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Do Soldiers' Lives Matter? A View from Proportionality

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A military operation is about to take place during an ongoing international armed conflict; it can be carried out either by aerial attack, which is expected to cause the deaths of enemy civilians, or by using ground troops, which is expected to cause the deaths of fewer enemy civilians but is expected to result in more deaths of compatriot soldiers. Does the principle of proportionality in international humanitarian law impose a duty on an attacker to expose its soldiers to life-threatening risks in order to minimise or avert risks of incidental damage to enemy civilians? If such a duty exists, is it absolute or qualified? And if it is a qualified duty, what considerations may be taken into account in determining its character and scope?

This article presents an analytic framework under the current international humanitarian law (IHL) legal structure, following a proportionality analysis. The proposed framework identifies five main positions for addressing the above queries. The five positions are arranged along two 'axes': a value 'axis', which identifies the value assigned to the lives of compatriot soldiers in relation to lives of enemy civilians; and a justification 'axis', which outlines the justificatory bases for assigning certain values to lives of compatriot soldiers and enemy civilians: intrinsic, instrumental or a combination thereof. The article critically assesses these positions, and favours a position which attributes a value to compatriot soldiers' lives, premised on a justificatory basis which marries intrinsic considerations with circumscribed instrumental considerations, avoiding the indeterminacy and normative questionability entailed by more expansive instrumental considerations.

Keywords: proportionality, force protection, international armed conflict, IHL

1. Introduction

Does the principle of proportionality in IHL require an attacking state to expose its soldiers to life-threatening risks in order to minimise risks of incidental damage to enemy civilians? If such a duty exists, is it absolute or qualified? And if it is a qualified duty, what considerations may be taken into account in determining its character and scope?

This article presents an analytic framework under the current IHL legal structure, which outlines different formulae for defining the attacking state's duty to risk its soldiers. Its aims are, first, to clarify and elucidate the conceivable justifications and considerations, thereby furthering

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the discourse regarding this controversial[1] legal question; second, to enhance intellectual integrity and interpretive consistency by spelling out the logical conclusions that are entailed by each formula; and third, to argue for a favoured formula.

An interpretive approach is adopted in the search for a workable formula which best interprets existing IHL provisions in light of fundamental principles of IHL. The analysis draws on three main principles: (i) human dignity and the protection of personhood; (ii) military necessity balanced against humanitarian concerns;[2] and (iii) a preference for workable formulae that give clear guidance to military commanders and state parties. Therefore, importantly, the article is not descriptive in the 'narrow' sense of exploring state practice; nor does it draw on an ideal moral viewpoint in pursuit of desirable legal arrangements that are unconstrained by the IHL regime.

2. SCENARIO

The analysis centres on the following scenario. A military operation is about to take place during an ongoing international armed conflict. The operation is intended to achieve a 'concrete and direct military advantage',[3] such as the destruction of an enemy ammunition storage facility. There is no doubt:

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[1] Gardam treats this matter as an 'area of uncertainty': Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (CUP 2004) 115. Shany suggests that *state practice* indicates that risk-avoidance by armies is acceptable, even when it infringes some humanitarian concerns: Yuval Shany, *The Principle of Proportionality under International Law* (Israel Democracy Institute 2009) 63–64 and accompanying notes (in Hebrew). Anthony PV Rogers, 'Zero-casualty Warfare' (2000) 82 International Review of the Red Cross 165, 178, quotes the previous British Ministry of Defence, *British Defence Doctrine* (JWP 0-01) (1996) which stipulated that 'there may be occasions when a commander will have to accept a higher level of risk to his own forces in order to avoid or reduce the collateral damage to the enemy's civil population'. Interestingly, the 2004 manual opts for a different stipulation: 'Sometimes a method of attack that would minimise the risk to civilians may involve increased risk to the attacking forces. The law is not clear as to the degree of risk that the attacker must accept. The proportionality principle does not itself require the attacker to accept increased risk. Rather, it requires him to refrain from attacks that may be expected to cause excessive collateral damage. It will be a question of fact whether alternative, practically possible methods of attack would reduce the collateral risks. If they would, the attacker may have to accept the increased risk as being the only way of pursuing an attack in a proportionate way': The Joint Service Manual of the Law of Armed Conflict (Joint Service Publication 383, 2004), para 2.7.1. cf Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia' (2000) 39 International Legal Materials 1257, para 21: '[a military commander] is entitled to take account of factors such as … risks to his own forces' (making reference to Rogers, ibid).

[2] Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 3 ('Additional Protocol I' or 'AP I'); Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross, Martinus Nijhoff 1987) ('ICRC Commentary') 681–82.

[3] AP I, art 57(2)(b). But cf the Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90 ('ICC Statute') art 8, which uses a different formula ('clearly excessive in relation to the concrete and direct overall military advantage anticipated'). The phrase '*overall* military advantage' seems broader than AP I, though arguably still falls short of referring to the whole conflict: Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (International Committee of the Red Cross, CUP 2003) 170–71. The ICC formula also sets a *'clearly* excessive' standard which, according to Fletcher, should lead to conviction only *in cases of extreme disproportion*: George Fletcher, 'Reclaiming

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- as to the necessity for attacking this military objective, nor as to the objective's 'effective contribution to military action';[4]
- that the objective is located in the vicinity of civilian installations or residential areas;[5]
- that by targeting intentionally military objectives only and not civilians the operation satisfies the IHL principle of distinction;[6] and
- that the manner in which the operation will be carried out does not violate IHL prohibitions against indiscriminate attacks.[7]

A military commander can carry out the operation using two methods of attack. Adopting the first method ('the aerial method'), the military objective will be aerially attacked; the operation is expected[8] to cause *c1* deaths of enemy civilians. Using the second method ('the ground method'), the attacker's ground troops will be used instead; the operation is then expected to cause *c2* deaths of enemy civilians with $c2 < c1$, as well as *s* deaths of compatriot soldiers.[9] For the sake of analysis, it is assumed that the financial cost entailed by both methods is similar (regardless of whether financial cost may legitimately be considered).

It is assumed that both *c1* and *c2* are proportionate *stricto sensu* to the expected military advantage to be achieved by the operation.[10] The ground method satisfies proportionality *stricto*

Fundamental Principles of Criminal Law in the Darfur Case' (2005) 3 Journal of International Criminal Justice 539, 561.

