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APPLYING THE PRINCIPLE OF PROPORTIONALITY IN COMBAT OPERATIONS

JANINA DILL

RESEARCH FELLOW IN SOCIO-LEGAL STUDIES, UNIVERSITY OF OXFORD

OXFORD INSTITUTE FOR ETHICS, LAW, AND ARMED CONFLICT

DEPARTMENT OF POLITICS AND INTERNATIONAL RELATIONS
UNIVERSITY OF OXFORD
MANOR ROAD
OXFORD OX1 3UQ

TELEPHONE: +44 (0)1865 285986 | **EMAIL:** elac@politics.ox.ac.uk | **WEB:** <http://www.elac.ox.ac.uk/>

Applying the Principle of Proportionality in Combat Operations

Executive Summary

The principle of proportionality has been deemed crucial to the regulation of armed conflict by international law, yet it is largely ineffective. The principle prescribes that belligerent parties in war not inflict collateral damage that is excessive in relation to the military advantage they seek with any hostile action (such as an air strike). As a rule of International Humanitarian Law (IHL), proportionality features a number of design flaws and remains extremely vague. Correspondingly, the law of proportionality fails: 1) to sufficiently guide a well-intentioned combatant in his or her actions in the field, 2) to adequately protect civilians in armed conflict and 3) to provide a standard for an unbiased assessment of the conduct of hostilities. A workable approach to implementing the principle is urgently needed.

Recent events have brought the ineffectiveness of the principle of proportionality into sharp relief. Repeated tightening of the rules for the use of air power in Afghanistan by the coalition have failed to mute international protests about collateral damage or to halt the resulting alienation between the Afghan population and the international presence. An enquiry on behalf of the United Nations Human Rights Council (UNHRC) known as the Goldstone Report into, amongst other issues, the proportionality of the conduct of combat operations in the Gaza Strip from December 2008 to January 2009 has fuelled controversy. Rather than shedding light on the legality of the military measures employed, the indeterminacy of proportionality has facilitated the escalation of the dispute. A potentially successful attempt to render the principle more effective should start by making it more concrete.

Applying proportionality by systematically drawing on a standard of military necessity in the conduct and assessment of combat operations bears considerable potential. For commanders as well as for those who judge military operations from a news-room, a court-room or on behalf of civil society, a set of standardized questions about minimizing collateral damage and ruling out alternative targets offers a place to start enquiring about proportionality. Military necessity alone, however, cannot render proportionality effective. Therefore, in a second step, an international initiative should operationalize the law in a systematic and transparent way by prescribing procedural requirements in the conduct of hostilities. These two measures – taking necessity seriously and operationalizing procedural requirements for carrying-out attacks – will enhance proportionality's ability to guide, to protect and to arbitrate.

Background: Proportionality in IHL

The first legal prescription for belligerents' during hostilities is not to target civilians directly, that is to say intentionally. However, harming civilians is not in itself illegal. An injury to civilians or damage done to civilian objects as a side-effect of a military operation may be permissible provided that it is proportionate to the military gain anticipated from the operation. This principle is considered part of customary international law, which binds all states. It has become part of the positive law of armed conflict (IHL) with its codification in the First Additional Protocol to the Geneva Conventions of 1977. Article 51 para. 5b) states that “[a]n attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated,” is prohibited.

No absolute standard for results. The principle of proportionality is crucial for the law's aim of protecting civilians in war. Its specific purpose is to connect means to ends in the conduct of hostilities. Whereas the principle of discrimination centres on the intent of the belligerents to only undertake legitimate military actions, proportionality concerns also the results of combat, because even unintentional harm, often referred to as collateral damage, must still be proportionate. However, the relevance of proportionality to results is qualified. Rather than the actual collateral damage of an air strike, it is the anticipated damage of a military action that must be proportionate to the expected military advantage. Proportionality hence fails to set an absolute standard for results of combat operations and instead prescribes how an actor should intend to employ means with regard to ends.

