

The Proportionality Principle in War

LAURIE R. BLANK

I

What does it mean to say something is “proportionate” or “disproportionate”? We may feel we have an instinctive sense of what those words and concepts mean in everyday life, but in the context of war, these terms have very specific meanings and purposes—with the starkest of consequences. . . .

A brief introduction: the law of war is the body of international law that governs the conduct of both states and individuals during armed conflict. It seeks to minimize suffering in war by protecting persons not participating in hostilities and by regu-

lating how parties conduct hostilities. Other terms often used for this body of law are: the law of armed conflict, international humanitarian law, or *jus in bello*.

Another body of international law—the *jus ad bellum*—governs when it is lawful for a state to go to war, including in self-defense. These two legal frameworks, the law of war and the *jus ad bellum*, are independent of each other and international law steadfastly maintains this separation.

The law of war applies equally to both sides fighting in a conflict, regardless of why they are fighting, who claims to be right or just, who is a state, who is a terrorist group, or any other such considerations. This equal application is essential to ensure the protection of civilians and maximize the law's effectiveness. As a result, the justness or unjustness of one side's resort to force (a *jus ad bellum* question) does not change any obligations to follow the rules under the law of war. Imagine if it did: each side would simply justify any and all atrocities, including summary executions, indiscriminate attacks, even crimes against humanity, by saying it fights on the side of "right." The result: an invitation to unregulated warfare.

II

With that as background, back to proportionality and its meaning and implementation during armed conflict.

Proportionality is a foundational principle of the law of war. It is defined as prohibiting attacks in which the expected civilian casualties will be excessive in light of the anticipated military advantage gained. As a first step, it is important to understand the difference between these two statements—the foundational principle and the specific operational definition—and what that means for understanding proportionality.

Proportionality as a principle is a manifestation of the law of war's delicate balance between the military imperative of defeating the enemy as quickly as possible and the humanitarian imperative of mitigating suffering during war as much as possible. Parties to a conflict must not only refrain from attacking civilians and civilian objects deliberately, but they must also make extensive efforts to minimize the incidental harm from their attacks on lawful military targets.

That means that sometimes attacking even a lawful enemy objective is impermissible because

the collateral consequences clearly outweigh whatever advantage would result from the attack. At the same time, the law accepts the inevitability of some civilian harm during war—the legal proscription on targeting civilians does not extend to a complete prohibition on all civilian deaths. Like the law of war overall, proportionality seeks to minimize civilian harm, not eliminate it altogether (an eminently laudable, although wholly unrealistic goal).

The *definition* of proportionality, in contrast, is about methodology and process. The definition thus puts the principle into practice. It is about how those who are fighting and their commanders implement this obligation to minimize incidental harm to civilians in the course of lawful military operations. Although media coverage and the public discourse creates the impression that proportionality is either impenetrable or a simple game of numbers, it is neither.

Rather, proportionality is one component of a comprehensive process to assess the lawfulness of an attack on a target or as part of a more complex mission. What does this part of the process require? Once a lawful target is identified, implementing proportionality requires an understanding of why

a target is militarily valuable. How will destroying, capturing or neutralizing the target contribute to the tactical and operational goals? How will the use of suppressing fire or other fire support for ground forces, for example, contribute to those forces' ability to fulfill the mission? How will any such actions weaken the enemy's forces, and in what way? How will they strengthen the commander's own forces, and in what way? That analysis is key to understanding the "anticipated military advantage gained" component of proportionality.

Careful consideration of the risk to civilians and the likely numbers of civilian casualties is equally essential—a commander must gather information regarding civilians who live and work in the area, their patterns of movement, whether they would be susceptible to the methods and means of attack under consideration, how many might be present at the time of and within the blast radius of the attack, and any other information relevant to understanding the potential consequences for civilians in the area. Based on all of this prospective information, the commander then makes a determination as to whether the attack can go forward.

Is this hard? In many cases, yes. But commanders do this every time they apply combat power with consequences for civilians, sometimes in a longer, deliberative process and sometimes in a split second. In addition, proportionality as a methodology helps commanders make these difficult decisions that may have tragic consequences for civilians.

III

It is therefore important to emphasize that proportionality is more than just a principle; it is a methodology for assessing lawfulness in advance through careful consideration of both the value of the military advantage and the likelihood of civilian casualties. The principle tells us what we are trying to achieve—a balance between military needs and humanitarian concerns that minimizes civilian harm as much as possible. The methodology provides guidance on how to achieve that goal—by gathering and analyzing information about both the military value of the target and the consequences to the civilian population and making choices among various operational alternatives

to achieve the mission while minimizing harm to civilians.

