite different from determining *in bello* proportionality. The threat to be resisted by the victim state may be defined in terms of dangers posed to both its soldiers and civilian population.²¹² An attack against a state's soldiers might be considered (sometimes) even more "serious" than against its civilians, in that the violence challenges the victim state's very sovereignty over its national territory, the first principle of public international law; it is soldiers who are charged with protecting that sovereignty.²¹³

permitted objective of that armed conflict, "may impose . . . constraints on the level of force used").

209. See U.N. Charter art. 2, paras. 3–4, art. 51 (requiring a peaceful resolution of conflict unless in self-defense against an attack).

210. See Paul Ducheine & Eric Pouw, Operation Change of Direction: A Short Survey of the Legal Basis and the Applicable Legal Regimes, *NETH. ANN. REV. MIL. STUD.* 51, 57 (2009); David Kretzmer, The Inherent Right to Self-Defence and Proportionality in Jus ad Bellum, 24 *EURO. J. INT'L L.* 235, 239 (2013) (surveying the different positions on the matter and reaching the conclusion that the majority opinion is "that proportionality must be judged against the legitimate ends of using force or in relation to the threat" (footnotes omitted)). Paul Ducheine and Eric Pouw propose:

[Ad bellum *p*]proportionality . . . is related to (1) the parity between the attack and the defence measured in terms of the total scale and effects of both, and (2) the purpose of the attack(er) and the defence. The parity between form and scale of the attack and the defence can be assessed through a combination of [these two kinds of] aspects.

Ducheine & Pouw, *supra*.

211. See *Corfu Channel Case (U.K. v. Alb.)*, 1949 I.C.J. 4, 35 (Apr. 9) ("The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law."); Kretzmer, *supra* note 210, at 264 (discussing the concern that "[s]tates may use a fairly low level attack as an excuse to pursue aims that are unconnected with that attack").

212. See YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 217 (5th ed. 2011) ("Unlike the *jus in bello*, the *jus ad bellum* does not recognize a difference between attacks against lawful targets (combatants or military objectives) and unlawful targets (civilians or civilian objects).").

213. See NATALINO RONZITTI, *RESCUING NATIONALS ABROAD THROUGH MILITARY COERCION AND INTERVENTION ON GROUNDS OF HUMANITY* 11 (1985) (stating that, unlike in the case of an attack against a state's civilians abroad, there is no legal dispute that an attack against a state's armed forces, even when committed abroad, is according to *jus ad bellum*, an armed attack against the state because the armed forces of a state are a symbol of its sovereignty).

The law further accords state leaders considerable discretion to assess the severity of the threat to which they are responding. This discretion extends much further, many contend, than the law of *in bello* proportionality affords military commanders when determining the “anticipated military advantage” of their contemplated actions.²¹⁴

Significantly, the law of *ad bellum* proportionality does *not* invite, much less require, state leaders to assess the civilian casualties anticipated on the other side of their imminent conflict.²¹⁵ Because they insist on this calculation, both Luban’s and Margalit and Walzer’s approaches offer an interpretation of proportionality that is simply incorrect at this decisional echelon.²¹⁶ Their analyses demonstrate a common tendency to confuse *ad bellum* with *in bello* proportionality; only the latter involves the estimation of foreign civilian casualties.²¹⁷

In the formulation of high strategy especially, war is filled with too many imponderables for the law governing it to require any calculation of foreign-civilian casualties, on pain of liability for getting the numbers wrong. Of necessity, any *ex ante* assessment of far-ranging consequences would be highly speculative and almost certainly inaccurate, beyond even the broadest parameters.²¹⁸ When entering armed conflict, states and their leaders cannot foresee with much precision how many civilians will be injured on the other side

214. See, e.g., Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT’L L. 391, 412 (1993) (stating that assessment of *ad bellum* proportionality “is a more demanding task than” the determination of *in bello* proportionality, since the former “involve[s] much broader considerations” and “consequently, opinions will legitimately differ”).

215. See Laurie R. Blank, *A New Twist on an Old Story: Lawfare and the Mixing of Proportionalities*, 43 CASE W. RES. J. INT’L L. 707, 712 (2011) (“[Jus *ad bellum* proportionality is unconcerned with the extent of civilian casualties, unlike *jus in bello* proportionality, in which civilian casualties play a central role.”); Michael N. Schmitt, “Change Direction” 2006: *Israeli Operations in Lebanon and the International Law of Self-Defense*, 29 MICH. J. INT’L L. 127, 153–54 (2008) (stating that a “common misapplication of the proportionality principle confuses the *jus ad bellum* criterion of proportionality . . . with the *jus in bello* principle by the same name,” while the fact of the matter is that the latter is the one that regulates the issue of civilian collateral damage and “considers the consequences of individual or related operations, not the scope of a response to an armed attack”).

216. The mistaken claim made by these scholars is relatively common in legal discourse. See, e.g., Gardam, *supra* note 214, at 404–05 (making such a claim).

217. See Blank, *supra* note 215, at 712 (noting the irrelevance of civilian casualties to *jus ad bellum* proportionality claims); Diamond, *supra* note 31, at 428 (describing several improper consequences of conflating *jus ad bellum* and *jus in bello*).

218. See Hilly Moodrick-Even Khen, *Having It Both Ways: The Question of Legal Regimes in Gaza and the West Bank*, 16 ISR. STUD. 55, 62 (2011) (describing the consideration of competing interests for *ad bellum* proportionality as often difficult and abstract, and noting that international law is of little aid in determining the scope of a military action for which the proportionality calculation must be done); Kretzmer, *supra* note 210, at 267 (“The point in time at which evaluation of proportionality is supposed to be made by the state using force is far more complicated in *jus ad bellum* than it is in *jus in bello*.”).

because the answer strongly depends on what enemy forces will do.²¹⁹ War has an interactive, reciprocal dimension, with each side often escalating in response to the other's preceding escalation, until one of them capitulates.²²⁰ Leaders almost invariably underestimate the duration of the conflict and the extent of ensuing casualties; this reflects what cognitive psychologists call "optimism bias."²²¹

To be sure, international law does require that, before taking up arms, states must assess whether their *initial* operational engagement with the enemy will likely yield a concrete and direct military advantage "not excessive" in relation to likely civilian harm in that particular engagement.²²² This is *in bello* proportionality, pure and simple, as now applied to operations that simply happen to be the first²²³ in a likely series of engagements with the enemy, which jointly compose an armed conflict. Leaders must consider the matter of *in bello* proportionality at the very beginning of armed conflict no less than thereafter, in their first "move" just as in later ones. This may sometimes, due to the expected harm to civilians, prohibit methods of warfare permitted by *ad bellum* proportionality.

There remains the question, as Luban poses it, of whether "the *political* need for force protection . . . [may be] an independent *strategic* goal of *military* operations."²²⁴ In many armed conflicts, for many countries, continuing the fight requires a measure of social

219. See Daniel Byman & Matthew Waxman, *Kosovo and the Great Air Power Debate*, 24 INT'L SECURITY, Spring 2000, at 9–10 (explaining that coercion is a "dynamic, two-player (or more) contest" to "induce an adversary to behave differently than it otherwise would"). See generally OSIEL, *supra* note 198, at 30–48 (discussing different legal conceptions of reciprocity as a means of influencing an adversary's behavior).

220. See DAVID RODIN, WAR AND SELF-DEFENSE 115 (2002) (stating that once an armed conflict begins, "the scale of force is intrinsically open-ended on both sides and subject to escalation"); Kretzmer, *supra* note 210, at 267 ("Unless the armed attack is limited and localized the situation is likely to be dynamic and could deteriorate rapidly into a wider armed conflict.").

221. JOHN GEORGE STOESSINGER, WHY NATIONS GO TO WAR 403–04 (11th ed. 2011); Daniel Kahneman & Jonathan Renshon, *Why Hawks Win*, 158 FOREIGN POL'Y 34, 37 (2007) (discussing the optimism bias and stating that "optimism is the order of the day when it comes to assessing one's own chances in armed conflict" to the extent that "almost every decision maker involved in what would become the most destructive war in history up to that point predicted not only victory for his side, but a relatively quick and easy victory").

222. Many argue that *jus ad bellum* proportionality assessments continue throughout the armed conflict. *E.g.*, Gardam, *supra* note 214, at 404. In such a case, the benefits of the dual (*ad bellum* and *in bello*) proportionality assessment continue throughout the conflict.

223. See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 42 (July 8) (stating that "a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law"); see also Gardam, *supra* note 216, at 392–94 (discussing the relation between *in bello* and *ad bellum* proportionality).