Uncertainty how and what to balance. Moreover, the ways in which means are connected to ends are less than clear. The principle of proportionality requires a balancing of aims that are at times contradictory: the protection of civilians and the achievement of military advantage. IHL does not specify how exactly two dissimilar values, human life and military advantage, should be weighed against each other for the purposes of proportionality. The requirement to balance without a specified mechanism for how to do so is difficult on its own. It is further complicated by disagreement over who counts as a civilian with immunity from attack and over what exactly constitutes a military advantage. The question of what counts as the harm that can be expected from an attack is likewise answered in different ways by different actors. While military organizations pay most attention to immediate physical endangerment of civilians, an alternative view holds that also indirect negative ramifications for civilian life should be taken into account, for example the death or injury to civilians caused by the destruction of critical infrastructure.

Opacity of the “ends” to be achieved in war. These controversies are sustained by a general opacity about the ends to which proportionality must be applied in war. The law of conduct in war (IHL) is separate from the law governing resort to force. It follows that the only legitimate goal in war is to defeat the enemy militarily. Correspondingly IHL does not allow conduct in war to be directly linked to the ultimate political goal of an armed campaign. As a result, the positive side of a proportionality calculus cannot be constructed in terms of its ultimate strategic or political objective, for example to overthrow an illegitimate regime, but only to the proximate end of achieving a military advantage. However, the definition of military advantage is itself subject to a long standing controversy. What is the frame of reference for

the determination of a military advantage (is it a single air strike or the overall campaign goal?). What is the required degree of nexus between an act and said advantage (do only the direct physical effects or also indirect and cumulative benefits of several attacks count?) Both questions are controversial.

These indeterminacies of the law complicate its application. For example, the physical destruction of a media installation may not be immediately militarily relevant. But does halting the spread of propaganda for the opposing forces contribute to outweighing the incidental death of some of its employees? Are civilians who die from waterborne diseases collateral damage of an attack against a water treatment plant? The interpretive choices, which the application of the principle of proportionality requires before an attack, radically determine the permissiveness it affords. As a result, in practice, the principle fails on three fronts.

The Failure of Proportionality to Guide, Protect and Arbitrate

Failure to guide. Anticipating the collateral damage of a particular attack in the midst of war is fraught with difficulties. For a combatant acting in good faith, the vagueness of the principle of proportionality, in practice, constitutes a problem rather than an opportunity. As suggested above, assessing proportionality before an attack is a complex judgement call. The law fails to provide an absolute standard for this judgement. Special instructions and rules of engagements (ROE) are meant to concretize legal rules in the specific strategic and political context of an armed campaign. However, research indicates that ROE do little more than assign the authorization of air strikes to higher levels of command as expected collateral damage increases, rather than guiding the decision-making process military procedures, thus further removing the process from the circumstances on the ground.

While the proportionality judgement call is thus pushed higher-up the chain of command as more civilian damage is expected to result from an attack, it remains an essentially subjective and personal matter. Interviews with practitioners suggest that professional experience and personal morality rather than a transparent and stable set of criteria determine what is considered proportionate. Military lawyers acknowledge that, as a result, different professionals are likely to come to different conclusions about whether an anticipated collateral damage is excessive in the same situation, when applying the law in good faith. Commanders suggest that, proportionality judgements, in reality, often boil down to asking “can the estimated collateral damage be further reduced, through timing, choice of weapons or angle of attack.” If the answer is no, the principle is considered to be fulfilled.

Failure to protect. The military intervention by the Israeli Defence Forces (IDF) in the Gaza Strip in late 2008 urgently raised the question whether proportionality adequately protects civilians in armed conflict. Israel repeatedly affirmed its adherence to IHL, yet civilian casualties from the relatively short operation are estimated to range between 700 and 1400. It is controversial whether this humanitarian catastrophe is a result of a violation of the principle of proportionality or whether the law was in fact adhered to. In the latter case would seem grounds for believing that the principle of proportionality is itself too lenient, privileging military over humanitarian concerns.

