

# For whom the bell of proportionality tolls: Three proposals for strengthening proportionality compliance

**Won Jang\***

Won Jang is an independent humanitarian researcher. He holds a master of international affairs degree from the School of International and Public Affairs at Columbia University.

## Abstract

*The State-centric bias in proportionality in international humanitarian law, where non-State armed groups (NSAGs) are expected to adhere to the same rigour of proportionality as States, regardless of how unrealistic that expectation is, has not often been considered in ideas to improve compliance with proportionality. This article puts forth three proposals—a Comprehensive Proportionality Assessment Framework, capacity-building for military actors, and rapid multidisciplinary assessment teams—that aim to reduce State-centric bias and strengthen proportionality compliance not just for States but for all parties to conflict, including NSAGs.*

**Keywords:** proportionality, proportionality assessments, dual-use items, rapid multidisciplinary assessment teams, archives for proportionality assessments.



\* The views in this article are the author's own and do not necessarily reflect the positions of any organizations with which he is currently or has previously been affiliated. The author would like to thank Gabor Rona, Charles Sabga, Amir Khouzam, Adam Day, Ruben Stewart and the anonymous peer reviewers for their comments and feedback.

## Introduction

If proportionality was a bell, and its ring was a call to abide by proportionality, who would be able to hear it toll? As international humanitarian law (IHL) currently stands, not everyone. The act of balancing military necessity and incidental harm when assessing proportionality is one of the trickiest questions for military planners and academics who think through the prism of IHL. And although both State forces and non-State armed groups (NSAGs) have the obligation to consider proportionality when planning and conducting attacks, NSAGs are severely lacking in their capacity to conduct informed proportionality assessments, compared to State actors such as regular military forces. This article frames the gap between the legal obligation to comply with proportionality and the lack of capacity of NSAGs to conduct proper proportionality assessments as a “State-centric bias”, where NSAGs are expected to adhere to the same rigour of proportionality as States, regardless of how infeasible or unrealistic that expectation is.

In many cases, NSAGs are unable to comply with proportionality because of a genuine lack of capacity or understanding. They can justify their disregard for proportionality by asserting that they do not possess the knowledge or tools for proportionality assessments, and use this as a pretext for intentionally disregarding proportionality. Furthermore, they are largely unable to determine when to attack dual-use objects – objects that carry out civilian and military functions simultaneously – and when not to.

In addressing these gaps, this article does not demand legal revisions to IHL but instead proposes policy solutions. The article calls for (1) a Comprehensive Proportionality Assessment Framework (COPAF) that provides guidance in assessing proportionality, (2) capacity-building support for military actors so that they may learn and use COPAF, and (3) rapid multidisciplinary assessment teams (RMATs) within military structures to carry out proportionality assessments using COPAF.

COPAF includes elements previously identified by academic IHL literature as important in conducting proportionality assessments, such as the location of civilians and civilian objects and the choice of weapons used in attacks, among many others. The other two proposals – capacity-building support for military actors, and RMATs – are tools and processes which ensure that COPAF is used more effectively. Ultimately, the three proposals work in tandem to counter the State-centric bias in proportionality and strengthen proportionality compliance.

### Legal basis for information-gathering in proportionality assessments

The legal basis for proportionality is enshrined in Article 51(5)(b) of Additional Protocol I (AP I), which prohibits “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a

combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated".<sup>1</sup> Article 51(5)(b) gives rise to what in the IHL community have been called proportionality assessments (even though the word "proportionality" is never used in Article 51), where a military commander assesses the concrete and direct military advantage anticipated and compares it with the expected incidental harm in order to make a decision to attack or not.

Accurate information relevant to the situation at hand is needed for the military commander to execute an attack that will be proportionate. The types of information needed, some of which will be discussed later in this article, include the location of civilians and civilian objects, the choice of weapons to use, and cultural property in the State where the attacks might be conducted.<sup>2</sup> However, the exact standards or requirements are nowhere to be found in AP I.

The more information (especially on the potential extent of incidental harm) the military commander has, the better chances the commander has of making an informed decision that will comply with the rule of proportionality.<sup>3</sup> While the military advantage side of the assessment might be relatively clearer for the military commander (as the commander's forces will be the ones who will be initiating the attack), those responsible for planning attacks must do everything feasible to have access to information and analysis on a range of factors that can affect incidental harm, and must make use of this information in their assessments.<sup>4</sup> In assessing expected incidental harm, belligerents must rely on information that they have, or can reasonably be expected to have, from all sources in the circumstances. Information that is "reasonably available" is a minimum standard that belligerents must meet, and should belligerents possess information over and above what they can reasonably be expected to have in the circumstances, they must make use of it.<sup>5</sup> The operative terms to be emphasized here are "do everything feasible to have access to information" and "information that is reasonably available", which are worded passively despite the centrality of information and information-gathering when assessing proportionality.

The actions that one can take to gain access to information today were inconceivable to military actors decades ago, and information that would have been considered extremely unreasonable to have when AP I was adopted in 1977 is considered reasonably available in 2021. For example, a 1976 paper on proportionality mentioned the advances in military intelligence and information-

1 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Art. 51(5)(b). Proportionality is also a customary IHL rule. See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 2: *Practice*, Cambridge University Press, Cambridge, 2005, Rule 14, available at: [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule14](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule14) (all internet references were accessed in October 2021).

2 Emanuel-Chiara Gillard, *Proportionality in the Conduct of Hostilities: The Incidental Harm Side of the Assessment*, Chatham House, December 2018, pp. 47–48.

3 The absolute amount of information is not the only important factor, however, as too much information can be detrimental and inhibit decision-making. Information needs to be relevant, accurate and timely.

4 E.-C. Gillard, above note 2, p. 47.

5 *Ibid.*, p. 26.

gathering and gave the example of ELINT, or electromagnetic intelligence (now more commonly known as electronic intelligence), which the United States used around the world at the time.<sup>6</sup> ELINT is based on the interception of electronic signals that do not contain speech, text or other communication information, and was still considered an advanced technology at the time. But for ELINT to work, it needs entities that emit electronic signals, and it is useless on entities that do not.

The author of the paper and most of the general public in 1976 (with the exception of legendary science-fiction author Arthur C. Clarke<sup>7</sup>) could not have imagined the possibility of tracking and acting on entities that do not emit electronic signals, as many modern militaries are able to do through the Global Positioning System (GPS). It was only in 1973 that the GPS project was first approved by the US Department of Defense, and the first experimental GPS satellites were launched in February 1978.<sup>8</sup> In the twenty-first century, however, it is perfectly reasonable to assume that well-equipped military forces would have access to GPS information, enabling them to know the real-time location of friendly and enemy forces even if those forces do not emit electronic signals—something that in the 1970s would have been conceivable only in the realm of the imagination. In other words, what was unreasonable in the past is reasonable now, and what is considered unreasonable is subject to technological advances and other variables that change as time progresses. Information that is reasonably available for proportionality assessments is not an immutable concept.

Given that the “information that is reasonably available” requirement is a relative concept whose outer limits undergo constant expansion as information-gathering capabilities evolve, in order to conduct proper proportionality assessments, we must emphasize not the mere need to have the best information possible, which is a passive stance, but the obligation to gather the best information possible. All parties to conflict should actively seek out as much credible and rigorous information as possible. But when taken at face value, AP I does not seem to provide a legal basis for the obligation to gather the best information possible to use in proportionality assessments.<sup>9</sup> The answer to the absence of explicit guidance may not lie in Article 51, but in Article 57(2)(a)(ii),

6 Bernard L. Brown, “The Proportionality Principle in the Humanitarian Law of Warfare: Recent Efforts at Codification”, *Cornell International Law Journal*, Vol. 10, No.1, 1976, p. 145.

7 Arthur C. Clarke predicted a GPS-like technology in a letter he wrote in August 1956: “My general conclusions are that perhaps in 30 years the orbital relay system may take over all the functions of existing surface networks and provide others quite impossible today. For example, the three stations in the 24-hour orbit could provide not only an interference- and censorship-free global TV service for the same power as a single modern transmitter, but could also make possible a position-finding grid whereby anyone on earth could locate himself by means of a couple of dials on an instrument about the size of a watch.” See “Did Arthur C. Clarke Predict GPS?”, *Technovelgy*, available at: [www.technovelgy.com/ct/Science-Fiction-News.asp?NewsNum=2967](http://www.technovelgy.com/ct/Science-Fiction-News.asp?NewsNum=2967).

