

# Proportionality in International Law

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MICHAEL NEWTON • LARRY MAY

OXFORD



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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

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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

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<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

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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, 2001, 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

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<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).

sense is the strategic objectives of the US military mission, which indeed saved civilian lives and was intended in the larger sense to build an Afghan society that is free of the depredations and human rights abuses suffered at the hands of the Taliban. As a matter of intellectual fairness, how can the larger salutary purposes for the use of force be considered as part of the proportionality analysis, while the circumstances of a controversial and aggressive war are discounted when evaluating the appropriate and proportionate response of forces in the midst of such conflicts?

Finally, the relative value placed on the military objectives is sometimes highly contested. From the US perspective, defeating the Taliban in this border area was valued very highly, while such defeat would prove crippling from the Taliban perspective. From the Pakistani perspective, such a defeat may have been seen as a decidedly mixed value. As a result, context will again intrude into our other considerations, such as weight, and make the overall proportionality assessment very difficult.

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### III. SOME PRELIMINARY DIRECTIONS

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What is clear from the various accounts of what went wrong in Maya village is that though they invoked proportionality as the dispositive measure, neither the Americans nor the Pakistanis were precise in their assessments of its dimensions. They also did not have shared criteria for assessing its threshold inquiries. This is the aspect of the controversy that is of concern to us, and which is highly illustrative of the costs of indeterminacy in the international debates over proportionality.

Proportionality is integral to military professionalism. If there can be safe harbor for war-fighters accused of disproportionate acts because there is no shared consensus on the criteria for evaluating the conduct in question, then proportionality becomes a hollow constraint. Noncombatant lives and property would be further endangered if proportionality becomes the property of the adversary with the most compliant media and the most well-tuned propaganda machine. Unless there is a refocused international clarity and common understanding of its parameters in international dialogue, war-fighters may well begin simply to discount proportionality in practice.

The Pakistanis admit that they fired in a nearly random fashion, hardly taking into account what were the likely consequences of such firing. US/ISAF authorities admitted that various protocols were not followed that could have allowed them to identify who was shooting at their troops in Maya. Could the incident, and ensuing loss of life, have been averted if proper proportionality assessments had been made, even when the adrenaline of incoming fire affected decision-making? With the benefit of hindsight it seems probable that the incident could have been averted—since

in the abstract, the US had no reason to fire on Pakistanis sitting on their side of the Afghanistan and Pakistan border. Even if both sides had engaged in the same kind of proportionality assessment, unless they were both using the same metric, using common assumptions, and had the same sense of what was valuable and how it was to be valued, the tragedy might still have occurred due to the inherent frictions of war.

Many of the objections to the use of proportionality focus on how hard it is for commanders to make such calculations when they are in battle or in other situations where quick decisions need to be made and where there is no time for elaborate calculations. As in the debates in ethical theory about utilitarianism, we will respond to this objection by offering rules of thumb as aids to commanders who must make very quick decisions in certain situations. Since we do not think that proportionality turns on what is merely extensive, we do not find it as difficult for commanders to make proportionality judgments as do some critics. In any event, modern targeting principles operate on a very rigid computerized analysis that is conducted with the full participation of a battle staff, and frequently subject to competing considerations in political channels. Commanders and others who make proportionality judgments must only determine whether their projected conduct is on the positive side of the threshold separating proportionate from disproportionate behavior. And such assessments, we believe, in light of the rules of thumb and threshold considerations we will propose, are not nearly as difficult as critics often claim.

We will discuss several such rules of thumb and operational principles as the book develops. Let us here mention one principle that partially responds to the weighing problem. The principle could be called the *civilian precautionary principle*: “when-ever civilian lives are greatly risked incidental to a tactic, very clear and weighty military objectives have to be enunciated for the tactic to be *prima facie* proportionate.” This principle indicates a special context and an appropriate level of review and action but will have to be refined in order to be usable in concrete cases. For example, there is one very common ROE that prohibits unobserved indirect artillery fire into built-up civilian areas in the absence of express authority from a more senior level of command. Our position is that such a rule of thumb should be accepted as an aspect of proportionality and common sense even absent express articulation in the ROE unless imminent circumstances of self-defense warrant exception. To be clear, commanders are certainly free to insist upon such a constraint as the default principle for the use of artillery fire as a matter of unit discipline, though the circumstances of imminent individual self-defense or defense of others may warrant exceptions.