224. Luban, *supra* note 6, at 40–41 (emphasis added); see also *supra* Part I.C.3.

solidarity.²²⁵ Force protection therefore becomes a major political consideration for national leaders, especially when support for the war effort is precarious. This is often due to intense public concern with the number of military casualties sustained.²²⁶ Leaders of democratic countries must remain especially attentive to public opinion, which highly values the rights of soldier-citizens. Civil society in those states is hence highly sensitive to the pain and psychological stress caused by soldiers' deaths.²²⁷ Accordingly, continued public support for the war effort requires continued confidence in national leadership, which can be sapped by high soldier casualties sustained over a long period.²²⁸ This is especially so when the immediate survival of the state and society are not obviously at stake.²²⁹ This demoralization of civil society is commonly known as the "body bag effect."²³⁰ It gives rise to what Luban calls "the political need for force protection."²³¹

The effect of military casualties on the national will to fight is irrelevant to *in bello* proportionality, as Luban correctly asserts. To that end, force protection can play no role in the legal assessment of alternative operational plans or tactical maneuvers.²³² It is simply impossible in these forms of decision making to anticipate the impact

225. See JOHN M. COLLINS, *MILITARY STRATEGY* 13 (2002) (describing the necessity of rooting national security interests in reality that will get public support).

226. John A. Gentry, *How Wars Are Won and Lost: Vulnerability and Military Power* 8–9 (2011).

227. See NED DOBOS, *INSURRECTION AND INTERVENTION: THE TWO FACES OF SOVEREIGNTY* 52 (2012) (discussing the connection between the rise of a right-oriented society and the increase in military casualty aversion).

228. See Michael Horowitz & Dan Reiter, *When Does Aerial Bombing Work? Quantitative Empirical Tests: 1917-1999*, 45 *J. CONFLICT RESOL.* 147, 150, 154 (2001) (stating that "[t]he world continues to democratize, and democratic states are especially sensitive to casualties," adding that "[t]he decreasing casualty tolerance threshold in America and the West makes it crucial to formulate and execute military strategies that involve the lowest possible risk to allied troops," and further describing the role of public pressure on different types of regimes in bringing about policy change); see also Leonard Wong, *Maintaining Public Support for Military Operations*, in *DEFEATING TERRORISM: STRATEGIC ISSUE ANALYSES* 65, 67–68 (John R. Martin ed., 2002) (discussing the American society).

229. See, e.g., JEFFREY RECORD, *HOLLOW VICTORY: A CONTRARY VIEW OF THE GULF WAR* 137 (1993) (describing the negative public perception of the Vietnam and Korean wars as, at least partially, related to the absence of a clear connection between casualties and a just cause).

230. Neil MacFarlane, *Politics and Humanitarian Action* 75 (The Thomas J. Watson Jr. Inst. for Int'l Studies & U.N. University, Occasional Paper No. 41, 2000) (defining the "body bag effect").

231. Luban, *supra* note 6, at 39, 41.

232. *Id.* at 40–41, 44. For an improper position that does allow the political need for force protection to be factored into the *in bello* proportionality assessments, see W. Michael Reisman, *The Lessons of Qana*, 22 *YALE J. INT'L L.* 381, 395–97 (1997).

of any given number of casualties on national fortitude.²³³ The anticipated military advantage from maintaining collective cohesion through force protection efforts at these levels is not concrete and direct enough to count for purposes of *in bello* proportionality.²³⁴ Yet, can the political need for force protection be taken into account at the strategic level, when making an *ad bellum* proportionality assessment?

Luban fails to consider how these national morale concerns affect the *ad bellum* proportionality of a state's action. Consider, in that regard, the following situation, similar to the one he himself presents.²³⁵ It is one that, though "hypothetical," readily arises in real armed conflicts. The enemy attacks and seizes territory from a neighboring state. The victim state forcibly responds. It chooses to do so by aerial campaign rather than ground attack, because this will minimize casualties among its forces, thereby preserving greater social solidarity in support of its decision to respond to the enemy's attack with force of its own.²³⁶ This choice is suboptimal in a strictly operational sense, for it is less likely to induce the enemy to withdraw from the territory seized. Due to this suboptimal nature, the air campaign will need to involve much greater violence against the enemy—its military installations and armed forces—than would a land campaign, to attain the same strategic aims.²³⁷

233. See Pierangelo Isernia, *Conclusions: What Have We Learned and Where Do We Go from Here*, in PUBLIC OPINION AND THE INTERNATIONAL USE OF FORCE 253, 262–63 (Philip Everts & Pierangelo Isernia eds., 2001).

234. See Luban, *supra* note 6, at 40–41, 44 (“[T]he legal test for proportionality weighs civilian damage against ‘concrete and direct military advantage,’ not the indirect and intangible military advantage grounded in civilian morale.”); Ziegler & Otzari, *supra* note 37, at 67–68 (arguing that “it would be normatively unacceptable to give weight” to issues of prevention of “the potentially detrimental effects of soldiers’ deaths on public opinion” and on military morale, when assessing military advantages as part of an *in bello* proportionality assessment, among other reasons because it would “increase uncertainty by adding . . . imprecise parameter[s] to the equation”).

235. See Luban, *supra* note 6, at 39–41. The main difference between the example discussed herein and the scenario discussed by Luban is that Luban chose not to focus his analysis specifically on a case in which the enemy seizes a territory of the victim state.

236. See *id.* Luban discusses actual historical examples in which the form of the armed conflict was chosen due to such a motivation. He further argues there that the legal test for proportionality should ignore “the indirect and intangible military advantage grounded in civilian morale.” *Id.* However, as discussed in the text, he reaches this conclusion based on the wrong proportionality test.

237. See the examples discussed in John S. Brown, *Historically Speaking: The Not So New ‘New Way of War,’* 62 ARMY, Jan. 2012, at 69–70 (discussing historical examples where an aerial campaign was chosen, due to a political force protection concern, even though a ground campaign (or a combined air and ground campaign) would have been much more effective in attaining the relevant strategic aim); Richard A. Lacquement, Jr., *The Casualty-Aversion Myth*, 57 NAVAL WAR C. REV., Winter 2004, at 43–49 (discussing American casualty avoidance and how it affected the use of air strikes in recent history); Martin van Creveld, *The Rise and Fall of Air Power*, 156 RUSI J., July 2011, at 53–54 (describing limitations of air power and giving examples

In assessing the measure of violence needed in order to defend itself against the attack it has suffered, the victim state must address the legal question of *ad bellum* proportionality: whether its response will be compatible with the exclusive strategic aim of countering the threat that attack represents.²³⁸ In the case at hand, the enemy will have to suffer more as a result of the state's choice of a strategy that will put the state's forces at lesser risk with a view to sustaining political support for a resort to force in the first instance. As such, the state's choice of a counterattack violates *ad bellum* proportionality because it was possible for the victim state to regain its captured territory through less violent means, inflicting a lesser measure of harm upon its adversary. Moreover, the decision to do otherwise was influenced by considerations immaterial to requirements of self-defense against the threat proximately posed to its national security by the particulars of the attack it had suffered (i.e., the need to induce the enemy to withdraw from the territory seized).²³⁹

In rejecting the political rationale of force protection as a legal consideration, Luban reaches the right conclusion, but for the wrong reason and at the wrong level of warfare: he is applying the *in bello* rule, when the *ad bellum* standard is truly at issue. Due to this flaw in his reasoning, Luban fails to recognize the legitimate ways in which this force protection aim may influence *ad bellum* proportionality assessments made at the strategic level.

First, when an air campaign will not be greater in scale than a land operation—even if the former might result in more civilian harm than the latter—then it is perfectly lawful, according to the norm of *ad bellum* proportionality, to select the former on the grounds that it will better safeguard the state's forces and thereby reduce the

where it was chosen, despite it being less effective than ground forces, due to considerations of force protection). See also Michael Bothe, *Targeting*, 78 INT'L L. STUD. 173, 179–80 (2002); Gardam, *supra* note 214, at 404 (discussing casualty avoidance motives for aerial bombardment during the First Gulf War and noting the limits to this justification under proportionality analysis). Bothe discusses NATO's choice, in its Kosovo campaign, to "restrict military action to an air campaign." Bothe, *supra*, at 179. This choice forced NATO to attempt to attain the strategic aim of the operation (i.e., stopping the Serbian attacks against the Kosovars) by way of bombing Serbia from the air, in the hope that that will terrorize the Serbian public and lead it to pressure Serbian leaders to accept NATO's demands. Such a course of action, Bothe argues, violates *in bello* law, because "softening the adversary's will to resist" and harming the "the morale of the entire population and, thus [the] political and military decision-makers" is not a "military advantage," but a political one. Bothe, *supra*. Yet, the point that is of importance to our current discussion is that there would not have been a need to attempt to attain the strategic goal of the campaign in such a problematic manner had the option of a ground campaign, to drive the Serbian forces out of Kosovo, been chosen by NATO.