Given the law's indeterminacy, it is difficult to definitively establish whether Israel fulfilled or the violated its legal obligations. Rather one can infer from the political circumstances that the required interpretation of the law, namely a refusal to isolate military action from its political context, on the part of the IDF may have contributed to such high levels of civilian casualties. The stated goal of the air campaign was to end Hamas' ability to launch rocket attacks against Israel, coupled with the assumption that only the destruction of Hamas would achieve this end. This overall political goal of the campaign, used as a frame of reference for the definition of military advantage in the conduct of hostilities, placed the large-scale destruction of government structures and public infrastructure on the positive side of the proportionality judgement. Likewise, the consideration of police academy graduates as legitimate targets betrays a notion of combatancy that is determined not by the goal of operational military success but by the political aim of ousting Hamas. The references to the reasons for resort to force in the conduct of hostilities almost certainly clash with the legal requirement to separate *jus in bello* and *jus ad bellum*. Nevertheless uncertainty about what precisely the law considers the frame of reference for determining military advantage may have played a role in facilitating Israeli practices. Doctrines such as effects based operations (EBO) common within militaries, such as the United States and United Kingdom, advocate that military practices should be systematically tied to complex and demanding political objectives. As proportionality, specifically military advantage, lacks a consensual interpretation, these doctrines' correspondence with legal requirements is rarely questioned.

Failure to arbitrate. After an attack, the same interpretive uncertainties generate intense international controversy. Israel refused to assume full responsibility for the casualties among Palestinians in the Gaza Strip, holding that the failure of the authorities of Gaza to take precautions for the separation of military targets and civilian infrastructure increased the likelihood of collateral damage. Israel, likewise, alleged that Hamas deliberately commingled with the population, thereby putting civilians in harm's way. While the IDF thus considered their action to be proportionate, in light of the number of civilian casualties several countries, non-governmental organisations and the UNHRC alleged the commission of war crimes.

The law on proportionality appears to have failed both the Palestinians and the Israelis. It has failed the latter as a standard to defend itself against the allegation of the commission of war crimes. Whether it has failed the Palestinians as a means to restrain the attacking force's military action or as a means to communicate their victimization is unclear. This in itself is a failure of proportionality to work as law should. In its failure to arbitrate, proportionality fuels international controversy, undermines strategies based around hearts and minds, impedes post conflict reconciliation, causes frustration among militaries and alienates civil society even from potentially humanitarian uses of force. As claims about disproportionality and excessiveness are available to almost every actor, in almost all situations, almost all the time, the principle of proportionality, in turn, loses its normative force.

The Example of Afghanistan

The harm inflicted on civilians by US air strikes against insurgents in Afghanistan has long attracted international criticism. The US command has on several occasions tightened the

rules for target approval of air strikes. During his short term on the job as the commander of coalition forces in Afghanistan, General McChrystal, significantly restricted the use of airpower. Only pre-planned targets that could be destroyed without causing civilian casualties were approved. In this respect Afghanistan stood out from other combat theatres where the collateral damage ceiling is more flexible and a higher collateral damage estimate, rather than producing rejection, simply triggers involvement from a higher level in the chain of command. Moreover, while the General's predecessor already repeatedly restricted pre-planned air strikes to avoid collateral damage, only General McChrystal questioned the paradigm that troops involved in active fire fights ought to obtain all available air support, notwithstanding the risk to civilians. He thereby challenged widespread military practice which attributes less importance to the principle of proportionality when forces act in self-defence.

However, in spite of the fact that the US policy in Afghanistan was based on a very restrictive interpretation of the principle, these moves failed to mute the controversy over collateral damage. The Karzai government continued to reap political rewards from alleging the excessiveness of coalition air power. The notion that coalition soldiers should take more risks by refraining from calling in air support, in turn, frustrated troops. In fact, the coalition can only compromise the security of its own troops so far in order to reduce civilian casualties, without encountering resistance at home. Casualties that appear to result from "over-fulfilling" the law, erode support for the mission in the home countries of the soldiers. McChrystal's successor, General Petraeus has responded to growing criticism from the troops and subjected the tight ROE to yet another review.

The Taliban and Al Qaida in Afghanistan systematically work to increase the civilian body count of coalition action as a key weapon in the fight against the international presence. Strategic and political considerations thus impede the reduction of collateral damage below a certain level. The situation in Afghanistan suggests that this level can still be framed as excessive and disproportionate, especially since the foreign military presence is supposed to be beneficial to the security of the Afghan people. The vague proportionality principle provides an endless reservoir for armed groups opposed to state building in Afghanistan to accuse the international coalition of wrongful activities and provides virtually no means for its forces to clearly exculpate themselves in the public domain.