As another variation on this theme, consider the plight of an American infantry unit in the early spring of 2012. A Q37 radar positioned at a remote combat outpost in eastern Afghanistan consistently acquired and tracked the flight of enemy 107mm rockets that were landing in a remote portion of the province, far from coalition

troops. The remote location, use of the same point of origin, and roughly the same point of impact led U.S. forces to conclude that insurgents were using the position to train new rocket teams and improve their accuracy. Intercepted radio communications verified that a Russian-speaking individual was leading this training. This rocket training was followed by an overall increase in the accuracy of indirect fire aimed at US forward operating bases and combat outposts.

Using terrain analysis and unmanned aerial vehicles to identify patterns of life of combatants in the area, US forces planned an operation to disrupt insurgent training efforts. This operation centered on a heavy barrage of artillery fire aimed at the most frequently used point of origin as well as likely locations for insurgent observers. Due to the unique nature of the mission—firing artillery at individuals who were training insurgents rather than directly engaging US forces—the operation was sent to higher headquarters for approval. To the disappointment of company and battalion-level leaders, the mission was disapproved due to concerns that engaging enemies under these conditions would not be consistent with the standing rules of engagement at that time. Here the problem was not of a built-up area, but an unverified concern that someone other than an enemy insurgent might have a chance of being injured. The higher headquarters thus, perhaps unwisely, weighted a statistical chance of injury to civilians or foreign trainers above the certainty of added risk to US forces from well-directed incoming indirect fire.

The principles and guidelines we will develop will largely be of the following sort: principles that guide behavior in a class of common cases in which proportionality considerations arise. We have already seen another rule of thumb in what was discussed earlier: “try to find a common denominator so that the weighing can be done between things that are similar not dissimilar.” This principle will have to be further refined given the evident problems with dealing with weighing and context.

Proportionality is at its core intended to be applied by war-fighters as an extension of disciplined professionalism even in the midst of mind-numbing fatigue, adrenalin, and soul felt fear. However, there is widespread anecdotal evidence that because proportionality is so frequently invoked as a form of political posturing, and so frequently misunderstood in application, listeners are prone to discount the need for discriminating analysis and application of its precise meaning due to its very familiarity. Because proportionality is such a textured concept that is prone to inconsistent application and occasionally paralyzing debate, its imprecision carries the risk that it will be honored in name only, and discarded by war-fighters when it is most important in practice. The persistent problem is that the omnipresence of the concept of proportionality, both in the context of *jus ad bellum* and *jus in bello* debates, is nearly matched by the misunderstandings, misapplications, and misstatements



associated with its use. Recurring debates over the application of proportionality inspired this work.

Proportionality may well be the most controversial imperative in modern conflicts from the legal, moral, and political perspectives. This is particularly problematic from the perspective of the war-fighter given the emergence of a globalized system of international accountability and post-conflict justice mechanisms. Nevertheless, the gap between the internationally accepted articulations of proportionality and its applications in practice cannot be permitted to widen. The mere invocation of proportionality cannot become an effective extension of combat power by serving to cripple combatant capabilities artificially. This, then, is the goal of this work, and we shall spend the next eleven chapters explicating our views for preserving, and also evaluating, the proportionality principle. In Chapter 2, we will begin this task by providing a detailed analysis of what proportionality means, at its most basic before, in Chapter 3, then surveying the many ways that proportionality is used, especially in very diverse legal contexts, with a goal to understanding the way proportionality might be different in the context of international law.



## 2

### WHAT IS PROPORTIONALITY?

IN ITS SIMPLEST formulation, *proportionality* means that a response or action must be commensurate with the anticipated goal to be achieved. War and armed conflict, the primary subject of this book, must be initiated and conducted, as well as ended, proportionately. At its simplest, to act disproportionately in war or armed conflict is to use clearly excessive force given the goals to be accomplished.<sup>1</sup> Proportionality allows the assessment of otherwise competing, or even seemingly incompatible, operational imperatives. Despite its seeming simplicity, and contrary to much writing in this domain, we will argue that proportionality places severe restraints in these areas of war and armed conflict. Proportionality is the key principle that requires the use of violence to be in some sense measured and also humane. Soldiers and other combatants have rights, and these rights carry commensurate correlative duties that require that the loss of lives must be offset by equally serious matters if the initiation, conduct, or ending of war is to be justified.