[4] AP I, art 52(2) defines military objectives as 'those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage'.

[5] This article does not enter into the debate over the implications of placing military objectives in the vicinity of civilian installations or residential areas, which revolves around interpreting AP I, art 51(7) ('The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations') and Convention (IV) relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287, art 28 ('The presence of a protected person may not be used to render certain points or areas immune from military operations'). See, for example, Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (CUP 2004) 129–30.

[6] AP I, art 51(2) enunciates that '[t]he civilian population as such, as well as individual civilians, shall not be the object of attack'. Article 52(1) similarly prohibits attacks against civilian objects. Notably, the principle of proportionality, discussed below, is a testament to the distinction that IHL makes between targeting civilians intentionally and causing civilian casualties inadvertently.

[7] AP I, art 51(4) and (5). It is assumed that all of the requirements regarding indiscriminate attacks are satisfied, save for art 51(5)(b), which can be interpreted as setting a proportionality test ('excessive') as part of the definition of an indiscriminate attack. Notably, IHL does not draw a distinction between the level of protection which should be afforded to enemy civilians and to civilians of a third party; this article nonetheless primarily uses the term *'enemy* civilians' in juxtaposition with *'compatriot soldiers*'.

[8] 'Expected' should be read as referring to the 'expected value' in probability theory terms. The 'expected number of deaths' can be explained intuitively as the average number of deaths had the same operation been carried out a very large number of times under the exact same circumstances.

[9] The expected loss of civilian lives may reflect markedly divergent maximal and minimal poles: for instance, two military operations may be expected to cause 10 civilian deaths; the first operation has a 10 per cent probability of causing 100 deaths and a 90 per cent probability of causing zero deaths, whereas the second operation has a 50 per cent probability of causing 15 deaths and a 50 per cent probability of causing 5 deaths. Distinguishing between the two scenarios may be normatively significant; nonetheless, it has no direct bearing on the claims examined in this article, since the normative dilemma may equally arise whether or not the military operations pose risks to the attacker's soldiers.

[10] See the analysis of the different proportionality tests in text at nn 19–24.

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sensu even if the expected loss of compatriot soldiers' lives *reduces* the attacker's military advantage.[11] Thus, the military operation may legally be undertaken in terms of proportionality *stricto sensu* using either method.

The applicability of the distinction between *jus ad bellum* and *jus in bello* proportionality is also assumed:[12] the overall effect of an operation is not evaluated when determining whether an operation is proportionate, nor is the justness of engaging in the armed conflict.[13] The analysis is situated in the *jus in bello* domain, and follows Article 57 of Additional Protocol I, assumed to be applicable between the parties to the armed conflict.[14]

3. Between Feasibility and Proportionality

Article 57 of Additional Protocol I may be interpreted as allowing a military commander to consider force protection in two contexts: first, the way in which it affects the means and methods that may be used to carry out an attack ('the feasibility analysis');[15] and, second, the extent to which the operation is expected to result in a military advantage ('the proportionality analysis').[16]

Regarding the means and methods of carrying out an attack, Article 57(2)(a)(ii) stipulates that those who plan or decide on 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 or

[11] It is assumed that, if the loss of some compatriot soldiers' lives reduces the attacker's military advantage, then the reduced military advantage is still proportionate (not excessive) in relation to *c2*. Importantly, this assumption should be distinguished from the assessment below of whether the possible additional military advantage (the averted risk to compatriot soldiers) is proportionate to the consequent additional risk to enemy civilians.

[12] Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (Basic Books 1977) advocates retaining the distinction between *jus ad bellum* and *jus in bello*, whereas Jeff McMahan, 'The Ethics of Killing in War' (2004) 114 Ethics 693, argues that the distinction is unsustainable in his account of the 'deep morality of war'. However, McMahan concedes that the 'laws of war' must diverge significantly from the 'deep morality of war': ibid 730. cf Robert D Sloane, 'The Cost of Conflation: Preserving the Dualism of the Jus ad Bellum and the Jus in Bello in the Contemporary Law of War' (2009) 34 Yale Journal of International Law 47. Sloane asserts that, on several occasions, *jus ad bellum* determinations have had an influence on the application of *jus in bello* rules. For instance, when sentencing two leaders of the Civil Defence Forces (CDF), a warring party in Sierra Leone's civil war, the Special Tribunal for Sierra Leone mentioned, as a mitigating factor, CDF's alleged legitimate cause 'to restore the democratically elected Government of President Kabbah': ibid 48–50. Similarly, the international assessment of the propriety of NATO's high-altitude bombing of Serbia during its 1999 campaign – a method designed to avoid risk to NATO soldiers – was arguably affected by the 'just cause' of preventing the continuation of ethnic cleansing of Albanian Kosovars, a *jus ad bellum* matter.

[13] This appears to be the prevailing view, primarily because permitting the overall effect of a single military *operation* undertaken during an armed conflict on the outcome of that conflict to be considered as part of the proportionality analysis arguably 'collapses' proportionality *jus in bello* into proportionality *jus ad bellum*. Similarly, if *jus in bello* proportionality assesses even partially the just causes of war, it cannot be assessed independently of *jus ad bellum* considerations, and especially of the moral importance of the conflict's causes. See Thomas Hurka, 'Proportionality in the Morality of War' (2005) 33 Philosophy and Public Affairs, 34, 44. See also Sloane (n 12) 50 and his references in fn 13.

[14] The article refrains from navigating the contentious terrain of determining whether some provisions of AP I have crystallised into norms of customary international law. See, for example, the manual published by the International Committee of the Red Cross: Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Vol I: Rules* (CUP 2005).

[15] AP I, art 57(2)(a)(ii).

[16] AP I, art 57(2)(b).