238. See sources cited *supra* note 210.

239. See JDCC, *supra* note 106, at 26 (stating that according to *jus ad bellum* proportionality, a state's "defined and limited [legal] goals" in a conflict impose constraints on the scale and form of that state's use of force); see also *infra* note 266 and accompanying text.

likelihood for a body-bag effect (as long as each operation within this aerial campaign will not violate the demands of *in bello* proportionality).²⁴⁰

Second, political concern with force protection may legitimately influence how the victim state assesses *ad bellum* proportionality in a common situation Luban does not consider. The victim state may confront enemies who do not seek to confine the measure of force they employ to what would be needed in order to achieve the strictly military goal of disabling its armed forces. Its enemies may seek, through maximizing soldier casualties, to demoralize its civil society with a view to inducing its surrender, capitalizing to this end on the society's intense aversion to sustaining them.²⁴¹ This strategy is most commonly employed by nonstate belligerents fighting democratic states.²⁴² Nonstate belligerents adopt this strategy not only due to the strong sensitivity of democratic states to military casualties; many nonstate belligerents also lack the resources for any large-scale, comprehensive campaign that can disable the military of their enemy state. They therefore often employ recurrent, smaller scale attacks, leading to the gradual accumulation of high casualties on the state's side.²⁴³ Certain nonstate belligerents also uphold ideologies viewing the annihilation of their enemy as their chief strategic aim. At this point, force protection is no longer merely a political consideration, but becomes a legal one as well, because demoralization of the

240. Cf. Gardam, *supra* note 214, at 404–05 (stating that the issue of force protection can be taken into account in a limited way when making a *jus ad bellum* proportionality assessment, yet mistakenly assuming that civilian harm is a consideration that is part of the *jus ad bellum* proportionality assessment). See generally THE ECONOMIST, MODERN WARFARE, INTELLIGENCE AND DETERRENCE: THE TECHNOLOGIES THAT ARE TRANSFORMING THEM 93, 154 (Benjamin Sutherland ed., 2011) (discussing the precision of new air power-related technologies).

241. See KRISTA E. WIEGAND, BOMBS AND BALLOTS: GOVERNANCE BY ISLAMIST TERRORIST AND GUERRILLA GROUPS 42, 108 (2010) (showing that nonstate belligerents adopt strategies, such as intentionally targeting citizens of their enemy state, or causing extensive or illegal harm to the soldiers of that state, in order to undermine public support in that state's leadership, and thus pressure that leadership to accept their demands); Daniel Byman & Matthew Waxman, *Defeating US Coercion*, 41 SURVIVAL, Summer 1999, at 114–16 (discussing the American aversion to sustaining large casualties, and the ways in which this aversion has been taken advantage of by enemies of the United States in recent history).

242. Byman & Waxman, *supra* note 241 (discussing the employment of this strategy even by some states); Mark T. Damiano, *Employing Aerial Coercion To Combat Terrorism: Recommendations for the Theater CINC 11–12* (Feb. 4, 2002) (research paper, Naval War College), available at http://www.au.af.mil/au/awc/awcgate/navy/nwc_damiano.pdf (discussing the adoption of this strategy by terrorist groups).

243. See CHRISTOPHER C. HARMON, TERRORISM TODAY 55 (2d ed. 2007) (“[B]oth terrorist[s] and guerrilla[s] . . . work to refine the strategy of exhaustion, by which stealth, intelligence, and swiftness make them ineradicable and a continuous drain on the strengths of the government.”); see also Damiano, *supra* note 242 (explaining that terrorists can try to increase casualties beyond acceptable levels to defeat U.S. coercion).

opposing society through maximal harm to its soldiers has become a central, independent strategic aspiration of the enemy. Therefore, it becomes a main strategic threat directly posed by that enemy's attacks.²⁴⁴

Under those circumstances, the victim state faces a security threat surpassing any effort merely to disable its soldiers on the battlefield. The law of *ad bellum* proportionality is clear that the scope of the relevant threat determines the measure of force that will count as lawful in resisting it.²⁴⁵ When the victim state must take account of force protection in order to resist an enemy strategy directed against civic solidarity, force protection becomes legally relevant in assessing the *ad bellum* proportionality of its rejoinder.²⁴⁶ Luban's analysis fails to recognize that certain enemies hold those ambitious strategic aims and how those aims affect the proportionality of the state's strategic response. If an air campaign would more effectively protect its forces in that type of conflict, the victim state may lawfully prefer this course of action to a ground campaign, even if it will necessitate the use of greater firepower.

Though this Article's reasoning in this respect differs from that of Kasher and Yadlin, it reaches similar conclusions. First, force protection may strongly affect (*ad bellum*) proportionality determinations when fighting a terrorist organization. Second, soldiers' lives can be accorded greater consideration than the lives of foreign civilians. Kasher and Yadlin's understanding of proportionality is thus suitable to strategic decision making, as it is consonant with existing *ad bellum* law. There, force protection plays a legitimate role—sometimes weighty—in whether a state may counter an armed attack with force and in determining the acceptable scale, and sometimes also the form, of that response. To this end, even the demoralizing political effect of mounting military casualties may legitimately influence those grave decisions. The permissible extent of

244. See Assaf Moghadam, *The Globalization of Martyrdom: Al Qaeda, Salafi Jihad, and the Diffusion of Suicide Attacks* 69–76 (2011) (discussing al-Qaeda's strategic aims).

245. See *supra* text accompanying note 210.

246. See Byman & Waxman, *supra* note 219, at 62 (discussing the reciprocal nature of coercive threats during an armed conflict, as well as their dynamic nature); Gerhart Husserl, *Interpersonal and International Reality: Some Facts To Remember for the Remaking of International Law*, 52 ETHICS 127, 127–28 (1942) (stating that “[e]ver since nations have waged war against each other, the importance of weakening the enemy's morale has been realized,” and further stating that “undermin[ing] and break[ing] the national spirit of the enemy” and “actual combat” are “two equally important avenues to the desired goal of victory”); cf. Robert F. Teplitz, *Taking Assassination Attempts Seriously: Did the United States Violate International Law in Forcefully Responding to the Iraq Plot To Kill George Bush?*, 28 CORNELL INT'L L.J. 569, 609 (1995) (explaining why an assassination of a head of state constitutes an imminent threat to the state's security).

that influence will vary with the nature and purpose of the armed attack the victim state has endured.

IV. AIR POWER AND THE FORCE PROTECTION POLICIES OF WESTERN STATES

It is true that the dispute this Article examines arose in response to accusations that Israel had implicitly adopted Kasher and Yadin's code of military ethics during its Operation Cast Lead. Yet the underlying questions are faced by modern military forces more generally.²⁴⁷ Israel is not unique in confronting enhanced public concern with soldier casualties as a constraint on military decision making.²⁴⁸ This Part examines the effect casualty aversion has on the actions of Western states at all three levels of war, using the common resort to aerial power to demonstrate this effect. This examination aids in further demonstrating and clarifying the differences between the proportionality analyses that need to be made at each of the levels of war.

Western societies today experience acute public fatigue with the horrors of war, of which they have seen much over the last hundred years.²⁴⁹ Explaining their increased aversion to further casualties among their soldier-citizens also requires acknowledgment of the rise of strong individualism, the spread of "rights consciousness," and the decline of public trust in political leadership.²⁵⁰ Until very recently, the United States had been considered a society more sensitive to the issue of force protection than even other democracies, mainly on account of its traumatic experience in Vietnam.²⁵¹ For many years

247. See DOBOS, *supra* note 227, at 51 (discussing the growing reluctance of the Western public to make sacrifices leading to commitment shortfall and casualty aversion); ROBERT MANDEL, SECURITY, STRATEGY, AND THE QUEST FOR BLOODLESS WAR 27–29 (2004) (arguing that the bloody record of the twentieth century has led to a gradual change in public attitude toward casualties in war (including military casualties), which led policymakers to seek ways to reduce such casualties and resulted in a change in military strategies).

248. See *supra* note 6 (citing all three groups of scholars discussed in the current Article as holding the view that this debate has universal significance and applicability).

