

# Proportionality in International Law

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MICHAEL NEWTON • LARRY MAY

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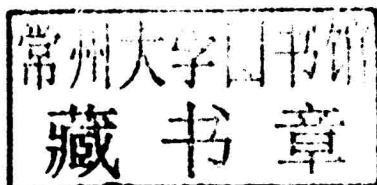
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# 1

## INTRODUCTION

PROPORTIONALITY, ALONG WITH distinction, necessity, and humanity, make up the chief principles that have been thought to govern armed conflict for hundreds of years. There has been a close relationship between the work of philosophers writing in the Just War tradition and lawyers who work in international law, especially today in international criminal law. Proportionality is debated in these two domains but also, very importantly, in military academies and in boot camps where those who are assigned the task of fighting armed conflicts are told that if they act disproportionately they will face legal proceedings afterwards. Conduct later seen to be *disproportionate* also raises a host of political and operational complications that commanders know are best avoided if at all possible. It is our goal to provide a comprehensive and also understandable analysis of proportionality that is useful for those who often must make tragic choices during armed conflict.

The authors of this book bring diverse expertise to the topic of proportionality in international law. The book seeks to meld abstract philosophical and legal analysis with very specific and highly emotive contemporary combat cases. The cases are discussed largely from the perspective of those who must make decisions, often in the midst of armed conflict. We hope to bring to the proportionality debate both analytic rigor and also sensitivity to facts on the ground. We will succeed to the extent that we impart more clarity to our readers about what proportionality has meant and what it could mean going forward as well as encouraging our readers to appreciate the very difficult task of making proportionality assessments, often while bullets whiz overhead.

This book seeks to analyze the modern usages of proportionality in order to achieve a more complete understanding of the values that proportionality preserves.

The most widespread references to proportionality come in the *jus ad bellum* and *jus in bello* debates linked respectively to the initiation and conduct of armed conflicts. Proportionality is thus intimately linked to overarching concepts of self-defense, lawful force, and the controlled application of violence. Proportionality also has a distinctive usage in post-conflict settings, so called *jus post bellum*.<sup>1</sup> As we will document, the concepts of proportionality are also central tenets in the formation of the European Union (EU) and are thus important to the decision-making of constitutional courts. The same term occurs in such fields as human rights analysis, criminal sentencing decisions and other law enforcement scenarios, election disputes and how to secure representation, the regulation of international financial markets, and of course in the decisions about whether to wage war and how to do so lawfully.

In this introductory chapter, we will set the stage for our much more elaborate discussions later in the book. We will first briefly set out some of the central ideas of the book in section I. We will explain our overall orientation in this study as well as a sense of why proportionality calculations are so important and so contentious. Then in section II, we will give a detailed example, drawn from Afghanistan, of how proportionality is relevant today. In the third section, we will provide a preliminary sense of the kind of guidance for soldiers and commanders that we will offer in much greater detail by the end of the book.

## I. A PRELIMINARY UNDERSTANDING OF *JUS IN BELLO* PROPORTIONALITY

Proportionality is the most controversial and arguably the most important when discussed in the context of armed conflict. The Latin phrase, *jus in bello*, has historically captured the rules and laws of war that concern the stage where a war has already been initiated and is now being fought. There are several well-recognized rules of armed conflict that set reasonable limits on how this fighting is to take place, such as that civilians should not be directly targeted. Proportionality is the rule that limits the severity of lethal force so that it only is properly employed in a way that is commensurate with the goal to be achieved.

The term proportionality recurs across an array of disciplines and usages; each conveys legally distinct meanings and applications as a technical matter. Chapters 4 and 5 contrast the applications of proportionality in both *jus ad bellum* (the law and morality of resort to force) and within *jus in bello* (the normative doctrines

<sup>1</sup> Melissa Labonte, *Jus Post Bellum, Peacebuilding, and Non-State Actors: Lessons from Afghanistan*, in *ETHICS, AUTHORITY, AND WAR: NON-STATE ACTORS AND THE JUST WAR TRADITION* 221–225 (2009), eds. Eric A. Heinze and Brent J. Steele. Also see LARRY MAY, *AFTER WAR ENDS: A PHILOSOPHICAL PERSPECTIVE* (2012).

applicable for using force in the midst of conflicts). The same term has very different meanings with often profound and context specific implications. One of the primary goals of this book is to clarify the boundaries of the proportionality concept. We hope that such clarity will in turn prevent reflexive acceptance that the term conveys common obligations, whatever the legal and philosophical context.