What happens after the fact—how does any observer, whether the international community, the commander's superiors, a court or international tribunal, assess this proportionality process. . . . [A]ssessing the legality of an attack that results in civilian casualties must be done prospectively, based on the information the commander knew or should have known at the time of the attack. The standard is "reasonableness"—whether a reasonable commander in the same position would determine, based on the information available at the time, that the expected civilian casualties would be excessive in light of the anticipated military advantage.

Key to this assessment is not whether the court, the media, or anyone else thinks the decision was right or would have actually made the very same decision. Nor is it whether any resulting casualties seemed or even were excessive afterwards. The controlling factor in assessing proportionality after an attack is whether the commander's determination—that the likely civilian casualties in that operation would not be excessive—was reasonable. This rea-

sonableness assessment can only be made with a full understanding of the situation and all relevant information at the time of the attack—and, just as important—an awareness of what is considered to be reasonable in light of general practice.

International tribunals have rarely undertaken this analysis. This may well be simply because they have no lack of much easier and obvious cases. Their dockets can easily be filled to overflowing with the staggering number of deliberate crimes against civilians that demand accountability—such as genocide, crimes against humanity, torture and a host of other categorical violations that require no difficult judgments about the reasonableness of a commander's judgment. The difficulty in translating the proportionality rule from the operational dynamic of the battlefield and the fog of war to the evidence-bound confines of the courtroom is certainly another factor. The few instances of adjudication, however, consistently reinforce both the prospective approach and reasonableness as the touchstones of the analysis. Responsible militaries, for their part, investigate and review every incident involving civilian casualties to determine whether further investigation or prosecution is warranted—and simply to improve training and implemen-

tation to mitigate civilian harm in future missions. Both internal and international inquiries have often explored, or attempted to explore, proportionality with respect to specific incidents.

IV

Last, a note about another rule of proportionality. The international law governing when states may use force in self-defense (the *jus ad bellum*) also has a requirement of proportionality, but it is quite distinct (and serves a different purpose) from the law of war rule of proportionality discussed above. This *jus ad bellum* rule of proportionality mandates that a state acting in self-defense in response to an armed attack can only use force that is proportionate to the needs and goals of repelling or deterring the attack. This is not a “tit-for-tat” requirement, however, limiting the state acting in self-defense to only what its attackers did. There is no obligation of symmetry between the original attack and the force used in selfdefense; indeed, the force needed to repel an attack may well be disproportionate relative to the original attack, in order to stop it and deter continuing attacks. What it must be, instead,

is proportionate to the ends of stopping and deterring the original attack and further attacks. . . .

Importantly, this rule of proportionality does not address civilian casualties. That is the task of the law of war principle of proportionality analyzed above. Unfortunately, these two concepts of proportionality are regularly conflated, leading to misunderstandings and ineffective legal analyses. First, if the bare fact of civilian casualties were to become the measure of whether the overall use of force in self-defense is lawful, the international legal framework governing the use of force in self-defense would be undermined. Any military operation causing civilian casualties would then be considered unlawful, even if a valid exercise of self-defense, emasculating state options for protecting their own civilians against attack.

Second, focusing on civilian casualties, without any legal analysis of proportionality, the targeting process or the nature of the objective attacked, simply incentivizes insurgent groups to co-mingle military personnel and assets within the civilian population and use civilians as a shield, thus causing greater and greater numbers of civilian casualties and louder claims of unjust war and war

crimes. Facilitating the defending party's exploitation of the law for its own defensive and propaganda purposes in this way gravely endangers the very persons the law of war seeks to protect—the civilians caught up in the combat zone—and thus undermines the essential fabric of the law of war.

V

At the same time, self-defense is not a trump card in the law of war proportionality analysis above. If the military advantage of every application of military combat power in a conflict were the overall self-defense of the nation in response to an attack, proportionality in the law of war would have no meaning. Few, if any, measures of civilian casualties would be considered excessive in such a framework. Military advantage must therefore be assessed in the context of the particular attack or operation at issue.

Observing and trying to understand proportionality from afar—through media reports and the blogosphere, for example—is fraught with uncertainty and ambiguity, because almost all of the information integral to the actual methodology and decision making is not available or communicated

to the public. The instinct to make judgments after the fact based merely on numbers of casualties or which side's civilians were killed in greater numbers is thus strong, because it often is the only information at hand. But this is not the actual law of proportionality. Nor is I an effective way to maximize the law's core purposes. The uncertainty and ambiguity does not mean that proportionality is not being applied or implemented in a lawful way—it merely means that we cannot peer into the processing factory to see how the sausage is made.