8 National Research Council, *The Global Positioning System: A Shared National Asset*, National Academies Press, Washington, DC, 1995, p. 146.

9 At an international expert meeting on proportionality, however, experts unanimously agreed that commanders have an obligation to proactively seek out and collect relevant and reasonably available information. See Laurent Gisel (ed.), *International Expert Meeting: The Principle of Proportionality in the Rules Governing the Conduct of Hostilities under International Humanitarian Law*, ICRC and University of Laval, June 2016, p. 48.

which states that it is necessary “to 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”. Specifically, if the phrase “all feasible precautions in the choice of means and methods of attack must be taken” is read in conjunction with the fact that choice of weapons is one of the key elements which should be considered when predicting the incidental harm aspect of a proportionality assessment, then Article 57(2)(a)(ii), at a minimum, can be interpreted to require that military commanders (1) have information about the nature and specifications of potentially deployable weapons, (2) understand how different variables such as timing, environment, and characteristics of the civilian population could affect the impact of weapons if deployed, and (3) have hands-on access to the aforementioned information for consideration leading up to the time of the attack.

Furthermore, Article 57(2)(a)(i) states that attackers shall “*do everything* feasible to verify that the objectives to be attacked are ... military objectives ... and that it is not prohibited by the provisions of this Protocol to attack them”.<sup>10</sup> Therefore, Article 57, as a whole, can be interpreted to mean that those who plan and/or decide an attack are obliged to do everything feasible to verify that an attack against a military objective is not prohibited because it would violate the rule of proportionality, and to refrain from such an attack if it did.<sup>11</sup> Here it must be noted that requiring parties to do “everything feasible” to verify is a relative standard.<sup>12</sup> Several States, such as Algeria, Belgium, Canada, France, Germany, Ireland, Italy, the Netherlands, Spain and the UK, indicated upon ratification of AP I that they interpret the term “feasible” as “that which is practically possible, taking into account all the circumstances ruling at the time, including humanitarian and military considerations”.<sup>13</sup>

However, there is nothing within Article 57 itself that delineates the exact temporal boundaries of doing “everything feasible”. While it is reasonable to think that States define “feasible” as what is practically possible at the precise time of the decision to attack, the word preceding “feasible” is “everything”, which means it can encompass all possible options regardless of any reservations expressed by States on temporal boundaries. Hence, “everything feasible” can be interpreted to include all feasible actions taken leading up to the decision to attack, such as gathering the best information possible for a proportionality assessment. Nothing in AP I contradicts or forbids this interpretation, which also aligns with Article 57(2)(a)(ii)’s requirement to take feasible precautions in the choice of means and methods of attack. Again, the choice of means and methods of attack is an essential consideration in a proportionality assessment.

10 AP I, Art. 57 (emphasis added).

11 E.-C. Gillard, above note 2, p. 43.

12 *Ibid.*, p. 16.

13 *Ibid.*

Returning to the broader question of whether information-gathering should be not a need but an obligation, it should be if we accept the maximalist interpretation of “everything feasible” proposed above. While this is certainly not an incontrovertible interpretation, it is a legally defensible position and one that would actually benefit parties to conflict. If they considered information-gathering—or, for that matter, gathering the largest amount of credible information possible—as an obligation, it would help overcome the State-centric bias that exists in IHL in general, and in proportionality in particular. This State-centric bias in proportionality will be the focus of the following sections of this article, before introducing the three proposals for proportionality compliance in detail.

## **State-centric bias in proportionality**

In binding parties to conflict to the rule of proportionality, IHL makes no distinction among the different types of State and non-State actors. It is a blanket rule applied equally to everyone. That NSAGs are bound by Article 3 common to the four Geneva Conventions and are included in the phrase “each Party to the conflict”, in the context of non-international armed conflicts,<sup>14</sup> is undisputed<sup>15</sup> and uniformly affirmed by international bodies.<sup>16</sup>

But are the effects of this blanket imposition of IHL equally felt? There has been debate around why NSAGs are bound to and held accountable for treaties that they have never participated in developing or acceded to.<sup>17</sup> States monopolize the ability to ratify treaties, and this monopoly is the foundation of the international legal system. Even customary international law is based on State practice. NSAGs are asked to comply with IHL and all its numerous articles, rules and requirements, including the rule of proportionality, without ever having been asked if they agree to be bound by them, or given the ability to contribute to their development.

Narrowing down the discussion to proportionality, the State-centred nature of IHL can be said to give rise to a “State-centric bias” wherein NSAGs are asked to comply with the same rules and requirements of proportionality as States, regardless of whether they agreed to them in the first place, and more importantly, whether they have the capacity to assess proportionality adequately.<sup>18</sup> As implied above,

<sup>14</sup> Whereas in the case of international armed conflicts, NSAGs would be bound by the four Geneva Conventions, AP I and the customary IHL of international armed conflicts.

<sup>15</sup> For the various perspectives on this issue, see Marco Sassòli, “Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law”, *Journal of International Humanitarian Legal Studies*, Vol. 1, No.1, 2020, p. 12.

<sup>16</sup> Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, Cambridge, 2009, p. 9.

<sup>17</sup> M. Sassòli, above note 15, p. 13.

<sup>18</sup> Article 57(2)(a)(iii) of AP I notes that “those who plan or decide upon an attack” are obligated to refrain from deciding to launch any attack that might be disproportionate. This suggests that the onus is on those who have the authority to plan or decide upon an attack, which in most cases would be military commanders, to refrain from disproportionate attacks. However, regarding Article 57(2)(b) on the

when done rigorously, proportionality assessments require a considerable amount of gathered information, as well as theoretical and technical knowledge on how to use that information to weigh the anticipated military advantage against the possible incidental harm. Even certain State military forces are unable to conduct proportionality assessments with rigour and precision, much less NSAGs that generally have weaker information-gathering capabilities or loosely defined decision-making procedures for proportionality assessments. Below are some examples of how NSAGs can behave because of these weaknesses.

### Behaviour 1: Non-compliance due to genuine lack of capacity

To note that NSAGs might not understand or have the capacity to assess proportionality is by no means a novel observation.<sup>19</sup> Concepts familiar to military lawyers or IHL specialists, such as proportionality, may not be well understood by members of NSAGs, both at senior and at lower operational levels.<sup>20</sup> Moreover, comprehending the rule of proportionality requires an understanding of even more fundamental concepts in IHL, such as distinguishing civilian objects and military objectives and determining when a combatant is *hors de combat* – which requires training and learning.

Even after gaining such knowledge, NSAGs would find it relatively difficult to comply with proportionality, especially when compared to States, as they often lack the material foundations needed to reify theory into practice. To assess proportionality, at the very minimum, they need information-gathering abilities, to a certain extent, and information-sharing processes and structures in which information flows from the initial observer/assessor to the final decision-maker. Needless to say, the person who orders the attack must also possess the knowledge and capacity to make a proportionality assessment before reaching a decision. These processes require material investments such as electronic equipment to enable information-gathering, communication devices for information-sharing, and qualified personnel to implement the processes.<sup>21</sup> The chances of an NSAG acquiring any of the material resources needed are

cancelation and suspension of disproportionate attacks, it has been noted that the rule applies not only to those planning and deciding upon attacks, but also, and primarily, to those executing them. See Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, International Committee of the Red Cross (ICRC), Geneva, 1987, p. 686.

19 See Annyssa Bellal, “Welcome on Board: Improving Respect for International Humanitarian Law through the Engagement of Armed Non-State Actors”, in Terry D. Gill (ed.), *Yearbook of International Humanitarian Law 2016*, Vol. 19, T. M. C. Aser Press, The Hague, 2018, pp. 44; ICRC, *Allies, Partners and Proxies: Managing Support Relationships in Armed Conflict to Reduce the Human Cost of War*, Geneva, April 2021, p. 39; Geneva Call, “Garance Talks: Armed non-State Actors and Experts Gathered in Geneva to Discuss the Conduct of Hostilities in Armed Conflict”, 10 March 2020, available at: [www.genevacall.org/garance-talks-armed-groups-and-experts-gathered-in-geneva-to-discuss-the-conduct-of-hostilities-in-armed-conflict/](http://www.genevacall.org/garance-talks-armed-groups-and-experts-gathered-in-geneva-to-discuss-the-conduct-of-hostilities-in-armed-conflict/).