249. See MANDEL, *supra* note 247 (describing how twentieth century wars generated significant casualty aversion).

250. See DOBOS, *supra* note 227, at 52 (describing the effects of changing attitudes toward life and war on the public will to risk soldiers' lives). With regard to the issue of public trust, see RAGNAR LÖFSTEDT, RISK MANAGEMENT IN POST-TRUST SOCIETIES 4 (2005) (discussing the phenomenon of declining public trust in Western societies); MANDEL, *supra* note 247, at 30 (discussing how declining public trust has affected military casualty aversion in the United States).

251. See DOBOS, *supra* note 227, at 51 (stating that since World War II, Western societies have gradually become more averse to military casualties, and that in the United States, following the Vietnam War, this aversion has further developed into what has been described by many as a "casualty phobia"); PETER D. FEAVER &

following that war, casualty aversion was a significant source of American reluctance to engage in armed conflict.²⁵² Only in the 1990s did this disinclination begin to diminish, as reflected in the First Gulf War.²⁵³ National leaders remained concerned, however, that public support for martial engagements would wane if U.S. casualties became numerous. They consequently adopted policies designed to minimize them.²⁵⁴ Force protection has in this way strongly influenced the military decision making of the United States and its allies at all the levels of war: strategic, operational, and tactical.²⁵⁵

Some contend that casualty aversion all but disappeared as a significant restraint on military force after September 11, 2001.²⁵⁶ That is mistaken. The increasing reliance on drone warfare, in lieu of special operations forces, reflects the continuing fear that a strong body-bag effect will undermine public support for foreign wars.²⁵⁷ Key

CHRISTOPHER GELPI, CHOOSING YOUR BATTLES: AMERICAN CIVIL-MILITARY RELATIONS AND THE USE OF FORCE 96, 98 (2005) (describing the thesis that the American public is strongly afflicted by a casualty phobia as “one of the most important strategic claims in the contemporary world,” which strongly affects the actions of both U.S. leadership and the actions of the United States’ enemies, and further arguing that the popular belief in the existence of such a phobia is based on what they argue is a misinterpretation of several historical events, especially the wars in Korea and Vietnam); MANDEL, *supra* note 247, at 33 (contrasting post-Vietnam attitudes about casualties in the United States with those after World War II); *see also* Bernard Boëne, *Postmodern Armed Forces and Civil-Military Relations?*, in HANDBOOK OF THE SOCIOLOGY OF THE MILITARY, 167, 178 (Giuseppe Caforio ed., 2006) (comparing American casualty intolerance to that of other Western democracies).

252. *See* John Mueller, *Vietnam and Iraq: Strategies, Exit and Syndrome*, in VIETNAM IN IRAQ: TACTICS, LESSONS, LEGACIES AND GHOSTS 179, 184 (John Dumbrell & David Ryan eds., 2007) (describing the public’s desire to avoid another Vietnam, which led, for many years, to an American reluctance to engage in armed conflict).

253. *See* RICHARD ALAN SCHWARTZ, THE 1990S, 88–89 (2006) (describing how the specter of the Vietnam War was gradually overcome leading up to Operation Desert Storm).

254. *See id.* at 88 (describing the Joint Chiefs’ desire to conduct a “swift, decisive offensive characterized by overwhelming American force”); *see also* Jeffrey Record, *Force-Protection Fetishism: Sources, Consequences, and (?) Solutions*, 14 AEROSPACE POWER J., Summer 2000, at 4, 6 (critically assessing this American policy, known as the Weinberger–Powell Doctrine, which was developed in the early 1990s).

255. *See* MANDEL, *supra* note 247, at 34–36 (describing the role of force protection in shaping national strategies and operational objectives of Western countries—i.e., its role in affecting both the aims of armed conflicts and the ways in which they are conducted); Vincent Desportes, Editorial, 15 DOCTRINE, Nov. 2008, at 4, 4–5 (contributing to a volume dedicated to a comparative examination of force protection policies in different militaries); *cf.* Horowitz & Reiter, *supra* note 228, at 150 (noting that increased democratization has led to lower casualty tolerance and, consequently, to greater reliance on aerial strikes).

256. *See* MANDEL, *supra* note 247, at 36–37 (noting that many observers who held this view attributed reduced casualty aversion to the concern of the American public with its own personal safety); Wong, *supra* note 228, at 66 (stating that “casualty aversion is currently not a major factor in public support of the war on terrorism”).

257. *See* MANDEL, *supra* note 247, at 39 (discussing views that downplay the change in American perspective regarding casualty aversion and stress the strong

U.S. allies share these concerns, leading some of them to withdraw from common troop commitments to Afghanistan, in particular.²⁵⁸

The effects of casualty aversion at all three levels of war are best evidenced in the increased reliance of Western armed forces on air power (including drones), rather than on ground forces.²⁵⁹ Dependence on aerial bombardment is clear from Western conduct in the first and second Iraq wars, NATO's 1999 Kosovo campaign, the war in Afghanistan, and most recently the NATO campaign in Libya.²⁶⁰

In these conflicts, Western states were widely criticized for consistently preferring aerial force over deployment of ground troops. That preference presents an *ad bellum* issue, as mentioned, when aerial warfare will be more violent and destructive than a contemplated land campaign in attaining the same objectives.²⁶¹ When the enemy seizes another state's territory (as in the First Gulf War) or commits international crimes against a civilian population (as in Kosovo and Libya), a land operation generally will be more effective than one from the air. Western strategists nonetheless preferred an aerial campaign in the initial stage of all these conflicts, due largely to concerns with safeguarding their soldiers and preserving public support for wars in which Western interests were often only tangentially at stake.²⁶² These leaders drew guidance as

efforts made by U.S. forces to reduce casualties during the post-9/11 wars); *see also* ALASTAIR FINLAN, SPECIAL FORCES, STRATEGY AND THE WAR ON TERROR: WARFARE BY OTHER MEANS 9 (2008) (discussing the reasons for the use of Special Forces on the battlefield); Kenneth Anderson, *Efficiency in Bello and ad Bellum—Making the Use of Force Too Easy?*, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 374, 381 (Claire Finkelstein, Jens David Ohlin & Andrew Altman eds., 2012) (discussing the connection between drone warfare and force protection).

258. Tom Lansford, *9/11 and the Wars in Afghanistan and Iraq: A Chronology and Reference Guide* 130–31 (2012); *see also* James A. Swanson, *The Bush League of Nations* 134 (2008) (providing statistics illustrating British troop withdrawals and showing that these withdrawals were affected by British military casualties); *supra* notes 9–10 and accompanying text; *cf.* Nigel D. White, *Democracy Goes to War: British Military Deployments Under International Law* 295 (2009) (discussing the role popular support should play in determining when the lives of soldiers should be placed in jeopardy).

259. Horowitz & Reiter, *supra* note 228, at 150 (“The decreasing casualty tolerance threshold in America and the West makes it crucial to formulate and execute military strategies that involve the lowest possible risk to allied troops. . . . This sensitivity to casualties makes air power quite attractive” (citations omitted)).

260. Brown, *supra* note 237, at 69–70 (criticizing the affectivity of the extensive reliance on aerial power in these armed conflicts); van Creveld, *supra* note 237, at 48, 52 (same).

261. *See supra* notes 237–239 and accompanying text.