In the realm of mathematics and architecture, proportionality has rather objectively ascertainable implications. The frequentist interpretation of Bayes's theorem, for example, specifies that if "various alternatives are equally likely, and then some event is observed, the updated probabilities for the alternatives are proportional to the probabilities that the observed event would have occurred under those alternatives."<sup>2</sup> Thus, if a quantity  $x$  is proportional (directly) to another quantity  $y$ , then  $x$  is written as  $x = ky$ , where  $k$  is called the Constant of Proportionality.<sup>3</sup> By contrast, proportionality as applied within moral and legal discussions is inherently complex because it is not simply matter of mathematical expectancy or extrapolation of a known premise.

Proportionality limits the use of lethal force within the war-fighting domain by reference to a relatively fixed standard: The costs of the use of lethal force must be outweighed by the value of what the lethal force is meant to accomplish, the military objectives of the use of force. As we will often characterize it, proportionality involves the application of a fixed standard by individuals who must subjectively consider context and circumstance in assessing the relative weights of the military objectives they pursue. Proportionality sets limits on what commanders and soldiers can do—they are not free to act in their own discretion. The thresholds of proportionality we will discuss, especially in the final chapter, permit greater or lesser permissibility, but that permissibility is relative to the fixed, rather stringent sets of restrictions (what we will call thresholds within which the principle of proportionality functions as a default governing constraint).

Some have said that in war commanders must be given deference to take those actions that will win wars. To a certain extent, *jus in bello* proportionality is both somewhat consistent with this view and also somewhat opposed to it. At the moment of decision, the commander has to assess whether the use of lethal force is appropriate, given what the commander judges to be necessary to accomplish the mission he or she has been given. But in another sense, this discretion is limited in that the commander is supposed to act only on the basis of what a reasonable person would do in these circumstances, and the thresholds of proportionality we will set

<sup>2</sup> Bayes's Theorem Principle of Proportionality, available at <http://www.cut-the-knot.org/Probability/Proportionality.shtml>

<sup>3</sup> Constant of Proportionality, available at [http://www.icoachmath.com/math\\_dictionary/Constant\\_of\\_Proportionality.html](http://www.icoachmath.com/math_dictionary/Constant_of_Proportionality.html)

out are fixed in the sense of reflecting what any reasonable commander should find acceptable.

Reasonableness means, at a minimum, that in judging the values of the means against the goal to be achieved, the decision is not fully up to the discretion of the commander—since if the commander acts unreasonably he or she has gone beyond the bounds of this discretion. At the moment of decision, the commander is the one who is best placed to weigh whether the use of lethal force is appropriate. But even in that pressure-cooker environment, proportionality sets the following limit: Act only in ways that are reasonable, that someone in the shoes of the commander would view as appropriate.

The shorthand phrase *reasonable commander* or *average actor* hardly captures the complexity of these interrelated factors, and the subjective valuations at the center of even the most elemental proportionality calculation. Yet, in deciding what is proportionate and what is disproportionate, especially during war or armed conflict, what is a reasonable assessment is about the best that can be hoped for. Nonetheless, as this book proceeds we will give advice to decision-makers about better and worse ways to make these assessments.

In this book, we will spend considerable time setting out the historical sources of *jus in bello* proportionality as well as the myriad legal frameworks today that define what proportionality means as a matter of international law. Our contention is that there is a core of *jus in bello* proportionality that has remained fixed for generations. A major goal of our book is to set out that core as clearly and comprehensively as possible. Here we aim to clear up confusion.