20 A. Bellal, above note 19, p. 44.

21 That being said, NSAGs are very diverse depending on the context in which they operate, including the level to which they maintain close links with the civilian population. See Médecins Sans Frontières, “The Practical Guide to Humanitarian Law: Nonstate Armed Groups”, available at: <https://guide-humanitarian-law.org/content/article/3/non-state-armed-groups/>. NSAGs that maintain close links are likely to have a

lower than those of a State. And the above list of prerequisites is by no means comprehensive – depending on the desired level of rigour and accuracy and how the “information that is reasonably available” requirement is construed, a proportionality assessment could incorporate a vast number of elements for consideration. In short, conducting proportionality assessments is a tall order even for many States, and as a rule of thumb, it is almost always taller for NSAGs.

### Behaviour 2: Using lack of capacity or knowledge as a pretext

NSAGs can also use their lack of knowledge of proportionality and its constituent elements as a pretext to disregard proportionality and carry out attacks that violate the principle. This does not necessarily assume that NSAGs have an idea of what proportionality is and then intentionally disregard it, although such a possibility is not unthinkable. NSAGs can flout proportionality without even knowing that they have done so. For instance, if an NSAG launches an indiscriminate attack on an area with a high concentration of civilians but only one or two low-level enemy combatants, causing a large amount of incidental harm to civilians, and then justifies its attack by claiming that it did not know of their existence, it will have conducted a disproportionate attack without knowing what proportionality is. And if the NSAG did indeed know of the existence of civilians but decided to attack anyway and then lied, saying that it did not know of their existence, it will have used its claimed ignorance of an essential element of the proportionality assessment (i.e., whether civilians are present) as a pretext for the attack, again without having knowledge of Article 57 of AP I.

Using lack of capacity to carry out proportionality assessments as a pretext would presuppose that the ones using the pretext already know what proportionality is, so it is less likely to happen than using the claim to ignorance. Also, lack of capacity as a pretext is theoretically possible, but it is hard to find any real-life examples because military actors who have agreed to be bound by IHL and AP I would not be willing to admit, as a matter of image and pride, that they failed to carry out a proportionality assessment due to lack of capacity, despite being required to do so. A possible scenario would be one in which an NSAG has been sufficiently trained on proportionality but has no genuine intention of complying and carries out disproportionate attacks, claiming that it possesses only the theoretical knowledge and not the capacity to comply. Regardless of the likelihood of such a scenario, this article puts forth proposals to strengthen proportionality compliance which do not promise to be foolproof solutions to such deceptive behaviour but will provide some remedy.

To be clear, States can be just as duplicitous as NSAGs in using lack of capacity or knowledge as a pretext. However, while there are no exact numbers due to the secretive nature of deception, we can reasonably speculate that NSAGs are more likely to unintentionally violate proportionality and use it as a pretext

considerable amount of information about the civilian population that does not require technology or material investments to collect – information that can be used for proportionality assessments.

than State forces are, as NSAGs are likely to know less or nothing at all when it comes to proportionality.

### Behaviour 3: Inability to determine whether to attack dual-use objects or not

Under the current state of affairs, NSAGs are largely unable to determine whether they can attack a dual-use object or not. “Dual-use” refers not simply to two uses but to two specific kinds of uses: civilian and military. The difficulty arises when the two kinds of uses are simultaneous rather than alternative – in other words, not when a facility sometimes serves civilian purposes and sometimes military purposes, but when it continuously serves both civilian and military purposes at the same time.<sup>22</sup> It must be noted that the term “dual-use object” is only used colloquially for practical purposes and is not a category of objects that holds any legal significance.<sup>23</sup> Once a civilian object becomes a military objective it ceases to be a civilian object,<sup>24</sup> but it can regain civilian status if the facts that made it a military objective change.

If a military objective has continuing civilian functions which if impaired would cause civilian deaths and injury and damage to civilian objects, there is general agreement that the impairment should count as incidental harm and thus should be taken into account in a proportionality assessment.<sup>25</sup> A proportionality assessment on such a dual-use object would be harder than a more conventional proportionality assessment where a military objective has no continuing civilian functions that need to be factored in. And even when adverse effects caused by an attack do not qualify as one of the types of incidental harm recognized under AP I, there is some support for such adverse effects to be somehow given weight in proportionality assessments.<sup>26</sup> This “somehow” is not expanded upon, and if it were, it would be a point of contention among parties to conflict.

One thing is clear: NSAGs are ill-equipped to deal with the dilemmas related to dual-use objects. One example of a dual-use object dilemma is a situation where a one-room school is used as a military communications centre, thus becoming a military objective.<sup>27</sup> If we accept the premise that somehow during the proportionality assessment, some weight needs to be given to impairment of the school’s educational function if attacked, how are NSAGs expected to go about this? Would they have information about the importance of the one-room school in terms of how many students it serves, what the value of

<sup>22</sup> Henry Shue and David Wippman, “Limiting Attacks on Dual-Use Facilities Performing Indispensable Civilian Functions”, *Cornell International Law Journal*, Vol. 35. No.3, 2002, p. 562.

<sup>23</sup> Geneva Water Hub, *The Geneva List of Principles on the Protection of Water Infrastructure*, Geneva, August 2019, p. 28.

<sup>24</sup> E.-C. Gillard, above note 2, p. 35.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.* The types of incidental harm that are recognized by AP I are death and injury to civilians and damage to civilian objects. The Gillard paper does not define what is meant by “adverse effects” not recognized by AP I, but it can be assumed to include environmental damage, spread of disease etc.

<sup>27</sup> *Ibid.*

the education they receive is, and what the repercussions would be if students were not able to receive that education because the school was blown to pieces? These are complex, multifaceted questions even for State forces to answer, and NSAGs would likely not be able to answer them at all. Even if we were to take the view that only incidental harm in the strictest legal sense (death and injury to civilians and damage to civilian objects) needed to be considered and that other adverse effects due to an attack could be neglected, it would not make things much easier for NSAGs because they would still lack the capacity to assess whether an attack would cause incidental harm and, if so, what the severity of that harm would be.

## **Proposals for strengthening proportionality compliance**

Taking into account the lack of capacity of NSAGs (and even States) to comply with proportionality, this article proposes a framework for proportionality along with three mechanisms that would strengthen proportionality compliance.

### **The Comprehensive Proportionality Assessment Framework**

#### *Premise*

Previous suggestions for clarifying the process of assessing proportionality have ranged from “a formula for such a calculation along with indicators and elements that should or should not be taken into account”<sup>28</sup> to “a guidance document on proportionality during armed conflict, to clarify the nature, scope and operational requirements of the principle”.<sup>29</sup> They have arisen from justified concerns about the opaque nature of proportionality—that the rule is a vague or flexible formulation which lacks definition,<sup>30</sup> is subjective and inherently difficult to apply,<sup>31</sup> and fails to guide decision-makers.<sup>32</sup>

Admittedly, not everyone wants a more meticulous way of assessing proportionality. States and military lawyers have so far refused to quantify how the risk of losing one civilian life weighs in comparison to the potential of gaining a certain military advantage, or when the relationship between the risk and the advantage becomes excessive.<sup>33</sup> Instead, they refer to “reasonableness”<sup>34</sup>

28 Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, Cheltenham, 2019, p. 521.

29 Ben Clarke, “Proportionality in Armed Conflicts: A Principle in Need of Clarification?”, *International Humanitarian Legal Studies*, Vol. 3, No. 1, 2012, p. 75.

30 *Ibid.*, p. 121.

31 Hamutal Esther Shamash, “How Much is Too Much? An Examination of the Principle of Jus in Bello Proportionality”, *Israel Defense Forces Law Review*, Vol. 2, 2005–06, p. 18.

32 Janina Dill, *Applying the Principle of Proportionality in Combat Operations*, policy briefing, Oxford Institute for Ethics, Law, and Armed Conflict, December 2010, p. 4.

33 M. Sassòli, above note 28, p. 522. By “excessive”, Sassòli seems to be referring to the point at which the risk of losing one civilian life is excessively larger than the military advantage to be gained from the attack.