262. *See* Luban, *supra* note 6, at 39–41 (noting reliance on aerial campaigns in Kosovo due to the public's low casualty tolerance but arguing, based on the wrong legal basis, that civilian morale should be irrelevant to the morality and legality of a war); *see also, e.g.*, ELIZABETH POND, *THE REBIRTH OF EUROPE* 200 (2d ed. 2002) (discussing President Bill Clinton's insistence on an aerial campaign in Kosovo so that no American soldier would die).

well from the acknowledged duty of democratic states to honor their soldiers' rights to life insofar as it is consistent with essential military goals.²⁶³ This is, of course, the consideration emphasized by Kasher and Yadlin, and rightly so. To compensate for the lesser efficacy of air power, these campaigns involved both much greater violence against enemy combatants (and installations) and greater incidental civilian harm than a land operation likely would have produced.²⁶⁴

Yet, as explained hereinafter, considerable concern exists that Western leaders have allowed themselves to be guided by the aim of force protection beyond what the law of *ad bellum* proportionality permits.²⁶⁵ There is reason to believe that *ad bellum* proportionality has been breached: force protection is so highly prized that no pilot faces significant risk, and much greater firepower is used than that which would have been used in a ground campaign (which could have achieved the strategic goal of the relevant war).²⁶⁶ This concern

263. See POND, *supra* note 262, at 200 (noting the derivative interest of the United States in Kosovo and the fortunate lack of casualties or commitment of ground troops that would have undermined U.S. involvement); Martin L. Cook, "Immaculate War": Constraints on Humanitarian Intervention, 14 ETHICS & INT'L AFF. 55, 65 (2000); Dunlap, *supra* note 146, at 99 (noting that "the American military ethos is largely built on the sanctity of all human life, combatant and noncombatant alike"). Cook states that the "[p]rotection of innocent foreign nationals will be a priority as well . . . because of the moral concern with protection of innocent life. But even the concern with protection of innocents will probably be secondary to protection of our own forces, for the weighty moral reasons I have indicated." Cook, *supra*, at 63. One main reason, among these moral reasons, as he explains earlier in his article, is that the core moral and political justification for risking soldiers' lives is one of social contract (i.e., soldiers' commitment to their state). Therefore it is more difficult to offer a moral justification for instructing soldiers to risk their lives when that instruction is given due to reasons unrelated to the social-contract rationale. *Id.* at 61–62. Cook discusses this issue in the context of the humanitarian intervention in Kosovo, but notice that nothing in his reasoning distinguishes between humanitarian interventions and other armed conflicts. The *jus ad bellum* justification often given to these operations in general, and sometimes even specifically to the priority given to aerial campaigns, is one of *lex specialis*—mainly, claiming to rely on Security Council Resolutions dealing with the relevant conflict as authorizing Western forces to act in a manner otherwise prohibited by *jus ad bellum*. See Christian Henderson, *International Measures for the Protection of Civilians in Libya and Côte d'Ivoire*, 60 INT'L & COM. L.Q. 769, 770–73, 778 (2011) (discussing the extensive (disputed) reliance of Western countries on Security Council Resolutions as the *ad bellum* legal basis for their actions); Victor Kattan, *The Use and Abuse of Self-Defence in International Law: The Israel-Hezbollah Conflict as a Case Study*, 12 Y.B. OF ISLAMIC & MIDDLE E. L. 31, 33–34, 41 (2005–2006) (claiming that the *ad bellum* legality of such a choice of an aerial option is solely due to the authorization given by the Security Council).

264. See sources cited *supra* note 237.

265. *E.g.*, JUDITH GAIL GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 24–25 (2004) (stating that it is debatable whether the choice to heavily rely on air power in Kosovo and in the First Gulf War can be justified according to *jus ad bellum* proportionality, as it was overly influenced by the concern for force protection).

266. See WILLIAM JOSEPH BUCKLEY, KOSOVO: CONTENDING VOICES ON BALKAN INTERVENTIONS 392 (2000) (noting that there are serious morality concerns regarding NATO's decision to restrict its engagement in Kosovo to airstrikes under the principle

should be especially acute where there is no clear indication that the enemy's strategy was actually to cause a body-bag effect, but Western leaders nonetheless chose the aerial option, fearing that a body-bag effect would be the inevitable result, in any event, of continued armed conflict.²⁶⁷ In light of the actions of Western states in the last two decades, there is considerable danger that air power has become the default option in considering strategic options, no matter if it comports with *ad bellum* proportionality or not.²⁶⁸

of *ad bellum*); Gardam, *supra* note 265, at 24–25 (arguing that high-altitude aerial bombardment was more likely to worsen the humanitarian problem in Kosovo than end human rights abuses, thus violating *ad bellum* proportionality); Gardam, *supra* note 214, at 404–05 (criticizing the *ad bellum* legality of the aerial campaign at the beginning of the First Gulf War); James Turner Johnson, *The Just War Idea: The State of The Question*, in 1 JUSTICE AND GLOBAL POLITICS 167, 189–92 (Ellen Frankel Paul, Fred D. Miller, Jr. & Jeffrey Paul eds., 2006) (discussing the reliance, due to a force protection motivation, on air power in Kosovo and in the initial stages of the 2000s wars in Afghanistan and Iraq, and further stating that “[the] calculation of proportionality also requires us to ask whether a particular means is the best way to a desired end” and that “[t]he air campaign against Serbia did nothing directly to protect the ethnic Albanian Kosovars, and it may, as some have argued, have triggered worse violence against them by the Serb troops and paramilitaries in Kosovo”); Julian M. Lehmann, *All Necessary Means To Protect Civilians: What the Intervention in Libya Says About the Relationship Between the Jus in Bello and the Jus ad Bellum*, 17 J. CONFLICT & SECURITY L. 117, 140 (2012) (criticizing the *ad bellum* legality of the reliance on aerial power in the campaign in Libya); Frederick Naert, *The Impact of the Fight Against Terrorism on the Jus ad Bellum*, 11 ETHICAL PERSP. 144, 148 (2004) (criticizing the *ad bellum* legality of the aerial attacks in Afghanistan after the fall of the Taliban). Some accounts suggest that the threat posed by an enemy's attack determines not only the scale, but also the form of lawful counterattack, i.e., the choice between a land or air campaign. For such authors, the mere fact that force protection has influenced the decision to fight from the air in itself counts as strong evidence that *ad bellum* proportionality has been violated. Also, criticisms of these Western actions are often motivated not only by an *ad bellum* concern, but also an *in bello* concern regarding the increase in civilian casualties that the choice of an aerial campaign over a land operation often entails. Thus, such criticisms often do not appear in a pure *ad bellum* form; instead, issues of *ad bellum* and *in bello* proportionality are conflated. That is, often, the criticisms are made in ways resembling the way in which these issues are conflated by Luban, as well as Margalit and Walzer. See Jasmine Moussa, *Can Jus ad Bellum Override Jus in Bello? Reaffirming the Separation of the Two Bodies of Law*, 90 INT'L REV. RED CROSS 963, 977–79 (2008) (discussing this common flaw in such criticism). For an example of such a flaw, see Gardam, *supra* note 214, at 404–05.

267. As discussed *supra* Part II.D, the body-bag effect becomes legally relevant to the determination of the scale of the conflict only when the enemy is intentionally seeking to cause it. In some of the recent aerial campaigns of Western forces, however, a counterargument might be made that the enemy did, in fact, had such intentions. See Lacquement, *supra* note 237, at 47–48 (discussing the wars in Iraq, Kosovo, and Afghanistan).

268. Some have even argued that Western leaders have acted reflexively, influenced by such an aim even when there was no actual concern that a body-bag effect would develop. See Lacquement, *supra* note 237, at 41–42. Lacquement points to the influence of this concern on the actions of American leaders: “The tremendous efforts by civilian and military leaders to minimize casualties in . . . the Persian Gulf War (1991), Haiti (1994), Bosnia (1995), and Kosovo (1999) . . . can be read as a reaction to the public's purported low tolerance for casualties.” *Id.* at 41. He then

Three legal institutions have evaluated the choice of air over land operations in the recent military operations of Western states.²⁶⁹ The International Criminal Tribunal for the former Yugoslavia (ICTY) prosecutor appointed a committee to assess the legality of NATO's actions relating to its Kosovo intervention.²⁷⁰ Several anti-war protestors, who committed illegal acts as part of their protest against British participation in the Second Gulf War, petitioned against their prosecution to the British House of Lords. They argued their illegal acts were justified, because they were performed in an attempt to impede the commission of a crime of aggression by the British Government. As such, they have, in fact, petitioned the House of Lords to examine whether British Prime Minister Tony Blair and other government leaders committed the crime of aggression in invading Iraq.²⁷¹ Finally, the prosecutor of the International Criminal Court (ICC) examined whether a criminal investigation should be opened against the leaders and soldiers of several countries participating in that invasion.²⁷²

These legal bodies were asked to evaluate the *ad bellum* proportionality of the choice of air power over land operations in the recent interventions of Western states, but concluded that they lacked jurisdiction over the relevant international crime, i.e., jurisdiction to examine whether recourse to force had entailed

criticizes these leaders, because "[t]here is in fact no evidence that the public is intrinsically casualty averse. Several studies . . . demonstrate that . . . [the] readiness [to accept casualties] is not restricted to issues of vital national interests or self-defense. The public takes its lead from how national leaders characterize and justify the mission." *Id.* at 42.