But another major goal of our book is critically to assess the current law of proportionality in normative terms. A distinction drawn in law is important here. The actual state of law at any given moment is called *lex lata* whereas what that law should be, from a given normative perspective, is called *lex ferenda*. We are interested in both of these projects: the description of the current state of international law especially concerning *jus in bello* proportionality (*lex lata*), and the normative assessment, often drawn in human rights terms, of what that law should be (*lex ferenda*).

At the moment, the long-standing rules of *jus in bello* proportionality as articulated in international humanitarian law are being challenged by those who are strongly influenced by human rights norms. As one example, traditional proportionality assessment was focused almost exclusively on weighing the likely collateral damage (the indirect damage to civilians) against the military objective. The lives of soldiers on both sides of the armed conflict were not weighed in the calculation of whether the lethal use of force was disproportionate in a given case. This was and still is the current state of the law (*lex lata*) of proportionality.

But many people are asking why the lives of soldiers should not be added into the *jus in bello* proportionality calculation. One reason, of course, is that if the lives of soldiers were given very great weight, lethal force would rarely if ever be proportionate. Wars could not be fought and won if a given commander could lawfully use lethal force against lawful targets only in strict proportion to the casualties anticipated or suffered by friendly forces. In this book, we will not seriously consider revised proportionality rules that would make all lethal action during war disproportionate. Instead, we are primarily interested in giving advice to soldiers and commanders who have already entered into combat situations. In this sense, we take an explicitly soldier-oriented perspective in seeking to understand and map the contours of proportionality.

Nonetheless, we will ask why it is, from the standpoint of what the law should be (*lex ferenda*), that the lives of soldiers should not be part of the proportionality calculation. And in fact today, commanders are raising just this question: Should not the lives of the soldiers under my command matter in assessing whether a given strategy or tactic is proportionate or disproportionate? And should we not also ask about the lives of “enemy” soldiers? Taking a soldier-centered perspective in our book will also cause us to wonder, as a matter of what the law should be, if the current state of law should not be changed so as better to support the lives of soldiers.

The human rights concerns just voiced will give a distinctive flavor to our analysis in this book. It is important though to notice two uses of human rights in what follows. The first use of human rights is as a normative perspective, in which every person’s life and liberty is to be respected and given equal weight. But there is another use of human rights, namely, as a currently recognized legal regime governing non-international hostile situations. We will sometimes refer to a human rights perspective as a normative framework (*lex ferenda*), and sometimes refer to human rights as a matter of accepted law (*lex lata*). In Chapter 5, these two uses are brought together, but only partially.

Before setting out an elaborate example, let us briefly indicate the framework of proportionality if armed force is at issue. In our view, there are five distinct thresholds for *jus in bello* proportionality that we envision: (1) for war or armed conflict; (2) for the special case of self-defense during war and in other contexts; (3) for emergency situations, such as terrorist attacks, and for other hostile acts committed by non-State actors against States; (4) for the preemption of hostilities and the accompanying erosion of human rights and safety; and (5) for areas where states exercise a very high degree of control over the population, such as during occupation or relief operations in the wake of natural disasters. These thresholds establish increasingly stringent proportionality conditions, ending with a situation that is almost entirely governed by human rights considerations rather than war-fighting norms. As we

will show, the human rights situations are the most stringent and the situations governed by the laws and customs of war, especially involving self-defense, are the most permissive threshold restraints that govern what are proportionate responses. These threshold considerations are what we earlier referred to as the fixed component of proportionality assessments. The subjective component involves how these are interpreted and applied to concrete cases in very specific contexts. We will next provide an elaborate example of the issues and problems that arise today when commanders try to decide when it is reasonable to use lethal force. Here three issues are most important: self-defense, context, and comparable weights.

## II. AN EXAMPLE OF FRIENDLY FIRE BETWEEN THE UNITED STATES AND PAKISTAN

We now will raise an example to illustrate the importance of the proportionality debate and focus attention on what we regard as the imperative need for a more precise understanding of its components and normative import, especially concerning context and comparability. For more than ten years after September 11, 2001, the United States and its allies waged war in Afghanistan against the Taliban, who were believed to be harboring the perpetrators of the attacks on the World Trade Towers in New York City. Much of the war was fought in the tribally controlled, semi-autonomous, regions of Afghanistan on its border with Pakistan. As Taliban fighters sought sanctuary outside the borders of Afghanistan, Operation Enduring Freedom often spilled over into the mountainous regions of Pakistan due to the tenuous authority exercised by the Pakistani government.