34 *Ibid.*

and depend on the (rather ubiquitous) reasonable commander who is expected to make decisions based on good faith. Adding to this, military actors might not want a more refined proportionality assessment method because it could be exploited to the benefit of enemy forces if knowledge of it got into their hands – or they may simply wish not to give up the current state of ambiguity that works in favour of the military<sup>35</sup> and to retain the luxury of over-evaluating the importance of the military advantage part of the proportionality equation.<sup>36</sup>

The assessment of proportionality has been frequently called, by analogy, an equation. An equation is a statement showing that two amounts or values are equal;<sup>37</sup> hence, when applied to proportionality, the expectation is that two or more values (or types of informational input) regarding a specific situation where an attack is being considered can be “plugged in” to produce a verdict on proportionality. However, no one has been able to put forth a definitive and mechanical equation that would resolve most, let alone all, of the proportionality conundrums that exist.

A more useful approach might be to assess proportionality not through an equation, but through a framework where the minimum standards and elements to be considered are defined, with the possibility of adding more standards depending on the respective capacities of military actors. As States and NSAGs have a considerable capacity gap, setting minimum standards to which both can realistically adhere, while providing the option of adding more elements to assess when capacity allows, would be a fair approach that reconciles the aspirational goal of applying proportionality to everyone with the reality of unequal capacities.

### *Description of the framework*

The proposed framework is called the Comprehensive Proportionality Assessment Framework, or COPAF. It consists of the various types of information, previously identified in academic literature,<sup>38</sup> that need to be included in a proportionality assessment, and breaks them down into two types of standards – Minimum Standards and Optional Standards – based on their importance and how feasible it would be for both States and NSAGs to obtain such information. The Minimum Standards and Optional Standards are shown in [Table 1](#) and [Table 2](#) respectively. The Minimum Standards are divided into primary criteria that must be considered by all parties at all times and secondary criteria that can be considered when capacity allows. The Optional Standards are not obligatory, but are nevertheless broken down into more important (primary) criteria and less important (secondary) criteria.

The distinction between Minimum Standards and Optional Standards would be that Minimum Standards include criteria that have a direct impact on

<sup>35</sup> H. E. Shamash, above note 31, p. 14.

<sup>36</sup> M. Sassoli, above note 28, p. 363.

<sup>37</sup> “Equation”, *Oxford Learner’s Dictionary*, available at: [www.oxfordlearnersdictionaries.com/definition/english/equation](http://www.oxfordlearnersdictionaries.com/definition/english/equation).

<sup>38</sup> E.-C. Gillard, above note 2, p. 47.

human lives and bodily harm. Optional Standards, while also important in determining the effect on human lives and bodily harm, have a relatively “indirect” effect compared to the Minimum Standards. Primary and secondary criteria have been selected according to the difficulty in obtaining information, with information that is relatively difficult to attain being classified as secondary criteria.

The criteria shown in [Table 1](#) and [Table 2](#) make up the pieces of the proportionality puzzle that relate to incidental harm. The other half of the puzzle, military advantage, consists of pieces that are so varied and context-specific that developing common standards and criteria for COPAF would not be very useful because they would be too broad and generic to provide any sort of meaningful guidance.

Military advantage, unlike incidental harm, is required to be “concrete” and “direct” as per Article 51(5)(b) of AP I. Unfortunately, the *travaux préparatoires* do not provide much help in understanding the “concrete” and “direct” qualifiers, as there was no shared understanding among State delegations at the Diplomatic Conference of 1974–77 as to their meaning.<sup>39</sup> As a result, experts and military actors have multiple interpretations of what these two terms mean.<sup>40</sup> Therefore, rather than imposing tiered criteria as COPAF does with incidental harm, which is based on elements that for the most part have a degree of general acceptability that military advantage does not have, it would be more practical to have a checklist for self-assessment and comparison with the analysis of incidental harm. This checklist is shown in [Table 3](#).

### *Considerations when using COPAF*

The true value of COPAF lies in its flexibility. If military actors have the ability to assess proportionality beyond the Minimum Standards, they can include more elements as Optional Standards, adding to those suggested above. The more comprehensive the criteria used, the more meticulous the proportionality assessment will be. The military advantage side of the assessment can also add more elements if necessary, but this must be done with the objective of placing checks and balances on exaggerating military advantage, not justifying planned attacks by adding more elements, because proportionality assessments as they are carried out now already tend to favour military advantage over incidental harm.

If COPAF reins in the impulse to overemphasize military advantage, why would military actors accept it in the first place? More broadly, why would military actors accept any sort of framework or process that could possibly limit their means and methods of warfare more than their current level of self-restraint? While COPAF will certainly not have universal appeal, it does benefit

<sup>39</sup> L. Gisel (ed.), *above note 9*, pp. 12–19, 17.

<sup>40</sup> See, for example, the discussions in L. Gisel (ed.), *above note 9*, pp. 12–13; and Sigrid Redse Johansen, *The Military Commander’s Necessity: The Law of Armed Conflict and Its Limits*, Cambridge University Press, Cambridge, September 2019, pp. 288–298.

**Table 1. COPAF Minimum Standards for incidental harm assessment**

Type of information	Criteria
Weapons	<p>Primary criteria (considered by all parties at all times)</p> <ul style="list-style-type: none"> <li>● Accuracy and precision</li> <li>● Size of direct area effect</li> <li>● Yield (size)</li> <li>● Type (guided/unguided, ballistic/cruise/anti-ship/anti-tank)</li> <li>● Method of engagement (direct/indirect/air-delivered/placed, e.g., improvised explosive devices)</li> <li>● Warhead (when relevant – explosive/blast/fragmentation/continuous rod/shaped charge)</li> <li>● Secondary and tertiary effects (i.e., outside the direct effects)</li> <li>● Expected casualties and damage to civilian objects</li> <li>● Fuse type and setting (when relevant)</li> </ul> <p>Secondary criteria (when capacity allows)</p> <ul style="list-style-type: none"> <li>● Target composition and construction</li> <li>● Angle of attack</li> <li>● Weather (how weather conditions affect visibility, trajectory of munitions etc.)</li> </ul>
Civilians and civilian objects	<p>Primary criteria</p> <ul style="list-style-type: none"> <li>● Location of civilians and civilian objects</li> <li>● Location of persons <i>hors de combat</i></li> <li>● Location of human shields</li> <li>● Concentration of civilians and civilian objects (density)</li> <li>● Movement patterns of civilians depending on the time of day and seasonality</li> <li>● Type of living (permanent settlement, migratory group, roving displaced persons, etc.)</li> </ul>

*Continued*

Table 1, Continued

Type of information	Criteria
Civilians and civilian objects	<ul style="list-style-type: none"> <li>● Expected civilian casualties</li> <li>● Expected damage to civilian objects and structures</li> </ul> <p>Secondary criteria</p> <ul style="list-style-type: none"> <li>● Number of vulnerable persons (elderly, children, disabled etc.)</li> </ul>
Medical and public health consequences	<p>Primary criteria</p> <ul style="list-style-type: none"> <li>● Presence of medical personnel, units and transports (which are afforded special protection under IHL)</li> <li>● Presence of hospitals and health facilities</li> </ul> <p>Secondary criteria</p> <ul style="list-style-type: none"> <li>● Extent to which public health would be compromised if medical facilities were attacked</li> <li>● Possibility of public health problems prevailing because of environmental damage caused by the attack</li> </ul>
Consequences to the natural environment	<p>Primary criteria</p> <ul style="list-style-type: none"> <li>● Existence of specific types of natural environment essential to the survival of civilians in the targeted areas (rivers, lakes, forests etc.)</li> <li>● Direct effects of the planned attack and whether it would cause widespread, long-term and severe damage (such as ground water contamination, flooding, uncontrollable fire, spread of disease)</li> </ul>

*Continued*

Table 1, Continued

Type of information	Criteria
Consequences to the natural environment	<p>Secondary criteria</p> <ul style="list-style-type: none"> <li>● Leading to teratogenic, mutagenic and carcinogenic effects</li> </ul>

Source: Adopted from E.-C. Gillard, above note 2, pp. 47–48; Kenneth Cross, Ove Dullum, N. R. Jenzen-Jones and Marc Garlasco, *Explosive Weapons in Populated Areas: Technical Considerations Relevant to their Use and Effects*, Armament Research Services, Australia, May 2016, p. 41; and US Chairman of the Joint Chiefs of Staff, *No-Strike and the Collateral Damage Estimation Methodology*, 12 October 2012, p. D-A-34, available at: <https://info.publicintelligence.net/CJCS-CollateralDamage.pdf>.

military actors as it provides a common language and standard(s) for proportionality for both States and NSAGs. At the initial planning stage, COPAF can be used to evaluate whether a planned attack would comply with the rule of proportionality. Post-attack, it can be used by the attacking entity and by others, such as independent observers or even the entities that were attacked, to assess whether the attack complied with the rules of proportionality (granted, persons outside of the decision-making chain will only have partial information). Furthermore, COPAF can be used to review how well the attacking entity collected information/intelligence and then how accurately it assessed the Minimum and Optional Standards. Lastly, COPAF can help to shed light on reasoning around situations involving dual-use objects. While COPAF in no way produces the final judgement on proportionality as it is not an equation or formula, by helping to methodically lay out the factors that could cause incidental harm and the expected military advantages to be gained, it can aid military decision-makers in complying with the rule of proportionality.