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civilian life, injury to civilians and damage to civilian objects'. According to one interpretation, taking precautions in order to minimise risk to enemy civilians by choosing a method which involves *excessive* risk to compatriot soldiers may render an operation 'unfeasible'; a military commander should therefore be permitted to include considerations of force protection in the feasibility analysis. This article, however, favours an interpretation of Article 57(2)(a)(ii) as referring to *empirical feasibility*, according to which the question is whether an attack can actually take place in the manner prescribed by its planners, and pose the expected level of risk to enemy civilians (rather than a higher level of risk to them), taking into account physical and psychological constraints.[17]

There are two main reasons for limiting the feasibility assessment to empirical constraints. First, in evaluating the methods and means of attack, Additional Protocol I refers to 'feasible' and 'excessive' as independent concepts; hence, interpreting 'feasible' as setting empirical rather than normative constraints on a planned attack contributes to achieving conceptual clarity. Absent such clarity, the risk to compatriot soldiers may end up being considered both at the feasibility stage *and* at the military advantage stage of the proportionality test; it may consequently be attributed *different weight* at each stage, and may even lead to attributing greater weight to force protection than is necessary. Second, the core meaning of 'feasible' seems to address an empirical possibility, rather than normative acceptability. For instance, it would sound awkward, from a linguistic perspective, for a commander to suggest that the ground method is unfeasible since it is expected to cause *s* casualties of compatriot soldiers, but that absent the option of an aerial method, the ground method would nevertheless be followed. Broadening the meaning of 'feasible' would hence be linguistically tenuous.

It should be noted that certain attacks may be *physically* possible, yet because of human psychology they cannot be expected to be carried out in the planned manner, and hence would be rendered empirically unfeasible. Consider, for instance, a plan of attack which is likely to expose soldiers to extreme risk if carried out as dictated to them; in order to avert such risk, soldiers are likely to carry out the attack in a different manner than that dictated to them, and may end up placing enemy civilians under a greater risk than the risk entailed by alternative methods.[18] It seems unreasonable to require a commander to choose a method which, because of empirical constraints caused by human psychology, may result in more enemy civilian deaths. Hence, if

[17] The ICRC Commentary does not offer clear guidelines as to the relevant considerations entailed by 'feasible precautions', though it seems to support a cautious approach; it is noted that, in the negotiations, some delegations suggested that 'feasible' means 'everything that was practicable or practically possible, taking into account all circumstances at the time of the attack, including all those relevant to the success of the military operations'. It is then opined that the latter criterion seems to be too broad since there might be reason to fear that, by invoking the success of military operations in general, one may end up neglecting the prescribed humanitarian obligations: ICRC Commentary (n 2) 681–82.

[18] cf Avishai Margalit and Michael Walzer, 'Israel: Civilians and Combatants' (14 May 2009) The New York Review of Books 56(8) 21–22. While Margalit and Walzer argue that soldiers should assume risks in order to reduce risks to enemy civilians, they qualify this duty in cases of exposure to extreme personal risk, and argue that soldiers 'don't have to take suicidal risk'.

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the ground method entails an extreme risk of such nature to compatriot soldiers, its unfeasibility would lead to its dismissal.

Significantly, though, according to the above interpretation of 'feasible', only under very extreme circumstances (where the precautions undertaken to minimise civilian casualties render the attack empirically unfeasible) would certain methods of attack be precluded; in most cases, several methods *are* empirically feasible. Consequently, the main assessment of this article's scenario follows a *proportionality* analysis, questioning whether the reduced risk to compatriot soldiers entailed by opting for the aerial method over the ground method may be legitimately considered when determining the military advantage, and, if so, on the basis of which criteria.

4. PROPORTIONALITY: GUIDING PRINCIPLES

In contemporary jurisprudence, proportionality analysis is commonly conducted using three tests: (i) rational connection, (ii) least harmful means, and (iii) cost–benefit (or proportionality *stricto sensu*).[19]

In a military operation context, a rational connection must be established between the means used and the destruction of the enemy's military objective. Under the least harmful means test, when faced with methods of attack which are expected to result in the *same* military advantage, a commander must choose the method that will cause the least incidental (or unintended) damage to civilians and civilian objects.[20] To satisfy the proportionality *stricto sensu* requirement, the incidental damage to civilians and civilian objects must not be 'excessive' in relation to the attacker's military advantage.[21]

The aerial and ground methods are both expected to destroy the enemy's military objective; hence, they satisfy the *rational connection* sub-test. If the aerial method is the only available method for attacking the military objective, it would satisfy the least harmful means sub-test, despite incurring *c1* enemy civilian deaths, since there would not be an alternative way of gaining *that* military advantage. Does the availability of the ground method – a less harmful means of

[19] For a detailed description of the proportionality sub-tests, see *Regina v Oakes* [1986] 1 SCR 103 [70] (Canada). Domestic courts have used proportionality in an IHL context: for example, HCJ 2056/04 *Beit Sourik Village Council v Israel and Israeli Defence Forces Commander in the West Bank*, 2004 PD 58(5) 807, ILDC 16 (IL 2004), 30 June 2004, Sup Ct (as High Court of Justice) (Israel) [40]–[41].

[20] AP I, art 57(3) stipulates 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'. This stipulation may literally refer to a choice between two separate objectives, the destruction of which is expected to result in a similar military advantage (eg two ammunition facilities in different locations). The ICRC Commentary, however, offers the following example by way of explanation: when attacking railways, an attacker should refrain from attacking railway stations, which are usually located in towns, and instead hit railway lines at crucial points, but away from inhabited areas: ICRC Commentary (n 2) 687. This example illustrates that the provision may be applied analogously to choices that are made between two methods of attacking the *same* objective, since the distinction between two separate objectives and two methods of attacking the same objective is sometimes blurry.

[21] See AP I, arts 57(2)(a)(iii) and 57(2)(b).

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attack in terms of deaths of enemy civilians (*c2*) – require a military commander[22] to choose it under all circumstances, or is there a discernible limit to the expected loss of compatriot soldiers that an attacker must endure in order to avert the additional loss of enemy civilians?

The answer depends in the first instance on whether the attacker's military advantage is reduced as a result of its expected loss of soldiers under the ground method. If loss of compatriot soldiers may *not* be legitimately considered as reducing the military advantage, the ground method and the aerial method achieve the *same* military advantage; hence, in order to satisfy the least harmful test, the commander must choose the ground method. If, however, loss of compatriot soldiers may be legitimately considered as reducing the gained military advantage, then both the ground and aerial methods satisfy the least harmful test, since they do *not* achieve the same military advantage.[23] The critical analysis is then conducted at the proportionality *stricto sensu* stage, where the additional military advantage (the averted risk to compatriot soldiers) is weighed against the consequent additional risk to enemy civilians.[24]

Significantly, the determination that loss of soldiers may legitimately be considered as reducing the military advantage is premised on the position that compatriot soldiers' lives are regarded as valuable (instrumentally for the military operation and/or intrinsically) when weighed

[22] The question whether proportionality ought to be assessed from a military commander's viewpoint or from that of an average (or 'reasonable') person is hotly debated; dissensus also persists as to whether a different threshold should be set for determining that an attack contravened IHL when an individual is tried for alleged war crimes. See, for example, ICC Statute (n 3) art 8(2)(b)(iv). However, resolving these matters has no direct bearing on this article's analysis.