269. To be clear, additional judicial bodies reviewed, or were asked to review, the legality according to international law of these armed conflicts and/or of the actions committed during these conflicts, yet the decisions discussed in the text are considered the leading decisions with regard to these conflicts. For decisions of additional judicial bodies, see *Banković v. Belgium*, App. No. 52207/99, 2001-XII Eur. Ct. H.R. 333 (holding a claim inadmissible that was brought by citizens of the Federal Republic of Yugoslavia against seventeen European countries that are members of NATO and participated in the Kosovo campaign); Jianming Shen, *The ICJ's Jurisdiction in the Legality of Use of Force Cases*, in *INTERNATIONAL LAW IN THE POST-COLD WAR WORLD: ESSAYS IN MEMORY OF LI HAOPEI* 480 (Sienho Yee & Tieya Wang eds., 2001) (describing and criticizing how the ICJ rejected the Federal Republic of Yugoslavia's proceedings against ten NATO member states, accusing them of violating *jus ad bellum*); Afua Hirsch, *Iraq War Was Illegal, Dutch Panel Rules*, *GUARDIAN* (Jan. 12, 2010, 2:05 PM), <http://www.guardian.co.uk/world/2010/jan/12/iraq-war-illegal-dutch-tribunal> (U.K.) (reporting on an independent commission of inquiry, set up by the Netherlands' government, that ruled that the 2003 invasion of Iraq violated *jus ad bellum*).

270. NATO Bombing Report, *supra* note 137, ¶¶ 30–34.

271. *R v. Jones* [2006] UKHL 16, [2006] All Eng. Rep. (H.L.) 741 (appeal taken from Eng. and Wales).

272. Letter from Luis Moreno-Ocampo, Chief Prosecutor, Int'l Criminal Court, to Senders Re Iraq (Feb. 9, 2006), available at http://www.icc-epi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf.

aggression.²⁷³ It is widely believed that the reviewing bodies could nonetheless have found a legal basis to comment on *ad bellum* matters.²⁷⁴ These decisions reflect reluctance to encroach upon the discretion that international law affords to states on *ad bellum* issues.²⁷⁵ That result ensured, however, that the law would remain unclear regarding the place of force protection within *ad bellum* proportionality assessments.

The practice of Western states raises concern that they are attempting to change the customary law of *ad bellum* proportionality by prioritizing casualty aversion to a degree beyond what international law permits. They have apparently done so by opting for the aerial option (despite its inevitable larger scale) even when no clear evidence existed that their enemy deliberately sought a body-bag effect. This attempt to change customary international law might succeed, if legal bodies prefer to dodge opportunities to critically review it.²⁷⁶ Two prominent organs will soon have the opportunity to

273. *Jones*, [2006] UKHL 16, ¶ 19 (Lord Bingham); NATO Bombing Report, *supra* note 137, ¶¶ 30–34; Letter from Luis Moreno-Ocampo, *supra* note 272, at 4.

274. *See, e.g.*, WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 186–91 (3d ed. 2008). Had these legal bodies been prepared to assess *ad bellum* proportionality, they might have performed the valuable service of clarifying that states are not free to make air power their default method for responding to any armed attack, regardless of whether their enemy's strategy has chiefly been to seek a body-bag effect. There are nonetheless defensible reasons why these legal bodies declined to undertake such an analysis. *See, e.g.*, *Jones*, [2006] UKHL 16, ¶ 30 (Lord Bingham) (noting that recognizing a judicial authority to determine culpability for the crime of aggression would require the courts to review the government's policies in matters of security and international relations, and there are "well-established rules that the courts will be very slow to review the exercise of prerogative powers in relation to the conduct of foreign affairs and the deployment of the armed services"); NATO Bombing Report, *supra* note 137, ¶ 4 (explaining that the ICTY has no jurisdiction over a crime against peace).

275. In fact, this motivation was explicitly admitted by the House of Lords. *Jones*, [2006] UKHL 16, ¶ 30 (Lord Bingham).

276. *See* Alexander Orakhelashvili, *Legal Stability and Claims of Change: The International Court's Treatment of Jus ad Bellum and Jus in Bello*, 75 NORDIC J. INT'L L. 371, 371–72 (2006) (showing that, in recent history, claims of a legal change in both *jus in bello* and *jus ad bellum* have been commonly raised by states during armed conflicts in order to legitimize their actions, and asserting that "[t]he claims of legal change attendant to such developments contradict the idea that the legal framework must be viewed as coherent and predictable, not liable to change at each and every instance of the exercise of power," and further asserting that "reflecting and applying the principles and standards that meet the requirements of predictability, stability and transparency, the judicial context of the International Court is most suitable"). Some argue that a custom cannot develop from this practice because the justification for the actions of Western states is not the conventional *jus ad bellum*, but in each case, a specific authorization of the Security Council. *E.g.*, Kattan, *supra* note 263, at 31, 41. Yet this argument is problematic in light of the fact that, in at least some of these conflicts, the legal claim of the United States and its allies that Security Council Resolutions authorized the action is extremely contested. *See* Henderson, *supra* note 263, at 770–73, 778 (discussing the dispute as to whether UN Security Council resolutions truly authorized the military actions in Libya and in the Second Gulf War,

take a position on the extent to which force protection can shape the form and scale of a military campaign. The first is the British government's Chilcot Inquiry, reviewing the legality of the United Kingdom's participation in the Second Gulf War.²⁷⁷ The second is the ICC's investigation of the armed conflict in Libya.²⁷⁸ Much would be gained if these two bodies resolved to clarify the law in a way that restrained the growing inclination of Western states to excessively prioritize force protection.

Choosing to perform a tactical or operational mission by aerial bombardment instead of close, ground engagement presents an *in bello* issue. Casualty aversion has been the chief rationale for interpreting international law to authorize the former method in lieu of the latter, as aerial operations require pilots to accept almost no risk at all. This legal position has gained some official support;²⁷⁹ the United Kingdom now formally adopts as its *opinio juris* that "[t]he proportionality principle does not itself require the attacker to accept increased risk" in order to reduce civilian risks.²⁸⁰ This reverses the United Kingdom's longstanding stance that soldiers are legally bound to accept some nontrivial level of risk to themselves in order to protect civilians.²⁸¹

and stating that "the problem of ambiguity, intentional or otherwise, in the mandates of Chapter VII resolutions of the UNSC, along with the possibilities for unilateral and potentially controversial interpretations that this provides, is one that still persists").

277. For the official website of this commission, see IRAQ INQUIRY, <http://www.iraqinquiry.org.uk/> (last visited Apr. 2, 2013) (U.K.).

278. See S.C. Res. 1970, ¶¶ 4–8, U.N. Doc. S/RES/1970 (Feb. 26, 2011) (referring the situation in Libya to the Prosecutor of the ICC). The ICC's jurisdiction over the crime of aggression has not yet come into effect. The difference between this case and the Iraq case, however, is that, to the surprise of most experts, in 2010, member states agreed on a definition of the crime of aggression and set a date to the coming into force of ICC jurisdiction with regard to this crime. R.C. Res. 6, Annex I, U.N. Doc. RC/6 (June 11, 2010). Until recently, the expectation was that such an agreement was not likely to ever be reached. See Sarah B. Sewall et al., *The United States and the International Criminal Court: An Overview*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW 1, 16–25 (Sarah B. Sewall & Carl Kaysen eds., 2000) (describing an agreement on the issue of aggression as something that is not likely to occur in the foreseeable future). Thus, the ICC prosecutor can be expected to exhibit less restraint in voicing opinions on *ad bellum* issues.

279. See, e.g., Smith, *supra* note 97, at 157–61 (arguing that such a position was incorporated into different rules of engagement adopted by U.S. forces during the second war in Iraq).

280. JDCC, *supra* note 106, at 25–26.

281. For the British position prior to the publication of the *Manual of the Law of Armed Conflict*, see A.P.V. Rogers, *Zero-Casualty Warfare*, 82 INT'L REV. RED CROSS 165, 180 (2000). Rogers is a former UK Director of Army Legal Services and he cites there MINISTRY OF DEF., BRITISH DEFENCE DOCTRINE: JWP 0-01 (2d ed. 1996). The current *British Defence Doctrine*, on the other hand, does not address this issue. See generally MINISTRY OF DEF., BRITISH DEFENCE DOCTRINE: JDP 0-01 (4th ed. 2011). *But cf.* Rogers, *supra* note 138, at 310 (supporting the former position).