In comparing military advantage against incidental harm, it might be tempting to assign scores or weights to the different criteria and elements in an attempt to find a formulaic solution. As certain experts have pointed out, comparing dissimilar categories such as military advantage and incidental harm is akin to comparing apples and oranges<sup>41</sup> and is a thorny business. COPAF eschews the quandary by avoiding a scoring system; instead, the two additional proposals below should help complement COPAF without falling into the trap of quantification. It is also important to note that the COPAF criteria and elements are interconnected and should not be considered as disparate boxes on a scorecard to be ticked off one by one. The correlation between each criterion and element must be pondered carefully to find causality and inter-influence. For instance, a decision-maker could ask what the relationship between expected

41 L. Gisel (ed.), above note 9, pp. 62–63.

Table 2. COPAF Optional Standards for incidental harm assessment (to be included in a proportionality assessment by parties that have the capacity to assess)

Type of information	Criteria
Structural engineering information	<p>Primary criteria</p> <ul style="list-style-type: none"> <li>● Structural information on the structure(s) about to be attacked</li> <li>● Networked infrastructure (both nodes and links) connected to the structure to be attacked</li> <li>● Estimated impact of direct and indirect damage to essential services and systems and resulting impact on civilian population</li> </ul> <p>Secondary criteria</p> <ul style="list-style-type: none"> <li>● Effect of previous military operations on targeted structure(s)</li> </ul>
Cultural property	<p>Primary criteria</p> <ul style="list-style-type: none"> <li>● Location of culturally significant sites and structures</li> </ul> <p>Secondary criteria</p> <ul style="list-style-type: none"> <li>● Location of culturally significant artefacts and objects</li> <li>● Historical, artistic, cultural and architectural value of objects</li> </ul>
Particular circumstances of the area where the attack will be conducted	<p>Primary criteria</p> <ul style="list-style-type: none"> <li>● Whether the State is subject to United Nations or other sanctions, blockades or measures that could restrict its ability to repair damaged infrastructure</li> </ul>

*Continued*

**Table 2, Continued**

Type of information	Criteria
Particular circumstances of the area where the attack will be conducted	<p>Secondary criteria</p> <ul style="list-style-type: none"> <li>● More detailed assessment of the extent to which sanctions, blockades or other measures could restrict repair of damaged infrastructure (amount of time, money, resources required etc.)</li> </ul>

Source: Adopted from E.-C. Gillard, above note 2, pp. 47–48; and ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict: Rules and Recommendations relating to the Protection of the Natural Environment under International Humanitarian Law*, Geneva, September 2020, p. 39.

civilian casualties and weapon yield is, or whether the presence or absence of medical personnel has an effect on the concentration of civilians.

It is also pertinent to acknowledge that many modern State military forces have collateral damage estimate (CDE) methodologies that assess the magnitude of the expected loss of life, physical injuries and damage.<sup>42</sup> However, these methodologies are not alternatives to proportionality assessments as they only measure the anticipated incidental harm and not the military advantage (which may be determined by States through other tools and processes). More importantly, unlike COPAF, specific CDE methodologies are inevitably and inextricably tethered to the respective State forces that created them. It would be less challenging to convince NSAGs to use COPAF (which is not created by a specific State and is catered toward NSAG use) than to convince them to accept CDE methodologies, especially methodologies from a State with which the NSAG in question is engaged in an armed conflict.

## COPAF capacity-building for NSAGs

### Premise

States' obligation to disseminate the contents of AP I (and thus, disseminate knowledge on proportionality) is limited to disseminating this information to their armed forces and civilian populations. Rule 142 of the International Committee of the Red Cross (ICRC) Customary Law Study notes that States and parties to the conflict must provide instruction in IHL to their armed forces. Article 83 of AP I also mandates the dissemination of AP I for the purpose of making its legal instruments known to the armed forces and to the civilian

<sup>42</sup> *Ibid.*, p. 35.

Table 3. COPAF checklist for military advantage assessment

Type	Checklist	Comment
Concrete advantage	<p>Is the advantage a military one?</p> <p>Is the advantage one that is not solely political, economic, financial, social or moral?</p> <p>Is there a reasonable likelihood of obtaining the anticipated military objective?</p> <p>Is the military advantage real or tangible, definable and quantifiable?</p>	<p>Disrupting government propaganda and undermining the morale of a population is not considered a concrete and direct military advantage.</p> <p>The uncertainty of obtaining the anticipated military advantage diminishes the concreteness of the advantage to be taken into consideration.</p> <p>Hope, speculation, hypothetical advantages, and spurious and unreliable intelligence cannot be considered.</p>
Direct advantage	<p>Is the military advantage offered by the attack in “one causal step”? If not, describe what the causal link from attack to military advantage looks like.</p> <p>Is the anticipated military advantage brought about by the attack itself, not external sources or intervening causes?</p> <p>How soon is the military advantage expected to manifest?</p>	<p>While military advantage can be gained through multiple causal steps, it would be more direct if it was done in one.</p> <p>The sooner the military advantage manifests, the more direct the military advantage is. However, attacking the enemy for the</p>

*Continued*

Table 3, Continued

Type	Checklist	Comment
	How close is the military advantage expected to manifest?	<p>purposes of eroding their military strength in the long term (for instance, neutralizing weapons that the enemy possesses and might use in the future) can be considered “direct” in the sense of being the immediate result of the attack in terms of causality.</p> <p>Geographic location and proximity matter, but there might a stronger and more direct military advantage by attacking objectives that are far away (for instance, attacking the distant enemy headquarters as opposed to closer field forces).</p>

Source: Adopted from L. Gisel (ed.), above note 9, pp. 12–19.

population, with “armed forces” here meaning State armed forces. Thus, we can say that States have no legal obligation to disseminate knowledge on proportionality to NSAGs.<sup>43</sup>

Building on the previous interpretation of Article 57(2)(a)(i) of AP I, however, can we assert that when attackers must do everything feasible to verify that the objectives to be attacked are not prohibited by the provisions of AP I, “everything feasible” should include putting in place systems and processes to assess proportionality – and that by corollary, NSAGs should be assisted in establishing these systems and processes because they lack capacity? This would have been an overbearing interpretation when AP I was first conceived, but in light of decades of progress on understanding and engaging with NSAGs on

<sup>43</sup> However, the 2016 ICRC Commentary on Geneva Convention I states that the High Contracting Parties must also ensure respect for the rules applicable in non-international armed conflict, including by non-State armed groups (para. 125), and that this obligation is not limited to the Geneva Conventions but applies to the entire body of IHL binding upon a particular State (para. 126), which would include the rule of proportionality. See ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016.

different fronts, it is arguably not so any more. The need to engage with NSAGs has been well noted in academia as well as policy circles,<sup>44</sup> and the United Nations (UN), ICRC and specialized organizations such as Geneva Call, the Centre for Humanitarian Dialogue and the Centre for Civilians in Conflict work on NSAG engagement from diverse angles. As COPAF was articulated as a framework for proportionality that can be used by both States and NSAGs, it can be used as the theoretical foundation for helping NSAGs build capacity to comply with the rule of proportionality. Such capacity-building would simultaneously satisfy the obligation in Article 57 of AP I to do “everything feasible”.