[23] There is a conceivable scenario according to which loss of lives of enemy civilians itself *reduces* the military advantage that is gained by the destruction of the military objective: namely, that there is a 'hearts and minds' effect. However, this scenario does not pose a special difficulty to the model of this article since its ramification is that the additional military advantage gained by the *aerial method* is smaller – ie the averted risk to compatriot soldiers *minus* the military disadvantage of enemy civilian casualties (in terms of the 'hearts and minds' effect). To isolate the question of the value of compatriot soldiers and for the sake of simplicity, the scenario devised by this article assumes there is no 'hearts and minds' effect. Nevertheless, as shown, the 'hearts and minds' effect can easily be reintegrated in the proportionality analysis.

[24] If force protection of itself cannot be included in the military advantage side of the proportionality calculus, the ramifications are that when *the military objective is force protection* (for example, when a unit of compatriot soldiers is about to be attacked by a remote controlled missile that is launched from within the enemy civilian population, and an attack aimed at intercepting the missile entails risking enemy civilians) the interception cannot be undertaken, and inaction (resulting in risk to compatriot soldiers) must be accepted as the only choice. In other words, since destroying the missile entails no military advantage other than force protection, the interception would be disproportionate (excessive).

This choice between *inaction* (resulting in risk to compatriot soldiers) and *action* (averting such risk, at the cost of enemy civilians) raises the same dilemma, and hence fits the analytic model with regard to the choice between the aerial method (resulting in lesser risk to compatriot soldiers and greater risk to enemy civilians) and the ground method (resulting in greater risk to compatriot soldiers and lesser risk to enemy civilians). In other words, choosing the aerial method means choosing to save compatriot soldiers' lives. Furthermore, the missile interception scenario is in fact a special case of the more general case exemplified by the aerial or ground method scenario: in this special case (ie the missile interception) inaction cannot be construed as the least harmful means, since it does not achieve any military end, and the analysis will inevitably funnel into the last proportionality *stricto sensu* sub-test. Therefore, the more general scenario is assumed, according to which, unlike in the missile interception scenario, the military advantage entailed by an attack (namely, the destruction of the storage facility) justifies it independently of force protection considerations. Hence, both the ground and the aerial methods are legal (proportionate), and the military commander is not required to consider inaction.

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against enemy civilian lives. The analysis below assesses whether compatriot soldiers' lives may indeed be assigned a value when weighed against enemy civilian lives and, if so, what are the permissible grounds for determining such a value. In other words, the questions are whether soldiers' lives 'matter', and if they do (as this article contends), which justifications may determine their value.

5. The Value and Justification 'Axes'

The analysis presents five main positions (referred to as Positions A, B, C, Ca and D) regarding the appropriate manner for determining the scope of the attacker's duty to risk its soldiers in order to avert or minimise loss of enemy civilians. These positions are arranged along two 'axes': a value axis, and a justification axis.

At one end of the value axis, enemy civilian lives (*c*) are assigned an absolute value in relation to compatriot soldiers' lives (*s*); at its other end, compatriot soldiers' lives are assigned an absolute value in relation to enemy civilian lives. Along the value axis, infinite possibilities exist for assigning relative values to *c* and *s*, respectively. The justification axis aligns the potential justifications (intrinsic, instrumental or a combination thereof) for assigning *s* a given value. If, however, either *c* or *s* is assigned an infinite value, the justification axis is effectively rendered irrelevant.

6. The Five Positions

Position A stipulates that, given the alternatives, *any* concrete reduction of risk to enemy civilians should be preferred, whatever the cost in the lives of compatriot soldiers. Position A entails that the reduced risk to compatriot soldiers should *not* be taken into consideration when determining the extent of the military advantage incurred by an operation, as part of the proportionality *stricto sensu* analysis. Therefore, the aerial and ground methods would be considered as having the same 'concrete and direct military advantage'; hence, in order to satisfy the least harmful means requirement, a commander would have to choose the ground method. The 'pure' version of Position A is thus at one end of the value axis.

Michael Walzer submits that soldiers should accept life-threatening risks in order to save civilian lives,[25] asserting that 'the limits of 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'.[26] Walzer's position thus seems to restrict risk taking by soldiers only where an operation would fail the empirical feasibility test presented above.[27]

[25] Walzer (n 12) 156. Blum challenges the combatants/civilians status-based dichotomy, and calls for the introduction of (individualised) risk and least harmful means criteria for assessing the propriety of attacks directed against soldiers, so that not all soldiers will be 'fair game': Gabriella Blum, 'The Dispensable Lives of Soldiers' (2010) 2 Journal of Legal Analysis 69, 71–74.
[26] Walzer (n 12) 157.
[27] See text at n 18.

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Advocates of Position A may argue that when soldiers fight they act as the 'long arm' of the state, performing a public function by advancing the state's goals; soldiers' lives and rights are consequently rendered irrelevant. Indeed, Smith asserts that, in war, a soldier should be regarded as an instrument of military policy, whose personhood and attendant rights are suspended; Smith contends that the practice of shifting risk from compatriot soldiers onto enemy civilians is beyond the pale, since force protection cannot be an end in itself if it means privileging compatriot soldiers over enemy civilians.[28]

Position B considers the reducing of risks to soldiers to be an integral part of the attacker's military advantage, for several instrumental reasons: preserving military strength; enhancing military morale; and maintaining public support for further engagement in the armed conflict.[29] Analogies may be drawn between the manner in which soldiers are perceived according to Position B, and the manner in which military equipment is considered. Variations of Position B may delimit the scope of legitimate instrumental considerations, for instance, by allowing weight to be given to the preservation of military strength, but not to considerations of military morale and public opinion.