On the night of November 26 and the morning of November 27, 2011, 24 Pakistani troops were killed by the US just inside of the Pakistan border. American forces had been sent to the village of Maya several miles from the Afghanistan-Pakistan border in order to engage and clear Taliban fighters from the village. Soon after arriving at Maya, US soldiers reported that they were fired upon first by machine gun fire and then by increasingly accurate mortar fire that seemed to originate from a position on the ridgeline very near the Pakistan border.

The Pakistanis claimed that the firing was not directed at the U.S. troops. To their credit, Pakistani officials had established the two outposts some 1,000 feet apart in an effort to help seal the notoriously porous border which would have had the salutary benefits of preventing the enemy from seeking safe haven on Pakistani soil and protecting Pakistani tribes from cross-border attacks. The response by the United States to the perceived attack against their troops was to launch helicopter and gunship attacks for between one and two hours against the Pakistani positions, resulting in death of 24 Pakistani troops and destruction of the Pakistani military base.

The outcry from Pakistan was immediate and fierce, and the military effect on North Atlantic Treaty Organization (NATO) operations was equally immediate and nearly disabling. The Pakistanis termed the sustained attacks as a “grave infringement” of national sovereignty, and closed the Torkham border crossing causing trucks full of needed supplies to sit idly at the border. Thousands of Pakistani citizens protested in the streets, and the military funerals were the centerpiece of profound national unity and grief. Labeling the American response as “unprovoked” the Pakistani Prime Minister Yousef Rasa Gilani announced that the US would be required to vacate the Shamsi Air Base located in southwestern Baluchistan province.

Neither side, Pakistan or the United States denied that Pakistani military casualties resulted from US helicopter attacks. In fact, this incident was the most important friendly-fire incident of the entire decade of war. There is dispute about whether Pakistani forces intentionally fired on the US ground forces in Maya village. There is also dispute about the length and intensity of the US attack, particularly in view of the Pakistani claim to have informed “US/ISAF about the incident at multiple levels within minutes of initiation of US/ISAF fire.” The Pakistani response bluntly concluded, “The US Investigative Report, is structured around the argument of ‘self-defense’ and ‘proportional use of force,’ an argument ‘which is contrary to the facts and therefore self serving.’”

The Pakistani claim that the US response was disproportionate turns on three issues. First, was the US response one of self-defense? Second, even if in self-defense, was the response excessive for initial self-defense given the context? Third, did the response that lasted perhaps as long as two hours, and was by all accounts overwhelming, risk much more in terms of casualties than what was to be gained? We will examine each of these issues in light of our preliminary suggestions about proportionality concerning weighing and context that we develop more fully in the next chapter. Notice, initially, that the proportionality considerations were not here about collateral damage to civilians but to combatants.

Self-defense often is a threshold consideration for justifying armed attacks. In terms of proportionality, self-defense is a threshold consideration in that armed action would not normally be justified at all unless it satisfied this, or a few other possible, threshold considerations that made the armed action *prima facie* justified. Yet even if armed action is completely warranted on the basis of soldiers defending themselves, proportionality poses a set of secondary limitations, such as whether or not the type of lethal force, and its extent, was warranted to overcome the self-defense threat. But if one cannot make a case for self-defense at all, then proportionality issues would be very different and would have to satisfy a much more restrictive assessment. This is because the response would not even be *prima facie* justified as self-defense in the absence of positive identification of an enemy as required by the

Central Command Rules of Engagement (ROE) or the declaration of an enemy as a hostile force that would authorize deliberate targeting based on the status of that enemy force.