### *What kind of capacity-building?*

Capacity-building for NSAGs using COPAF would bring these groups closer to fully complying with the rule of proportionality. The term “capacity-building” is used intentionally in lieu of “training”, as training presupposes a lack of knowledge and just that. While a knowledge deficit might exist, capacity-building aims not only to address that deficit but also to aid in the establishment of processes and structures that would enable the holistic implementation of COPAF. Capacity-building would include (1) theoretical training on the basic concepts of IHL and COPAF, (2) case study exercises on proportionality by which individual combatants would acquire the ability to assess proportionality to the best of their abilities in a specific conflict setting, (3) helping NSAGs to establish clear reporting lines and coordination processes through which the information needed for COPAF would flow from the field to the decision-making level, and (4) establishing an organizational structure that would allow the command level to have control over its combatants in the field.

There is a real risk that these activities, especially the latter two, could inadvertently strengthen an NSAG’s ability and resolve to conduct warfare, which would somewhat defeat the purpose of COPAF capacity-building. Stronger command lines and coordination processes could easily be used to issue orders to attack civilians.<sup>45</sup> The way to mitigate this risk is closely related to the answer to another critical question – what would be the very first step in capacity-building? It would be to identify and target NSAGs that are already committed to adhering

<sup>44</sup> See A. Bellal, above note 19; Hyeran Jo, “Compliance with International Humanitarian Law by Non-State Armed Groups: How Can It Be Improved?”, in T. D. Gill (ed.), above note 19; Andrew McLeod, “Engaging Non-State Armed Groups for Humanitarian Purposes: Experience, Constraints and Ways Forward”, in *Humanitarian Engagement with Non-State Armed Groups*, Chatham House, London, April 2016.

<sup>45</sup> At the same time, stronger command lines can be used to communicate and enforce restraints on military action. For instance, dissemination of the Taliban’s code of conduct, known as the Layeha, would be easier and more effective if the Taliban was able to unify its command and control structure and resolve the difficulties that the top leadership face in coordinating fighters at the district and provincial levels. The Taliban attempted to find solutions to such challenges when it revised the Layeha in 2010. See Thomas H. Johnson and Matthew C. DuPee, “Analysing the New Taliban Code of Conduct (Layeha): An Assessment of Changing Perspectives and Strategies of the Afghan Taliban”, *Central Asian Survey*, Vol. 31, No. 1, 2012, p. 87.

to IHL but lack the capacity to convert that commitment into practice on the ground. Geneva Call has been a trailblazer in this line of work and has managed to get NSAGs – as they cannot sign international treaties – to sign an innovative instrument known as the Deed of Commitment, whereby NSAGs commit to abiding by specific humanitarian norms and agree to be held accountable for complying with those norms. Geneva Call has also used other methods, such as unilateral declarations, internal rules and regulations, and bilateral or multilateral agreements, to secure humanitarian commitment by NSAGs.<sup>46</sup> It would be logical to start capacity-building with NSAGs that have formalized such commitments. This would also mitigate the risk of NSAGs expropriating newly established processes and structures to conduct more attacks instead of using them to facilitate proportionality assessments. Even more ideal would be to find and select NSAGs that have expressed specific interest in or intention to adhere to proportionality, and to build capacity with them first.<sup>47</sup>

### *Capacity-building by whom?*

Who, then, should carry out COPAF capacity-building for the selected NSAGs? The strongest candidates are reputable humanitarian organizations such as the ICRC and Geneva Call, which have ample experience engaging with NSAGs. However, because of its normally confidential, fieldwork-oriented approach,<sup>48</sup> the ICRC might not be the ideal body to undertake this task, especially if the results of the capacity-building need to be publicized. The UN, while not a purely humanitarian organization, could play a role in capacity-building as well.<sup>49</sup> Whoever takes on the role, an important factor to consider is counterterrorism legislation that prohibits providing “material support” to so-called “terrorist organizations”, an umbrella term that many NSAGs fall under. Such laws could be a chokepoint if COPAF capacity-building activities are determined to be “material support”, similar to the legal precedent set by the US Supreme Court in

<sup>46</sup> Out of the 150 NSAGs that Geneva Call have engaged, more than half have signed one or more Deeds of Commitment or made similar pledges. See Geneva Call, *The Garance Series*, No. 3: *Conduct of Hostilities by Armed Non-State Actors: Report from the 2020 Garance Talks*, Geneva, 2020.

<sup>47</sup> One of the very few NSAGs that has formally committed to the rule of proportionality is the Popular Mobilization Forces (PMF) of Iraq, which stated in its Unilateral Declaration in 2018 that it would “commit before the military attack and military operations to consider the anticipated military advantage in comparison with the expected collateral damages”. See PMF, “Declaration on the Commitment to Respect Humanitarian Norms during and in the Aftermath of Armed Conflict or Military Operations”, *Geneva Call: Their Words*, 2018, available at: <https://tinyurl.com/yhkwx2x>.

<sup>48</sup> M. Sassoli, above note 15, p. 41.

<sup>49</sup> See Luciana Vosniak, “How the UN Can Help Ensure Non-State Armed Groups Protect Civilians”, *International Peace Institute Global Observatory*, 16 April 2021, available at: <https://theglobalobservatory.org/2021/04/how-un-can-help-ensure-non-state-armed-groups-protect-civilians/>. According to Vosniak, there are precedents for the UN to engage with NSAGs in order to achieve humanitarian objectives. For instance, UNSC Res. 1539 and 1612 established a framework for monitoring and reporting grave violations against children’s rights in armed conflict. UN country teams and peacekeeping missions engage in dialogue with NSAGs in order to develop action plans outlining commitments to cease practices that violate children’s rights. Similar resolutions and mechanisms can be used by the UN to engage NSAGs in capacity-building for assessing proportionality.

*Holder v. Humanitarian Law Project*, which found peaceful conflict resolution activities targeting Turkey’s Kurdistan Worker’s Party and Sri Lanka’s Liberation Tigers of Tamil Eelam to be “material support”. Thus, it might be better to establish a new organization solely focusing on COPAF capacity-building in order to circumvent potential obstacles and find donors willing to fund its operations without legal restrictions or conditions on engaging with NSAGs.

### *Capacity-building when, and for whom?*

COPAF capacity-building would have the most impact if it could be carried out before armed conflict flares up. Implementing COPAF capacity-building imminent to or during hostilities would make its pre-emptive purpose moot as there would be no time to learn how to utilize and internalize the framework. Combatants should be given plenty of time to practice proportionality assessments appropriate to their level of authority with the information that is available to them during periods of peace.

Even NSAGs have different levels within their organizational structure, ranging from ground-level soldiers to mid-level commanders and the top leadership. While each level has different decision-making capacities and certain elements such as strategic military advantage might be better assessed at the strategic commander level,<sup>50</sup> it is nonetheless essential for all NSAG members to internalize COPAF so that the observations and information relevant for proportionality assessments are gathered from the lowest levels up and are fed into the higher-level, strategic decision-making process. Furthermore, considering the loose-network nature of many NSAGs that operate in semi-independent cells without higher command oversight, it is even more imperative that capacity-building reaches as many members as possible.

If possible, civilians living under the control of NSAGs should be made aware of the concept of proportionality and COPAF. Research shows that both States and NSAGs care about the opinion of their national populations when assessing their conducts, image and political positioning.<sup>51</sup> One of the most important features of COPAF is that it consists of criteria that anyone with knowledge of it can use to hold military actors accountable, given that the actors have agreed to use and be bound by COPAF. Media outlets, independent organizations and associations, and even the general population could point out possible violations of COPAF if they were taught what its constitutive elements were and how its processes worked. Of course, civilians would not be privy to confidential military data and information, but nonetheless, attempts to identify violations would apply pressure on NSAGs. Civilians would also need to be trained on fundamental IHL concepts to understand COPAF, such as the humanitarian principles, what *jus ad bellum* and

50 L. Gisel (ed.), above note 9, p. 64.

51 Juliane Garcia Ravel and Madalena Vasconcelos Rosa, “IHL in Action: Seven Patterns of Respect”, *Humanitarian Law and Policy Blog*, 19 November 2020, available at: <https://blogs.icrc.org/law-and-policy/2020/11/19/ihl-in-action-seven-patterns-respect/>.

*jus in bello* are, and how civilians and combatants are defined in IHL. This holds true for capacity-building for NSAG members as well – they need to be trained in IHL basics before COPAF is introduced to them. However, the reasoning is somewhat circular here, as it was recommended above that COPAF be first introduced to NSAGs which show interest in complying with IHL and proportionality, and NSAGs which have shown such interest would already possess some knowledge of IHL. Nevertheless, there could be NSAGs that sincerely want to adhere to IHL but lack understanding of its rudiments, and their basic training needs to be addressed before introducing them to COPAF.