Position C attributes *intrinsic* value to the preservation of each compatriot soldier's life. Assuming that the propositions that (i) equal weight should be attributed to each compatriot soldier's life vis-à-vis other compatriot soldiers, and (ii) equal weight should be attributed to each enemy civilian's life vis-à-vis other enemy civilians are both fairly uncontroversial, it should be conceptually possible to set a constant which reflects the desirable ratio between the averted loss to enemy civilians and the expected loss of compatriot soldiers. Position C therefore lends itself to a linear formulation. This is in contrast with Position B, under which the instrumental value of, say, ten casualties among compatriot soldiers cannot a priori be assumed to be ten times greater than the instrumental value of a single casualty. Position B thus cannot be a priori assumed to be linear.

One may envisage multiple hybrid formulae combining elements of Positions B and C – namely, the suggestion that compatriot soldiers have a combined intrinsic *and* instrumental value, depending on the particular model. Among them lies this article's favoured position, referred to as Position Ca: compatriot soldiers are presumed to have an intrinsic value, while their *circumscribed* instrumental value (for instance, preservation of military strength) may also be taken into consideration. However, unlike Position B, Position Ca does not legitimise policy considerations, such as enhancing military morale or maintaining public support.

Position D mirrors Position A in that *any* concrete reduction of the risk to compatriot soldiers is considered desirable whatever the cost in enemy civilian lives, subject, as noted above,[30] to the

[28] Thomas Smith, 'Protecting Civilians … or Soldiers? Humanitarian Law and the Economy of Risk in Iraq' (2008) 9 International Studies Perspectives 144, 146–7. Notably, if one accepts that instrumental considerations are legitimate, Smith's view could lead to adopting Position B, discussed below. It seems, however, that Smith favours Position A.

[29] Regarding the third reason, see W Michael Reisman, 'The Lessons of Qana' (1997) 22 Yale Journal of International Law 381, 395–97, who argues that democratic societies involved in elective combat operations (such as interventions in foreign countries to shield indigenous populations from massacre) will have little tolerance for high numbers of casualties among their own soldiers. The argument can be applied *mutatis mutandis* to ongoing armed conflicts when public opinion may not be willing to accept a high casualty toll.

[30] See text at n 21.

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chosen method satisfying proportionality *stricto sensu* requirements. Kasher argues that in an imagined conversation between a state and its soldiers, the state will not be able to convince its soldiers to prefer the lives of enemy civilians to their own.[31] Benvenisti suggests that by imposing risks on compatriot soldiers in order to protect enemy civilians, compatriot soldiers are used merely as tools for the benefit of others.[32] He concludes that there is no general requirement on a state to risk the lives of compatriot soldiers merely in order to reduce risks to enemy civilians, although specific IHL rules entail the assumption of such risks.[33]

Positions B, C, Ca, D – and, indeed, *any* position that attributes *any* value to compatriot soldiers' lives under the scenario in this article – suggest that the reduced risk to compatriot soldiers may legitimately be taken into consideration in determining the extent of the military advantage incurred by an operation as part of the proportionality *stricto sensu* test analysis. The 'concrete and direct military advantage' expected to be achieved by the aerial method would thus be considered to be *greater* than the military advantage expected to be achieved by the ground method. Since the two methods differ in terms of the gained military advantage, the extent of the duty to risk compatriot soldiers in a concrete case will be determined by proportionality *stricto sensu* – namely by examining whether the additional risk to enemy civilians is excessive in relation to the additional military advantage (the reduced risk to compatriot soldiers).

Position D logically entails that *no* additional risk to enemy civilians will be considered excessive in relation to a concrete reduction of the risk to compatriot soldiers, while Positions B, C and Ca assign a relative value to the lives of both compatriot soldiers and enemy civilians.

Positions A and D could be seen as special instances of Position C's linear formula, in which compatriot soldiers' lives are respectively assigned either no value at all (Position A) or infinite value (Position D) in relation to enemy civilian lives. It is nevertheless contended that there is a fundamental difference between assigning infinite or finite values to human life. Since Positions A and D are premised on a contentious normative hierarchy between enemy civilians and compatriot soldiers leading to assigning infinite value to lives of the former (under position A) or of the latter (under position D), they will be appraised separately from Position C.

6.1 Positions A and D: Critical Appraisal

Position A attributes no value, intrinsic or otherwise, to the lives of compatriot soldiers. The IHL framework, however, accepts the risk of enemy civilian casualties during an armed conflict; rather than unrealistically attempt to avoid casualties altogether, it aims to minimise unintended harm. The IHL framework thus lends itself to a balancing formula.

[31] Notably, however, Kasher's article assumes a state fighting 'terrorism' emanating from a territory outside its control. It is unclear whether Kasher intended that the article's rationale would be applied in *any* armed conflict: Asa Kasher, 'The Principle of Distinction' (2007) 6 Journal of Military Ethics 152, 166.

[32] Eyal Benvenisti, 'Human Dignity in Combat: The Duty to Spare Enemy Civilians' (2006) 39 Israel Law Review 81, 90.

[33] ibid 108. Benvenisti notes that this conclusion does not preclude the possibility that compatriot soldiers have a *moral* duty to consider taking some risks to reduce harm to enemy civilians: ibid 90.

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Furthermore, Position A raises some conceptual difficulties. First, assigning no intrinsic value to the lives of compatriot soldiers seems to be incompatible with their universal rights to life and human dignity, since it should not be assumed that soldiers shed their humanness in its entirety when they are recruited, especially when military service is mandatory.[34] Notably, IHL provisions protect the human dignity and personhood of soldiers; an attacker, for instance, is prohibited from using means and methods of warfare that cause superfluous injury and unnecessary suffering.[35] One may argue that Position A does not deny compatriot soldiers their life and dignity; rather, their rights are always trumped by the duty to minimise incidental damage to civilians. However, since the human dignity of soldiers and the protection of their personhood appear to be one of IHL's guiding principles, this contention seems problematic. Following Dworkin, it may be argued that principles, unlike rules, are not applied in an 'all-or-nothing' fashion; rather, they carry balanceable weights.[36] Suggesting that an IHL principle should be given *no* weight along a spectrum of possible options is arguably tantamount to discarding the relevance of the principle.