Making Proportionality Work

Applying proportionality starting with necessity. The first step in rendering the principle of proportionality more effective is understanding the fact that necessity is a precondition of its fulfilment. Necessity sets a lower bound for proportionality. Damage to civilians that is not necessary is never proportionate. Some militaries already go to great length to minimize the expected collateral damage from a chosen target. Practitioners relate that once the collateral damage expected from an attack can be no further minimized, for instance through the choice of a different weapon or a change in the angle or time of attack, the proportionality principle is considered fulfilled and a "go" for the planned attack is likely. This is a necessity judgment, but an incomplete one. Meeting the requirement of necessity also means searching for alternative

targets. Militaries do not yet routinely establish several courses of action to implement the commander's intent and then pick the one with the best proportionality calculus.

One could argue that what is necessary is just as much subject to interpretation as is what is proportionate. However there is an important difference between the two criteria. While proportionality does not imply an absolute standard, necessity, at least, in theory does. For an attack to have been necessary there can have been no alternative course of action with a reasonable chance of achieving a certain military advantage that would have caused fewer civilian casualties. The epistemic conditions under which a combatant could establish this with certainty will never be present in combat. However the theoretical scenario, in which the condition of necessity is met, provides the basis for establishing concrete criteria for its application in practice. To the contrary, as long as notions of excess are an essentially private and subjective matter, the absence of the intent not to excessively harm civilians cannot even in theory be rendered manifest.

However, the protective capacity of proportionality exceeds that of necessity. Incidental harm might be necessary but still disproportionate. In the interest of protecting civilians from harm should we not therefore abstain from emphasizing necessity in the application of proportionality? In light of the striking inadequacy of existing attempts to apply proportionality, the clarity afforded by necessity is invaluable. We can never answer the question 'how much is too much?', but by starting with necessity the law can better guide and arbitrate, and thereby also better protect the civilian population. However, it is important that in the means to ends judgment necessity does not simply replace proportionality but offers a place to start and a complement to unguided discussions about excess. It needs to be stressed that achieving this condition is still not enough for an actor wanting to do the right thing in combat, because, as mentioned, something might be necessary yet still disproportionate.

Applying proportionality by drawing on procedural requirements. The endeavour to make the principle of proportionality more effective involves a second step. Article 57 of the First Additional Protocol obliges belligerents to "take all feasible precautions" and constant care with a view to implementing proportionality and distinction. It contains three concrete obligations – to refrain from launching a potentially disproportionate attack, to cancel or suspend a potentially disproportionate attack as well as to always choose the target with the most favourable anticipated proportionality calculus. All three obligations are already implicit in the principle of proportionality and therefore receive relatively little attention during combat operations. But the added-value of Article 57 lies in the fact that it prescribes actions for those who intend not to harm civilians excessively. It thus bears the potential to more concretely connect intention and outcomes in the conduct of hostilities. The ICTY has indeed drawn on Article 57 in allegations of disproportionate attack. However Article 57 is itself rather indeterminate, raising the question of what it means to do "everything feasible". In order to realize the potential of procedural requirements to render proportionality more effective the obligation contained in the provision should be operationalized in a transparent and systematic manner, preferably by an international body that commands authority in matters of law and war.

The Road Ahead

Applying proportionality by 1) taking the condition of necessity seriously and 2) drawing on procedural requirements has the potential to enhance the effectiveness of the principle in its threefold task to guide, to protect and to arbitrate. This approach is still not the be all and end all of the effective application of the principle of proportionality. The combatant faced with the task of making a decision whether or not to attack, should still after establishing necessity and fulfilling all procedural requirements make a judgement call about excessiveness. At the same time, challenges also remain for implementing the two steps recommended here. Adopting this approach has implications for different actors involved in making proportionality judgments.

Military Organizations

The procedure of target vetting, besides the identification of a target as a military objective and the attempt to minimize the collateral damage that is expected to arise from an attack, should routinely include a systematized search for alternative courses of action.

The ICRC/Asser Institute

An initiative along the lines of the collaboration of the ICRC and the Asser Institute to clarify the notion of “direct participation in hostilities” should be established. The aim would be twofold, first, to operationalize the condition of necessity and, second, to operationalize the procedural requirements contained in Article 57 of the First Additional Protocol. These two aims imply, in particular, two tasks. First, the concept of “doing everything feasible to minimize collateral damage” should be clarified. Second, a list of steps to establish and rule out alternative courses of action in a number of typical military scenarios should be drawn-up.

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