### *Interactive learning*

COPAF capacity-building should be an interactive process between the recipients and those carrying out the capacity-building, not just a top-down foisting of IHL rules. Hypothetical scenarios describing situations where proportionality must be assessed<sup>52</sup> can be used to spur vigorous discussions. Capacity-building in an interactive manner is also a rare opportunity to draw insights from NSAGs and to learn about their logic, values and ideologies, and the rationale behind their actions. For interactive capacity-building to become a reality, it must be conducted in a mutually respectful environment where NSAGs can be transparent and honest about their ability or inability to comply with proportionality and IHL; this would also expand the space for further engagement. Open dialogue based on reciprocity would make NSAGs feel genuinely included, enhancing a sense of ownership and willingness to do more to comply with proportionality and other parts of IHL.

### Rapid multidisciplinary assessment teams

Conducting a proportionality assessment based on COPAF would require personnel with expertise from different disciplines and backgrounds. For example, even without mentioning a framework like COPAF, academic literature notes the need for engineers, public health experts,<sup>53</sup> medical experts that can quantify mental harm<sup>54</sup> etc. when assessing proportionality. At the same time, these experts would also need to understand COPAF and IHL in general and have military expertise and knowledge of the operations, tactics and strategies of the theatre of war in which they are operating.

These needs are unique and costly, and it would be beneficial for military actors to consider the establishment of rapid multidisciplinary assessment teams that would gather information for COPAF and also carry out rapid COPAF

52 See L. Gisel (ed.), above note 9, which makes ample use of hypothetical scenarios to facilitate discussions on the application of IHL.

53 *Ibid.*, p. 47.

54 See E.-C. Gillard, above note 2, p. 41. While mental harm is not one of the previously described elements of COPAF, it can be included as an Optional Standard. As Gillard asserts, there is no reason in principle to exclude mental harm from the scope of proportionality assessments. Again, the more elements COPAF adds, the more rigorous the assessment becomes.

assessment both *ex ante* and *ex post* – the former for the military commander to use before making a final decision to attack or not, and the latter for evaluation and accountability after the attack. RMATs would be embedded in the military command structure and would gather open intelligence, analyze military intelligence and use COPAF to produce preliminary proportionality assessments that would be disseminated to all levels of the military unit. At the final stage, the strategic decision-maker, informed by the RMAT's preliminary proportionality assessment, would give the order to attack or not.

RMATs would gather two types of information: (1) general information about the operating environment that can be collected on a consistent basis even before active conflict, such as population, the number of civilians, and characteristics of the natural environment; and (2) information that is directly relevant to a military attack, such as weapon type, yield, and estimated damage. Gathering as much general information as possible even in relatively peaceful times would be particularly beneficial for the decision-maker because there may be carefully pre-planned attacks, totally spontaneous or reactive attacks, or any other type of attack in between the two. As the decision-maker might desire to make, or be pressured into making, a quick, on-the-fly decision due to an urgent situation, it would be advantageous to have as much pre-attained, instantly accessible information as possible even if it is to carry out a bare-bones proportionality assessment. To prepare for attacks that require quick decisions, militaries with advanced capabilities in computer modelling could even create numerous scenarios based on the information they have and, for example, predict the possible number of civilian casualties in a specific area according to the different types of weapons used.

### ***Benefits of RMATs***

RMATs can make use of existing methods and processes that military actors might already possess, such as CDE methodologies. Furthermore, many State forces and even NSAGs already have intelligence-gathering teams and structures in place, in which case, duplication should be avoided. The conceptual components of RMATs, such as housing multidisciplinary expertise under one roof or the use of COPAF, can be added to pre-existing teams and structures (and modified to suit those teams and structures) instead of creating new ones.

The second benefit of RMATs is the synergy that comes from housing diverse experts under one roof in order to assess proportionality. As opposed to a siloed approach where experts simply produce individual assessments in their respective disciplines and report them separately, RMATs would facilitate multidisciplinary exchanges that analyze how observations and data from different disciplines affect and influence one another. For instance, a water expert and a weapons expert could discuss how the use of different weapons would affect the water supply in a certain area, or an environmental expert and a structural engineer could work together to predict the environmental consequences of attacking an oil refinery. RMATs would facilitate such multidisciplinary thinking and cooperation, which in turn would enhance the quality of proportionality assessments.

Last but not least, the third benefit of RMATs is that the information they collect can be used to judge whether a potential target is a military objective or not. If the target is found to be the latter, there would be no need for a proportionality assessment. It is precisely for this reason that the proposed name of the team is not “rapid multidisciplinary *proportionality* assessment team”, aside from the preference for terminological brevity. If a potential target is not a military objective, it is illegal to attack it, and any attempts to do so must be cancelled. An RMAT, while carrying out its work, could find that a building has no military functions or that a bridge is being used solely by civilians, and thus there would be no need for a proportionality assessment in the first place as there is no military advantage to be gained. Such analyses by RMATs could also bring down the number of civilian casualties resulting from the mischaracterization (whether knowingly or unknowingly) of civilians and civilian objects as combatants and military objectives.

### *Feasibility and limitations*

As implied above, it is more feasible for State forces than for NSAGs to establish RMATs. NSAGs would not possess the means to recruit and coordinate a team of experts that would carry out proportionality assessments. Also, the loose-network nature of many NSAGs might make it difficult for assessment results to reach the parts of the military hierarchy that need them to make an informed decision.

Helping NSAGS to create RMATs, if they need such assistance, could be a part of the COPAF capacity-building exercise, but it is hard to pinpoint exactly what kind of assistance should be given, except maybe helping them to formulate reporting lines and structures and training them on how to use these to communicate effectively. Organizations working on capacity-building would not, for instance, be able to provide NSAGs with the actual experts that RMATs would need, or any material assistance such as GPS devices or communication equipment, as these might be used to exacerbate the very armed conflict that should be kept under control. Hence, while helping NSAGs to create RMATs as part of COPAF capacity-building is not out of the question, organizations must carefully contemplate the legal and ethical ramifications of such assistance.

## **Considerations when interacting with NSAGs and States**

Neither NSAGs nor States are monolithic. The above proposals for strengthening proportionality compliance should be implemented with a deep understanding of the unique characteristics of each NSAG and State and their respective cultural, developmental, socio-political and historical trajectories.

Specifically, NSAGs can vary depending on their ideology, doctrine, leadership preferences, recruitment strategies, funding sources, group history,<sup>55</sup>

55 ICRC, above note 19, p. 38.

goals, military capacity, degree of territorial control<sup>56</sup> etc. Their structures can also be shaped by external factors such as the opposing force's strength and effectiveness, the topography of the group's operating terrain and whether they have external political or military support.<sup>57</sup> The characteristics of NSAGs and how they might interact with and influence COPAF capacity-building and other (feasible) activities need to be carefully considered.

The same can be said about States – generalizations will prove to be counterproductive and only tailored approaches will truly enhance proportionality compliance. One important consideration is that since States are viewed as more legitimate actors that hold legitimate authority over their claimed territories, all proposed activities in a particular area will have to take place with the consent of the State that controls it. This is true whether the activities are targeting State forces or an NSAG, or even if the NSAG has a certain degree of control over the territory in which it is located. Access to the NSAG territory would still be subject to the approval of the State that controls the State borders. And even in the most extreme case imaginable, where an NSAG has unimpeded control over who comes in and goes out, attempting to implement activities related to the three proposals put forth in this article without some sort of consent from the State(s) involved in the conflict is likely to backfire. States might forbid or clamp down on such activities under the view that they give “legitimacy” (or material support) to NSAGs. Therefore, it is crucial to assess the relationship between specific States and NSAGs assiduously and to build a solid engagement and implementation strategy centred around that understanding.

## Conclusion

### An obligation for all

The three proposals put forth in this article – COPAF, COPAF capacity-building and RMATs – are closely intertwined and complement each other. They work better together and are less effective when implemented separately. COPAF is a conceptual framework for capacity-building and proportionality assessments that RMATs can use. It is also a common standard for comparing the quality of various capacity-building programmes and different proportionality assessments. Capacity-building increases the use of COPAF and reinforces its understanding. RMATs can be established through capacity-building, given that there is political and military buy-in to do so.