Second, it may be suggested that Position A, at least in its 'pure' form, relies on two interconnected tenuous assumptions: that the attacker's duty to minimise incidental damage to enemy civilians is hierarchically superior to the duty that it owes its soldiers to minimise the risks to which it exposes them, and that, consequently, the former duty always trumps the latter duty.[37] These assumptions may rely on the contention that soldiers lose their immunity from attacks when they are recruited, and that the risk to compatriot soldiers' lives should consequently never be shifted to civilians who retain their immunity from attack. Nonetheless, it is

[34] ibid 83–84. Benvenisti argues that regardless of whether international human rights law should be directly applicable in armed conflicts, the principles that inspire the law on human rights should have bearing on the interpretation and application of IHL. Benvenisti refers to the Universal Declaration of Human Rights, which recognises 'the inherent dignity and … equal and inalienable rights of all members of the human family': Preamble to the Universal Declaration of Human Rights, UNGA Res 217 A(III), 10 December 1948, as well as the Preamble to the International Covenant on Civil and Political Rights stating that the rights in the covenant 'derive from the inherent dignity of the human person' (entered into force 16 March 1976) 999 UNTS 171: Benvenisti (n 32) 86.

[35] For example, the prohibition on causing unnecessary suffering to enemy soldiers, enunciated in AP I, art 35(2), and in Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (entered into force 26 January 1910) art 23(e). See also Common Article 3 of the Geneva Conventions (as well as AP I, art 75) proclaiming with regard to persons who are in the power of a party to the conflict that, as a minimum, 'the following acts are and shall remain prohibited at any time and in any place whatsoever … outrages upon personal dignity'. See also Gardam (n 1) ch 3. Gabriella Blum, 'The Laws of War and the "Lesser Evil"' (2010) 35 Yale Journal of International Law 1, 57 quotes the canonical 1899 Martens clause, and suggests that general principles of military necessity and humanity mandate that some respect for the well-being of soldiers, even when they are actively engaged in the war effort, is warranted. Blum further posits that IHL should be conceived as treating the death of soldiers as a 'lesser evil' rather than a goal to be promoted.

[36] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 24, 26–27. Similarly, Alexy distinguishes between rules and principles, suggesting that rules are definitive, non-balanceable norms, whereas principles are competing optimisation requirements which should be realised to the 'greatest possible extent', applying proportionality: Robert Alexy, *A Theory of Constitutional Rights* (OUP 2002) 47.

[37] Notably, this duty cannot be derived from IHL; rather, it can be considered as part of a 'social contract' between states and soldiers fighting on their behalf. Similarly, Kasher argues that states have a moral obligation to their soldiers qua citizens to justify their military activities: Kasher (n 31) 155.

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submitted that the latter contention is a *non sequitur*: IHL *permits* an enemy to attack soldiers *intentionally*; however, such permission does not entail that military commanders have a *duty* to accept 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. Indeed, suggesting that the permission to attack soldiers intentionally entails a corresponding prohibition on shifting risks to civilians would analogously mean that military commanders would be prohibited from shifting risks to their military objectives or equipment that are caused by enemy attacks.

Similarly, the fact that from the attacker's point of view, IHL gives enemy soldiers less weight than it gives enemy civilians does not imply that the duty of the attacker to its soldiers is inferior to its duty to the enemy's civilians, regardless of the justificatory basis for IHL's status-based distinction.[38] Even if there is a hierarchy between the duty to minimise incidental damage to enemy civilians and the duty that the attacker owes to its soldiers, it does not necessarily mean that the attacker's duty to minimise incidental damage always trumps the duty that it owes to its soldiers: a balancing act between competing duties may take place even if one duty is deemed hierarchically superior to the other. The above considerations may apply a fortiori when the soldiers engaged in the operation are conscripts.

One may draw an analogy, based on prevalent moral intuitions, which cuts against assigning absolute value to compatriot civilians' lives, whatever the cost in compatriot soldiers' lives. Consider the following scenario. A compatriot civilian is held by the enemy as a human shield in the vicinity of a military objective from which attacks are being launched against the compatriot's civilian population. A counter-attack is planned to destroy this military objective, with two options at hand: (i) launching a ground attack that will not risk the human shield, but is expected to result in 100 deaths of compatriot soldiers; or (ii) an aerial attack, in which no risk will be posed to compatriot soldiers' lives, but the human shield's life will be put in danger. In such a scenario, there is clearly a limit to the number of compatriot soldiers a society would be willing to risk; if so, it is unclear why the enemy civilians should enjoy greater protection than compatriot civilians.[39]

Furthermore, at least on a consequentialist account,[40] it is asserted that a consistent application of Position A to the letter would result in unacceptable outcomes. Consider a military objective that an attacker would reasonably choose to destroy at the expected cost of some incidental damage to enemy civilians. Position A states in essence that *no* risk posed to *any* number of compatriot soldiers justifies placing *any* number of enemy civilians at *any* risk. It follows that to justify causing *any* incidental damage to enemy civilians, an attacker must contend that the pursued

[38] For descriptions of three major justifications for the IHL principle of distinction, see Blum (n 25) 86–92.
[39] cf Blum who argues that, for a country at war, protecting its soldiers is as strong (and sometimes even immediately stronger) an interest as protecting its civilians, since soldiers are the government's war machine and their success will determine the fate of the government and the country: Blum (n 35) 59.
[40] A consequentialist account seems to be more compatible with IHL provisions concerning unintentional incidental damage. cf Blum, ibid 41–42, arguing that under a deontological paradigm it is hard to account even for some of the absolute IHL prohibitions.

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military objective is of greater value than *any* number of its soldiers. In other words, Position A stipulates that only a military objective that justifies risking an *unlimited* number of compatriot soldiers would justify causing *any* incidental damage to enemy civilians.[41]

Now, even if an extreme scenario may exist in which a certain military objective would be deemed so vital as to justify risking an unlimited number of compatriot soldiers, setting such a high threshold for carrying out an attack in all cases where an attack may cause incidental damage to enemy civilians seems to be a manifestly unreasonable interpretation of the IHL proportionality principle.

Finally, from an empirical perspective, conventional wisdom holds that since armies are made up of human beings, soldiers have instrumental value for the military. By maintaining that the actual ('concrete and direct') instrumental value of compatriot soldiers may not legitimately be considered when determining a military advantage, Position A appears to stray away from the assumptions underlying IHL.[42] As noted above, under IHL, the instrumental military value of equipment and military objectives may justify launching attacks which will result in civilian casualties.