Neither the ICTY committee nor the ICC prosecutor chose to evaluate this legal interpretation of *in bello* proportionality. Both simply concluded that the scale of civilian damage, in the military actions examined, provided no clear indication of disproportionate acts.²⁸² In reaching that conclusion, both inquiries stressed that the states in question (including the United Kingdom) had followed procedures designed to limit civilian losses.²⁸³ This attention to procedure, rather than result, reflects doctrinal accommodation to the fact of great disagreement over when civilian casualties become so numerous as to be disproportionate in relation to combat goals.²⁸⁴ International agreement is more likely to be reached over desirable processes for decision making on uses of force than on the acceptability of consequences.²⁸⁵

This is not an entirely satisfactory solution, however. It does nothing to address the possibility that given procedures, adequate in their design, do not preclude commanders from employing substantive standards that continue to overvalue soldiers' lives over those of the enemy's civilians. The current British Manual, like the code proposed by Kasher and Yadlin, adopts a position highly

282. See NATO Bombing Report, *supra* note 137, ¶¶ 48–56 (analyzing how to apply the principle of proportionality); Letter from Luis Moreno-Ocampo, *supra* note 272, at 6–7 (discussing the method by which the Office of the Prosecutor analyzed the evidence).

283. See NATO Bombing Report, *supra* note 137, ¶¶ 48–56 (describing how the relatively low number of casualties relative to the high number of munitions released during the aerial bombing campaign undermines claims of intentional targeting of civilians); Letter from Luis Moreno-Ocampo, *supra* note 272, at 6–7. The Chief Prosecutor of the ICC reported:

Publicly available information from the UK states that: lists of potential targets were identified in advance; commanders had legal advice available to them at all times and were aware of the need to comply with international humanitarian law, including the principles of proportionality; detailed computer modeling was used in assessing targets; political, legal and military oversight was established for target approval; and real-time targeting information, including collateral damage assessment, was passed back to headquarters. This information was taken into consideration by the Office, in accordance with the standards of critical evaluation. . . .

According to the UK Ministry of Defence, nearly 85% of weapons released by UK aircraft were precision-guided, a figure which would tend to corroborate effort to minimize casualties.

Letter from Luis Moreno-Ocampo, *supra* note 272, at 6–7.

284. See *supra* notes 155–156, 205 and accompanying text.

285. See Benvenisti, *supra* note 104, at 100 (highlighting the emphasis that will likely be placed on procedural protections when analyzing whether civilian casualties are disproportionate); Cohen & Shany, *supra* note 95, at 320 (“Robust institutional requirements could compensate for the inevitable ambiguity of the substantive contents of the proportionality tests and provide courts with objective criteria for judicial review.”).

vulnerable to this danger.²⁸⁶ Even the most punctilious procedures for implementing those standards would often do little to limit civilian harm within acceptable bounds. It is regrettable that neither the ICC nor ICTY investigators saw fit to assess the legal defensibility of the British standard (as applied by Royal forces in the Second Gulf War and perhaps also the Kosovo campaign).²⁸⁷

The question of whether to prefer aerial methods to ground deployment generally arises at war's operational level. But once aerial bombardment has been chosen, the relation of force protection to *in bello* proportionality moves into tactical modalities.²⁸⁸ That relation finds vivid illustration when pilots must decide how to attack ground targets. Does their duty to prevent unnecessary civilian harm require them to fly at an altitude that would put them and their aircrafts at much greater peril by exposing them to anti-aircraft fire incapable of reaching higher altitudes?²⁸⁹ The ICTY committee faced

286. See Confino & Kremnitzer, *supra* note 31 (warning, while referring to Kasher and Yadlin's position, that in a military system that conveys the message that strong priority should be given to the lives of soldiers over the lives of civilians, an increased and disastrous risk to civilians is likely to occur). See more generally, with regard to the relationship between substantive norms and procedure, Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH U. L. REV. 801, 802, 840–41 (2010). Main shows that procedural norms and substantive norms are inherently intertwined to the extent that the end substantive result of a legal decision-making process is always the result of an interaction between the two kinds of norms.

287. If international law obligates soldiers to accept at least some nontrivial level of risk, then the British officials who incorporated a less restrictive interpretation into this manual may have committed the international crime of soliciting disproportional attacks. See Rome Statute, *supra* note 32, art. 25(3)(b) (making the solicitation of such attacks a crime if the attacks in fact occur or are attempted).

288. See *supra* Part II.C.

289. A dispute exists over the duty of pilots to perform an independent proportionality assessment. In addition to the position discussed in the text, which views the matter as simply another case in which the proportionality norm for tactical actions applies, two other positions have been suggested. Some argue that pilots cannot make a proportionality assessment of any kind, since they may be unaware of facts determining the military advantage to be anticipated from their actions when it is examined in the context of the attack as a whole. Others argue that pilots should have a duty not to drop a bomb where they themselves can anticipate no proportionate advantage relative to likely civilian loss. This second position affords pilots greater tactical discretion not only from the first position, but also from the position discussed in the text (that simply sees it as another case in which the proportionality norm set for tactical actions applies). That is because this position wishes to see each dropping of a bomb as an "attack." Thus, it sets the reference point for a fully developed proportionality assessment at a much lower level on the levels-of-war continuum than current international law. See Hamutal E. Shamash, *How Much Is Too Much? An Examination of the Principle of Jus in Bello Proportionality*, 2 IDF L. REV. 103, 116–27 (2005–2006) (discussing this dispute briefly and implicitly). The Israeli Air Force voluntarily adopted (i.e., as a restriction not obligated by the prohibitions of international law) a position that comes close to the approach that places extensive discretion and responsibility on the pilots. A military regulation provides that the final decision whether to abort a mission, due to reasons of excessive harm to the civilian population, may be made by the lead pilot in a formation of planes. The higher ranking commanders, who are usually found at a command post on the ground, watching the

this question in a case involving a pilot who twice inadvertently bombed a civilian train.²⁹⁰ On his first pass, his missile was already programmed to fire before he noticed that it had not targeted the bridge but instead a nearby civilian train. Since his first attempt did not destroy the bridge, the pilot returned for a second try. Though hitting the bridge, he also again hit the train.²⁹¹

The committee did not assess whether the military advantage anticipated in destroying the bridge was excessive in relation to foreseeable civilian casualties.²⁹² Answering that question would have been essential to a full assessment of *in bello* proportionality. The committee instead summarily found that the pilot had aimed only at the bridge and that it constituted a legitimate military objective,²⁹³ then asked whether the pilot, in “endeavoring to keep the aircraft in the air and safe from surrounding threats in a combat environment,”²⁹⁴ had been reckless in his efforts to avoid hitting the train.²⁹⁵

How should one understand the committee’s resort to this form of “concise” proportionality assessment? Some have claimed that it suggests a greater concern with the principle of distinction than with proportionality.²⁹⁶ Others have attempted to explain the committee’s reasoning as being based on the demand of international criminal law for the existence of *mens rea*—which does not exist when responsibility of a state for a violation of the principle of proportionality is examined.²⁹⁷ Still, a different explanation should be given. The committee, in this case, simply applied correctly the proportionality requirement as it pertains to *tactical* decisions—

actions through a video screen, are prohibited to order the lead pilot (or any other pilot in the formation) to perform the bombing when the lead pilot has decided otherwise. Such ground-situated, higher ranking commanders can, however, order the pilots to abort the mission if they think that the bombing is disproportional, even if the leading pilot thinks otherwise. HCJ 5757/04 Hus v. Deputy Chief of Staff 59(6) PD 97, para. 7 (Isr.) (discussing this classified military regulation).

290. NATO Bombing Report, *supra* note 137, ¶¶ 58–62.

291. *Id.*

292. The committee only defined that event as one of the most problematic events it examined. *Id.* ¶ 57.

293. *Id.* ¶ 62.

294. *Id.* ¶ 61.

295. *Id.* ¶¶ 61–62 (dividing on the issue with regard to the second bombing).

296. See William J. Fenrick, *Targeting and Proportionality During the NATO Bombing Campaign Against Yugoslavia*, 12 EUR. J. INT’L L. 489, 500–01 (2001) (analyzing the *NATO Bombing Report* examination of this event and stating, with regard to the aircraft crew, that they clearly failed to distinguish between military and civilian personnel, and discussing, with regard to their commanders, whether these high-ranking superiors violated *in bello* proportionality). Such a position is understandable in light of the almost complete convergence, at the tactical level, between the conduct rule set by *in bello* proportionality and the one set by the principle of distinction. See *supra* note 188 and accompanying text.