Apart from the self-defense debate, the second consideration concerns context. Here we should first think about whether the US lethal response against Pakistani soldiers was accidental or intentional. Of course, the response was meant to be lethal, but from the US perspective, the context was a response aimed at countering an enemy attack by Taliban insurgents. But was that a reasonable interpretation of the context? The Pakistanis claimed that it was not reasonable since the US knew that there were Pakistani soldiers in the area. And was it the case that the killing of Pakistani troops, as opposed to killing of Taliban fighters, was intentional?

These matters of context are very important for determining whether the US response was proportionate since it might be argued that stopping an attack by enemies takes much more fire-power than stopping an attack by supposed allies who were mistakenly shelling US troops. Indeed, it could be argued that the only way to be sure that enemy insurgents would stop attacking US troops, who claimed to be tied down and unable to retreat, would have been to kill all of them. There is one other important contextual matter: the US and Afghan operations were conducted in that particular region at that time without prior notice to the Pakistanis because previous operations had been compromised by intelligence leaks to the Taliban operating in the border region.

It is interesting to consider how a past history of interaction can affect proportionality in such cases. The Pakistanis claim that there had been four similar incidents in which Pakistani border troops were killed, supposedly accidentally, and where US officials promised to make sure it did not happen again. Assuming this is true, since the United States did not deny it, the question is whether this contextual history of interaction should affect the assessment of proportionality of the November 26, 2011, incident. Furthermore, Pakistani officials vigorously asserted that they had given NATO a map with the marked location of the two outposts. The context of this incident certainly does change when considering the past history of interaction. It could explain why the Pakistanis continued to fire, perhaps fearing that the US forces would again kill them, as indeed they did. It could also make it less likely that these killings could be simply written off as non-culpable accidents.

The third consideration concerns how to weigh the expected losses. This is the core consideration of most proportionality assessments. On one side of the balance is the concern for the lives of the US troops under fire and seemingly unable to retreat. The competing considerations involve the relative military worth of the lives of those firing on the US troops. And here is a key, highly contentious, matter: Do we weigh the lives of enemies as less than lives of allies? Today, many philosophers



have argued that the lives of those who act unjustly during war should be treated differently than those who act justly. We do not share this view. But even if we could tell whether it was the United States or Pakistani forces that were in the right that is not the only issue. Regardless of which side one fights for, in our view self-defense can arise nonetheless. We take up this issue in much more detail in Chapter 6.

One more context specific consideration here is that the U.S. forces dispatched an F-15 fighter and an AC-130 gunship to shoot flares in a show of force to demonstrate that NATO forces were clearly on the receiving end of the shelling due to the fact that the Taliban have no air assets. Yet from the perspective of the US commanders on the ground, the fact that the Pakistani fire continued following the show of air-power seemed to confirm the source of the fire as coming from an enemy and the reality that force was the only method for eliminating the threat posed to American lives. This illustrates the operational reality that, although the proportionality principle is important, and often paramount, it is by no means independent of other principles and considerations. As we will illustrate in subsequent chapters, proportionality is only one of an array of other applicable norms, *inter alia* those of distinction, humanity, and military necessity.

Every combat operation functions within the larger fabric of the laws and customs of warfare, to include the interrelated backdrop of other legal tenets. As one last illustration of this interconnected set of legal imperatives, consider the duty imposed upon an attacking force by Article 57(2)(c) of Additional Protocol I to the Geneva Conventions, to provide “effective advance warning” of any attacks “which may affect the civilian population, unless circumstances do not permit.”

The correlative duty of the commander is 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.”<sup>4</sup> From the perspective of coalition forces, the fire emanated from a remote region with no known civilian structures or population, and did not abate following a show of force. Thus, the proportionality principle was a secondary concern to the immediate and overwhelming self-defense need to end the threat.

In hindsight, and from the comfort and safety of western offices, we must ask whether the risk to the Pakistani soldiers was offset by the risk to US soldiers. At least in this proportionality calculation we have lives on the one side and lives on the other, so a seemingly simpler proportionality calculation could be made than if the two things to be weighed are seemingly incommensurable. But the calculation is more complex than that. For the other thing to be added into the mix in the broader

<sup>4</sup> Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, Article 51(2)(a)(ii).)