Position D raises similar difficulties. First, contra Position A, it assumes the opposite normative hierarchy between enemy civilians and compatriot soldiers, which results in the duty to one's own soldiers always trumping the duty to minimise incidental damage. Arguing for such a hierarchy is tantamount to suggesting that, in this context, the lives of enemy civilians have zero value when weighed against those of compatriot soldiers. The arguments regarding the principle of human dignity in relation to compatriot soldiers, discussed earlier, are applicable *mutatis mutandis* to enemy civilians.

Second, even if partiality towards one's society members (which some scholars premise on domestic analogies[43]) may be morally justified, the fact that it is the attacker's actions that are the source of the risk to enemy civilians ought to offset, at least to some extent, such partiality.[44] Common moral intuitions support the existence of an enhanced duty towards those who are subjected to danger by our actions, independently of the justifiability of these actions.[45] Consider, for

[41] In a semi-formalised way, this argument may be presented as follows:
Premise 1: There is (a military objective) > (*some* risk of deaths of *enemy civilians*).
Premise 2: (*any* risk of deaths of *enemy civilians*) > (*any* risk of deaths of *compatriot soldiers*).
Conclusion: that (military objective) > (*any* risk of deaths of *compatriot soldiers*).

[42] Ironically, perhaps, while Position A seems, at first glance, to be more restrictive from the attacker's point of view, a logically consistent application thereof suggests otherwise: since, according to Position A, the value of compatriot soldiers cannot be taken into account, the military advantage of the ground method for the purpose of the proportionality analysis is greater than its actual military advantage. Accordingly, in the context of proportionality *stricto sensu*, it justifies greater risk to enemy civilians than would be justified by the actual military advantage that it achieves.

[43] Frances Kamm, 'Failures of Just War Theory: Terror, Harm, and Justice' (2004) 114 Ethics 650, 674; Hurka (n 13) 61. See also the discussion in David Lefkowitz, 'Partiality and Weighing Harm to Non-Combatants' (2009) 6 Journal of Moral Philosophy 298.

[44] cf Hurka (n 13) 62.

[45] cf Michael S Moore, *Act and Crime: The Philosophy of Action and its Implications for Criminal Law* (OUP 2010) 34; Michael S Moore, *Placing Blame: A Theory of Criminal Law* (Clarendon Press 1997) 270. It may be contended that the use of domestic analogies as a ground for moral principles when interpreting IHL provisions

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instance, a situation in which a person is able to aid only one of two individuals, both of whom are suffering from the same injury; the first was accidentally injured by the person in the position to help, whereas the second was injured as a result of a natural disaster. One would arguably hold a greater moral duty to aid the first.[46]

Third, Benvenisti's argument – that imposing risks on compatriot soldiers to minimise enemy civilian deaths suggests that soldiers are used merely as tools – is quite hard to square with the fact that missions which soldiers undertake already require them to risk their lives to protect their fellow civilians. While, as noted above, being recruited to serve does not entail shedding one's humanity in its entirety, it does require some degree of risk-taking.[47] Furthermore, one is left wondering why imposing risk on the enemy's civilians does not amount to using *them* merely as tools to reduce risk to compatriot soldiers.

At least on a consequentialist account, it is asserted that a consistent application of Position D would result in unacceptable outcomes. Consider a military objective that the attacker would reasonably choose to destroy at the expected cost of *some* of its soldiers. This military objective is hence of a greater value to the attacker than the preservation of these soldiers' lives. Position D states, in essence, that *any* risk to *any* number of compatriot soldiers justifies causing *unlimited* incidental damage to enemy civilians. It follows, therefore, under this position, that the *greater* expected military advantage, in destroying the above military objective, should also justify causing unlimited incidental damage to enemy civilians.[48] Even if an extreme scenario may exist in which a certain military objective would be deemed so vital as to justify causing unlimited incidental damage to enemy civilians, adopting such a permissive standard in all cases where a military objective justifies risking compatriot soldiers seems to be a manifestly unreasonable interpretation of the IHL proportionality principle.

It may also be argued that destroying a particular military objective would justify any risk to compatriot soldiers only if it reduces the risk to *compatriot civilians*: otherwise, the state cannot justify putting its soldiers at risk.[49] Not destroying this military objective because of the risk of incidental damage to the *enemy*'s civilians would, by implication, (indirectly) increase the risk to *compatriot civilians*. Does this not imply, according to Position D, that such military objectives justify *any* incidental damage to enemy civilians? If not, following Kasher's conceptual

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is problematic; however, the partiality argument and the offsetting counter-argument, above, are equally susceptible to a disanalogy objection.

[46] It is nevertheless acknowledged that the moral relevance of this fact is closely related to the question of the moral relevance of the distinction between action and omission. Consequentialist theories view normative evaluations as dependent consequences. As such, at least act-consequentialism would not hold the distinction between acts and omissions to be morally significant, cf Piers Ben, *Ethics* (UCL Press 1998) 74.

[47] Christopher, rejecting Position D, posits that it is the nature of soldiers to take risks, and so the risk to the lives of soldiers should not be weighed equally against the risk to the lives of civilians: Paul Christopher, *The Ethics of War and Peace: An Introduction to Legal and Moral Issues* (Prentice Hall 1994) 165.

[48] In a semi-formalised way, this argument may be presented as follows:
Premise 1: There is (a military objective) > (*some* risk of deaths of *compatriot soldiers*).
Premise 2: (*any* risk of deaths of *compatriot soldiers*) > (*any* risk of deaths of *enemy civilians*).
Conclusion: that (military objective) > (*any* risk of deaths of *enemy civilians*).

[49] cf Kasher (n 31) 166.

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framework, how can a state reply to its citizen's question: 'Why does my state prefer an enemy citizen over me?'[50]

6.2 DISTINGUISHING POSITIONS B, C, AND CA

Positions B and C both assign a relative value to compatriot soldiers' lives. The difference between them lies in the justification axis: Position B assigns instrumental value to the lives of compatriot soldiers, while Position C assigns intrinsic value to each soldier's life. In contradistinction to both positions, Position Ca offers a hybrid model which permits circumscribed instrumental considerations to be taken into account alongside attribution of intrinsic value to compatriot soldiers' lives.