297. Andreas Laursen, *NATO, the War over Kosovo, and the ICTY Investigation*, 17 AM. U. INT’L L. REV. 765, 809 (2002).

examining whether the pilot had done as much as reasonably possible to protect civilians without jeopardizing his mission or rendering it suicidal.²⁹⁸

In sum, one should understand the three positions here examined in light of a larger sociohistorical context, one in which military casualty aversion has become the overriding preoccupation of Western societies and the armed forces serving them. If international law does not check this powerful trend, the legal rules on proportionality at both the *ad bellum* and *in bello* stages of military decision making will fail to significantly restrain war's violence in general and civilian suffering in particular. That said, international law cannot remain indifferent to the changing nature of security threats faced by Western democracies, threats much broader than those confronted in classic interstate wars. Judicial bodies have shown themselves increasingly willing in recent years to address legal aspects of armed conflicts,²⁹⁹ including matters of proportionality.³⁰⁰ Those efforts today require enhanced attention to how decisions on proportionality in the use of force differ significantly at various levels in a military chain of command.

298. See *supra* Part II.C.

299. For an example of this increased readiness by international tribunals, see Yuval Shany, *No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary*, 20 EUR. J. INT'L L. 73, 79–80 (2009). For an example of this increased readiness of domestic courts, see Victor V. Ramraj, *The Impossibility of Global Anti-Terrorism Law?*, in GLOBAL ANTI-TERRORISM LAW AND POLICY 44, 49–50 (Victor V. Ramraj et al. eds., 2d ed. 2012) [hereinafter GLOBAL ANTI-TERRORISM].

300. While it is likely that domestic courts will still be hesitant to review issues of *ad bellum* proportionality, it is clear that, in certain democratic states, courts are increasingly reviewing *in bello* proportionality assessments made by commanders. See, e.g., Nicola McGarrity & Edward Santow, *Anti-Terrorism Laws: Balancing National Security and a Fair Hearing*, in GLOBAL ANTI-TERRORISM, *supra* note 299, at 122, 126–30 (discussing the increasing use of *in bello* proportionality analysis in Australia, Canada, and the United Kingdom). President Barak of the Israeli Supreme Court, in reviewing the legality of the “separation fence” built by Israel on the West Bank, went so far as to state:

The question is whether the route of the separation fence, according to the approach of the military commander, is proportionate. The standard for this question is not the subjective standard of the military commander. The question is not whether the military commander believed, in good faith, that the injury is proportionate. The standard is objective. The question is whether, by legal standards, the route of the separation fence passes the tests of proportionality. This is a legal question, the expertise for which is held by the Court.

HCJ 2056/04 Beit Sourik Vill. Council v. Gov't of Isr. [2004] IsrLR 264, 303–04 (Isr.), available at http://elyon1.court.gov.il/files_eng/04/560/020/a28/04020560.a28.pdf. The ICJ (i.e., an international tribunal), in its recent rulings, showed considerable readiness to review even states' *ad bellum* proportionality assessments. See Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT'L L. 715, 719–21 (2008). Franck shows that, after many years in which the ICJ avoided ruling on issues of *ad bellum* proportionality, in recent cases it has done so.

V. CONCLUSION

The three positions in the current debate on the place of force protection within proportionality call to mind a famous fable. It tells of three people describing an elephant in the dark: one touches the tail, the second the tusk, and the third the trunk; thus, each portrays “an elephant” quite differently. As allegory, the story intimates, of course, that one can only fully understand a complex issue by examining its multiple dimensions at once. Like the three people in this story, the three positions here examined fail to recognize that any thorough, satisfactory appreciation of proportionality requires attending to all its dimensions, i.e., to how military decision making is decidedly different at various levels in a chain of command.

Margalit and Walzer are deeply dissatisfied with the capacious discretion that the law of proportionality now affords to military decision makers, and they seek to replace it with a clear and simple rule prioritizing civilian’s lives. Yet they fail to recognize the impracticality of regulating proportionality assessment at the higher rungs of a chain of command through any bright-line rule. Luban’s position suffers the opposite flaw. He has high expectations that soldiers will be able to accurately measure risks both to themselves and to civilians. These hopes are unrealistic with respect to low-ranking soldiers on the field charged with tactical decisions. Insisting that those soldiers make nuanced proportionality assessments can only lead to greater civilian carnage and unwarranted second-guessing of operational matters beyond their ken.

These three authors contemplate a deliberative process in which soldiers must regularly incur serious risk of death to save not merely comrades in arms or fellow citizens at home but also civilians on the other side of the battle lines. Yet their focus on the duty to protect the lives of foreign civilians leads them to adopt positions that would prevent states from honoring their moral and constitutional duties to safeguard the lives of their own citizens, including those who happen for the moment to be soldiers. Notably, these legal stances would keep a victim state from satisfactorily addressing the strategic threat posed by nonstate adversaries seeking to maximize its military casualties.

Kasher and Yadlin, in contrast, defend a decision-making process and legal interpretation that lets states honor their moral and constitutional duties to citizens. These duties, they argue, require that soldiers’ lives receive greater consideration in military deliberations than those of foreign civilians. Yet, this one-sided position would yield catastrophic results if adopted at the operations level and even more so at the tactical level—results incompatible with *in bello* proportionality, as generally and properly understood.

Like the three fictitious people, however, each of the legal positions here examined also captures a salient element of truth

about proportionality in war. Each is therefore helpful in resolving the state of irresolution from which the applicable legal doctrine has long suffered. If applied to the operational level, Luban is right to demand that soldiers undertake careful assessments of relative risk (to themselves) and harm (to the enemy's civilians). Yet it is also true that the particular uncertainties of operational warfare render more than very rough measurement of those factors impossible. International law is therefore right to demand proportionality assessment at this level to involve applying general standards (not bright-line rules) to the shifting facts of specific circumstances.

At the tactical level of armed conflict, there is generally much less leeway for nuanced, time-consuming deliberation. Bright-line rules are therefore more appropriate than flexible standards. The law of proportionality still applies. But its requirements must be interpreted in light of the acute constraints that soldiers face when laboring at the proverbial "pointy end of the spear." International humanitarian law has thus been wise to impose liability on low-ranking field soldiers acting under orders only when the disproportionality of civilian harm, ordered by their superiors, is truly egregious, and transparently so to any disinterested observer. In all other circumstances, the law rightly expects no more of low-ranking soldiers than that they exercise their admittedly limited discretion to spare civilians as much as possible. This instruction aims to counteract impulses, to which low-echelon soldiers are most susceptible, to invariably prioritize one's own life (and the lives of combat buddies) over civilians who find themselves in harm's way. Yet, this current rule is vague, which leaves it susceptible to manipulation and skewed, self-interested interpretation. Margalit and Walzer's approach suggests a rule quite congenial to warfare at the tactical level, one that aids in clarifying what proportionality would really mean for soldiers there. The relative clarity and simplicity of that rule is more likely than the alternatives here discussed to counter soldiers' impulses to depreciate the duty to safeguard foreign civilians.

At war's strategic level, by contrast, a proper understanding of the law and how it bears on military decision making accords lesser weight to possible foreign civilian harm. This is because war's reciprocal dynamics—the attendant imponderables of one side's serial responses to the other's—render prediction of civilian harm virtually impossible at the outset of conflict. These inescapable vagaries, as well as the moral and constitutional obligations of states to their soldier-citizens, demand that international law afford states considerable discretion to consider their soldiers' right to life in choosing between alternative strategies of response to enemy attack. The law of *ad bellum* proportionality, rightly understood, continues to limit their discretion—and the harm it might otherwise cause—by

confining a state's armed response to the threat posed by the enemy's specific attack.

Kasher and Yadlin's approach to proportionality is helpful at this strategic level, for it enables states attacked by terrorist groups, in particular, to construe the requirements of self-defense with sufficient breadth to accommodate the fact that their enemies bypass traditional territorial goals for more amorphous but capacious ones. After all, terrorist groups often seek, as their strategic objective, to influence the foreign policy of their adversary across a wide range of issues (when they do not simply seek its complete annihilation). Their preferred means to those far-reaching ends typically involve direct targeting of civilian populations—as well as efforts to kill many more soldiers than strictly territorial goals would require—with a view to demoralize civil society, inducing its members to press for policy change. When formulating its strategic response, the victim state may apply the doctrine of *ad bellum* proportionality with those circumstances in mind. Thus, in its attention to the unique contours of anti-terrorist conflict, Kasher and Yadlin's approach wisely endorses this path.

One must therefore interpret international law both to accept each described approach and confine it to the level of warfare at which it makes sense. The competing views of the several authors discussed, apparently contradictory at first, then become complementary. Granting too wide a berth to any of these views would be to misunderstand the nature of war itself and the structure of the complex organizations that conduct it. In these momentous matters, misunderstandings of this sort can easily have profoundly lethal consequences for the lives of both soldiers and civilians, each reluctantly caught in war's unforgiving maelstrom.