One of the main objectives of the three proposals is to counter State-centric bias in proportionality and bring NSAGs into the fold as equal duty-bearers of IHL by not just regurgitating rules and laws that NSAGs did not consent to but instead

<sup>56</sup> ICRC, *Engagement with Non-State Armed Groups: Why, How, for What Purpose, and Other Salient Issues*, position paper, Geneva, March 2021, p. 2.

<sup>57</sup> ICRC, above note 19, p. 38.

suggesting concrete ideas to assist NSAGs. COPAF provides the theoretical foundation and can be adjusted according to the respective realities of the military actors while obligating adherence to minimum standards that cannot be derogated from. Capacity-building, in particular, can benefit NSAGs that traditionally lack the capacity which States possess. States would also benefit from capacity-building directly when it is carried out by their military forces and indirectly when it is carried out for NSAGs, as both cases would contribute to the practice and dissemination of proportionality and reduce the number of disproportionate attacks on the battlefield.

When implemented, the three proposals can improve the capacity of NSAGs to comply with proportionality, minimize the use of ignorance as a pretext for non-compliance and provide better guidance in targeting dilemmas involving dual-use objects. It would be naive to believe that the three measures proposed here will magically inspire all NSAGs to take proportionality to their hearts; some may reject the applicability of IHL as a whole, as part of a broader rejection of the prevailing international order.<sup>58</sup> However, the very fact that the three proposals exist and are ready to be provided to NSAGs willing to consider them is a critical starting point. COPAF and capacity-building, in particular, enable engagement based on a mutual understanding, which can be used to assess not only one's own conduct but also the conduct of other parties.

It must be noted that COPAF capacity-building is not just for NSAGs but for State forces as well. This article singles out NSAGs for capacity-building because they need external assistance, not because NSAGs have more of an obligation to build capacity than States, nor because there is proof that NSAGs are more likely to violate proportionality than States. The number of disproportionate attacks and ensuing civilian casualties is hard to ascertain, but it is not uncommon to find conflicts in which States kill more civilians than NSAGs. In Syria, for instance, the Syrian regime and Russian forces are responsible for most of the civilian deaths, not NSAGs.<sup>59</sup> And while States are said to wield the right to "legitimate violence", this does not mean that all State violence is legitimate or proportionate in the eyes of IHL<sup>60</sup>. Enforcing proportionality compliance by States and NSAGs means working toward flattening the disparity between the two by supporting NSAGs and tempering the already formidable bias that favours States. Proportionality is a yardstick for all to judge conduct in warfare, and if it is to be a yardstick at all, there should be no obstacles as to who can use it.

<sup>58</sup> *Ibid.*, p. 39.

<sup>59</sup> In 2020, 432 out of 1,734 civilian deaths in Syria were caused by the Syrian regime, which includes the Syrian army, security, local militias and Shi'ite foreign militias. On the other hand, NSAGs killed far fewer civilians – twenty-one civilians were killed by ISIS and twenty-six by Hay'at Tahrir Al-Sham. See Syrian Network for Human Rights, *Extrajudicial Killing Claims the Lives of 1,734 Civilians in Syria in 2020*, 1 January 2021, p. 9.

<sup>60</sup> For instance, the UN Human Rights Council's report on IHL violations in Syria specifically singled out a Syrian Air Force attack on Al-Feijeh spring, which provides 70% of all of Damascus's water, in 22 December 2016. The report stated that "[t]he attack amounts to the war crime of attacking objects indispensable for the survival of the civilian population, and further violated the principle of proportionality in attacks". See Human Rights Council, *Human Rights Abuses and International Humanitarian Law Violations in the Syrian Arab Republic*, 21 July 2016–28 February 2017, UN Doc. A/HRC/34/CRP.3, 10 March 2017, paras 32, 37.

## Further questions

There are further questions to be contemplated that are relevant to the arguments put forward in this article. How should the different characteristics of States and NSAGs be considered when implementing the three proposals? How does the relationship between the State(s) and NSAG(s) engaged in a conflict affect implementation? Does the implementation of the proposals influence more traditional humanitarian activities, such as aid delivery? Can COPAF capacity-building provide an opening to discuss other issues with NSAGs, such as humanitarian access? Can the concept of accountability be incorporated, and how should military actors be held accountable for actions that they have willingly undertaken? There are a myriad of questions that remain to be explored. The purpose of this article is not to devise a comprehensive strategy that covers every minute detail, but to introduce new ideas for proportionality compliance and to explain the underlying logic of those ideas. Even if one is not convinced of the merits or effectiveness of the three proposals, they will hopefully spark further conversations on how to bring NSAGs into the fold of proportionality compliance without marginalizing them by clinging onto State-centric approaches such as parroting their obligations under the Geneva Conventions without providing any real solutions.

Another way in which State-centric bias reveals itself is when discussing accountability for NSAGs. There is no shortage of literature discussing ways to make NSAGs more accountable under international law, including IHL. This is essentially States (and entities operating under the consent of States, such as independent organizations and academia) attempting to hold NSAGs more accountable. However, not many have asked why NSAGs should not, in turn, be able to hold States accountable for their actions. There are mainly two reasons why the possibility of accountability flowing in this direction has not been considered widely. Firstly, NSAGs have been viewed by many as inherently immoral, so the notion of them holding States accountable has never been given serious consideration. Secondly, and related to the arguments presented in this article, NSAGs have not had the means to hold States accountable. Traditionally, the UN, civil society organizations, independent monitors and humanitarian agencies have been the ones to point out and criticize proportionality violations by States. However, when attacks are conducted on NSAGs or in NSAG territory, NSAGs are better positioned to assess the proportionality of the attacks than outsiders. Once COPAF capacity-building is carried out for NSAGs, the window of opportunity for NSAGs to hold States accountable for proportionality violations will become wider, bringing military actors closer to true equity in proportionality. Accountability in proportionality should be a two-way street.

Not all NSAGs will be interested in holding States accountable for proportionality violations or complying with proportionality themselves. There must be a pre-existing level of voluntary will to comply for NSAGs to adapt COPAF, build capacity and then, if capacity allows, create RMATs (or tweak existing intelligence-gathering structures). Even then, they would be excluded

from certain privileges that States possess. As previously stressed, NSAGs are not able to become parties to international treaties and their practice does not, *lex lata*, contribute to the formation of international customary law.<sup>61</sup> NSAGs have also been excluded from the elaboration of good practice standards, such as the Irish-led process on civilian protection from explosive weapons.<sup>62</sup> While the three proposals do not remove the limitations that exclude NSAGs from contributing to customary international law, they can help NSAGs to comply with proportionality and produce their own best practices that other NSAGs and even States could learn from, which is something that has seldom been considered. Only when NSAGs are no longer viewed as passive entities that norms must be forced upon and are instead treated as dynamic entities that can create best practices (which can develop into norms as they accumulate) will NSAGs and States genuinely be on an equal footing. And by implementing the three proposals, NSAGs can start to possess the capacity and knowledge to produce and enforce norms, specifically with regard to proportionality.

The title of this article alludes to *For Whom the Bell Tolls*, Ernest Hemingway's classic 1940 novel revolving around guerrilla fighters in the Spanish Civil War. Hemingway used a quote from metaphysical poet John Donne's series of meditations as the title to epitomize the book's central theme: that all persons, all entities, are bound to one another by a common thread, whether that be love, humanity or the outcome of a civil war. John Donne's mediation reads:

No man is an Iland, intire of it selfe; every man is a peece of the Continent, a part  
of the maine; if a Clod bee washed away by the Sea, Europe is the lesse, as well as  
if a Promontorie were, as well as if a Manor of thy friends or of thine owne were;  
any mans death diminishes me, because I am involved in Mankinde; And  
therefore never send to know for whom the bell tolls; It tolls for thee.

What binds everyone in armed conflict is proportionality, from the uniformed commander of State forces behind a monitor ordering surgical missile strikes to the non-State combatant fighting with small arms. If proportionality were a bell, there would be no need to ask for whom it tolls, except rhetorically. It tolls for everyone in armed conflict, though not everyone can hear its call. The hope of this article is that the ideas presented herein will give those engaged in armed conflict the power to sound and heed the clarion call of proportionality.

61 Ezequiel Heffes and Jonathan Somer, *Inviting Non-State Armed Groups to the Table: Inclusive Strategies towards a More Fit for Purpose International Humanitarian Law*, briefing note, Overseas Development Institute, Centre for the Study of Armed Groups, December 2020, p. 2.

62 *Ibid.*