The suggestion that soldiers possess an instrumental value for an attacker seems quite straightforward. However, it does not necessarily follow, as Position B suggests, that *all* instrumental effects may legitimately be considered when determining a military advantage: the deaths of compatriot soldiers can affect public opinion, military morale, and military strength.

It would be normatively unacceptable to give weight to the potentially detrimental effects of compatriot soldiers' deaths on public opinion; moreover, such consideration would be likely to increase uncertainty by adding an imprecise parameter to the equation. The latter argument also cuts against permitting considerations of military morale.

Position B legitimises considerations such as maintaining public support for military operations. In democracies, the public exerts its political influence through periodic elections: politicians wishing to be re-elected may choose to adopt popular policies which are incompatible with international law obligations. It is submitted, however, that aside from an expression of personal preferences, voting is also a public function: voters should be expected to respect the state's international obligations. Permitting decision-makers to consider popular hostility to such obligations may be viewed as complicity with nationalist preferences.[51]

Importantly, this argument does not assume that the reason that it would be inappropriate to consider public opinion is because of the particular state's international obligation (such an argument is question-begging); rather, the argument is that because, for states, elections are a medium for collective decision-making, considering public opinion at the international commitment's *implementation* stage would be tantamount to saying that a 'state has a duty to do X, unless it doesn't want to'. No state would agree to be part of a multilateral or bilateral treaty containing such 'duties' which other state-parties may evade at their will.

It also seems quite difficult to establish a direct causal link between soldiers' deaths and the effects on public opinion. Similarly, while it is reasonable to assume that deaths of soldiers may

[50] ibid.

[51] Hurka (n 13) 66. Nonetheless, Hurka's position is qualified: he asserts that if, according to the politicians' assessment, declining public opinion is likely to result in defeat, choosing to reduce risk to compatriot soldiers may be proportionate. Nevertheless, the line which Hurka draws seems to be quite vague; the better view is that considerations which cannot be directly related to the operation's result should not form part of the equation.

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have adverse psychological effects on other soldiers – even if they are trained to accept that military operations involve such risks – the extent to which soldiers may be affected is extremely difficult to assess. In contradistinction to public opinion and military morale, the extent to which casualties affect military strength seems to be both directly linked and more easily discernible. Thus, attributing military significance to public opinion and military morale does not sit easily with Article 57 of Additional Protocol I, which requires an anticipated 'concrete and direct military advantage'. Moreover, even if Article 57 could be construed as permitting considerations such as military morale, IHL generally aims to set a workable framework capable of guiding military commanders, while Position B cuts against the need to make the proportionality formula as clear as realistically possible.

In view of the above, Position B is, arguably, too broad, since it allows any instrumental effect to be considered when determining a military advantage. However, Position B is also too narrow, since it assigns only instrumental value to compatriot soldiers' lives. Fundamentally, considering compatriot soldiers' lives as having only instrumental value is undesirable, whereas attributing intrinsic value to soldiers respects their human dignity, and is conceptually compatible with other IHL provisions such as the prohibition on causing superfluous injury. As noted above, soldiers do not cease to be human beings when they are recruited. Moreover, under Position B, the intrinsic value of compatriot soldiers will never in itself justify placing enemy civilians at risk; hence, Position B opens itself up to the objections related to Position A's rejection of the intrinsic value of soldiers.

It is thus submitted that the better view follows Position Ca – a hybrid model which attributes both intrinsic and circumscribed instrumental value to compatriot soldiers' lives, and which thus best satisfies the 'concrete and direct' military advantage criterion. Specifically, Position Ca accepts that soldiers' deaths reduce military strength, since militaries are based, in part, on manpower; thus, aversion to the deaths of compatriot soldiers may be legitimately considered on instrumental grounds.

Beside its normative attractiveness, which emanates from an appreciation of the significance of respecting human dignity and personhood, the intrinsic value component of Position Ca lends itself to a linear (and hence determinate) formulation, which can be consistently and transparently applied by decision-makers. Hence, compared with Position B, Position Ca reduces indeterminacy, thereby advancing IHL's workability aim. It requires setting a ratio between the relative values of the lives of compatriot soldiers and those of enemy civilians, or at least setting its contours; it thus enables decision-makers to apply the proportionality test in a consistent and reviewable manner.

It is important to distinguish between the nature of the justification for attributing weight to compatriot soldiers' lives and their actual weight. The fact that Position C and variations thereof, including Position Ca, justify attributing weight to compatriot soldiers' lives based on their *intrinsic* worth is conceptually separate from their actual weight when balanced against enemy civilian lives; the latter are uncontroversially assumed to be at least intrinsically valuable. Hence, the designated ratio between lives of compatriot soldiers and lives of enemy civilians depends on the weight given to the intrinsic worth of compatriot soldiers' lives. One possibility,

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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.[52]

7. CONCLUSION

This article explored whether IHL imposes a duty on an attacker to expose its soldiers to life-threatening risks in order to minimise the risk of incidental damage to enemy civilians, and, to the extent that such a duty exists, aimed to determine the considerations that may be used to determine its scope of application.

It was asserted that a proportionality analysis provides the suitable framework for assessing the extent of the duty. The article presented five positions for addressing this question. These positions were arranged along two 'axes': the value axis, which assesses the value assigned to compatriot soldiers in relation to enemy civilians, and the justification axis, which examines the justificatory basis for assigning certain values to the lives of compatriot soldiers and enemy civilians: intrinsic, instrumental or a combination thereof.

It was contended that the extreme positions on the value axis (Positions A and D), respectively assigning an absolute value to enemy civilian lives or compatriot soldiers' lives, are untenable, and that the choice remains between different formulae on the justification axis (Positions B, C and Ca), which assign relative values to both enemy civilian and compatriot soldiers' lives. These formulations inevitably entail some indeterminacy.

Position Ca, the favoured model, combines intrinsic and circumscribed instrumental justifications concerning the value of compatriot soldiers' lives. The intrinsic value component lends itself to a linear formulation which may serve to reduce indeterminacy. As for the instrumental value component, indeterminacy is also reduced by permitting only justifications that are related to military strength. Hence, Position Ca avoids the indeterminate features of an expansive instrumental approach (Position B). At the same time, it maintains a realistic view of IHL, which recognises the instrumental value of soldiers, and acknowledges their human dignity and personhood.

[52] Hurka (n 13) 64, who posits that they are of 'approximately equal weight'.

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