Ours is the “era of proportionality” in the sense that one encounters proportionality as an integral aspect of legal and moral discourse in virtually every effective legal system.<sup>2</sup> Proportionality occupies a central position between military efficiency and moral fairness. Military commanders see proportionality as an element of the professional ethos that provides the latitude needed to accomplish their strategic and tactical mandates. Public perceptions may see precisely the same actions from a distance and conclude that the doctrine permits commanders more latitude than needed. It often does not help that the details of the debate are hidden from public

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<sup>1</sup> Here it is important not to confuse “clearly excessive” with “merely extensive,” as we argue in Chapter 6.

<sup>2</sup> AHARON BARAK, *PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS* (2012).

view; nor is there precise popular agreement on the interface between competing bodies of law and moral principles.

In this chapter, we will discuss some of the conceptual difficulties in understanding and grounding a concept of proportionality in war and armed conflict in a way that is useful for scholars. But as in the rest of the book, our primary intention is to address those commanders and soldiers who must be the practitioners of proportionality. In the first section, we will address the question of what proportionality is at its most basic. In the second section, we will address the most difficult components of proportionality, how comparisons are to be made and why context is so important. In the third section, we will examine how proportionality is understood at the International Criminal Court (ICC). In the fourth section, we provide a few more examples. And in the fifth section, we address the overriding problem of how a fixed standard of proportionality can be understood within the context of decisions, for instance by commanders, that are subjective. Proper proportionality analysis employs a fixed standard understood in terms of thresholds that, when crossed, requires certain behavior, but the processes of weighing the behavior and the determination of context and circumstance involved in that weighing are both subjective. With this chapter, we will set the stage for more detailed analysis to follow in later chapters.

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## 1. WHAT IS PROPORTIONALITY AT ITS MOST BASIC?

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At its most basic level, proportionality requires a subjective weighing of two fixed values. The Oxford English Dictionary (OED) echoes the way fixed standards are part of proportionality by describing proportion as the “relation between one thing and another in terms of size, quantity, number, or the like; comparative relation, ratio.” However, the OED also frames “proportion” in a more useful, yet subjective manner: the appropriate, fitting, or pleasing relation (of size, etc.) between things or parts of a thing; the due relation of one part to another; balance, symmetry, and harmony.

According to Black’s *Law Dictionary*, the term *proportionate* in law means “Adjusted to something else according to a certain rate of comparative relation.” The plain legal dictionary definition then refers the reader to the explanation of *pro rata*. At its simplest, proportionality requires the decision maker to reach two or more evaluative judgments and assess those judgments against each other. The definition of *pro rata* helps us understand proportionality by employing the following example:

If a corporation has ten shareholders, each of whom has 10 percent of the stock, a *pro rata* dividend distribution of \$1,000 would mean that each shareholder would receive \$100.

This is seemingly a very easy case. Each of the ten shareholder's proportionate dividend is 10 percent of the \$1,000 total dividend, or \$100. But the simplicity is somewhat misleading, since the values have been fixed to start with. We are adjusting dividends to shares of stock. And both of these can be given a numeric measure so that it is relatively easy to figure out what each shareholder's proportionate share should be.

The great challenge in practice lies in balancing subjective and often shifting relationships in a manner that sustains a relationship of "balance, symmetry, harmony" envisioned by the OED. And so the first thing to discuss is how to get seeming incommensurables to be such that they can be weighed and measured against each other. To do so, a common denominator must be found. Finding such a common denominator is difficult. The difficulty can be illustrated by comparing civilian lives on the one hand and military objectives on the other, as is true in the traditional proportionality assessment in international humanitarian law.

In many aspects of life, proportionality assessments are relatively easy. But then we come up against cases in which there are apples on the one side and oranges on the other, and no clear common denominator for fruits. We seem to be blocked by our inability to translate the values of these fruits in terms of some third factor, or even to translate the value of one, the apple, in terms of the value of the other, the orange. About proportionality in war, Michael Walzer has said "proportionality turns out to be a hard criterion to apply, for there is no ready way to establish an independent or stable view of the values against which the destruction of war is to be measured."<sup>3</sup> Wartime proportionality assessments involve weighing military objectives against the loss of civilians or soldiers likely to occur from securing the military objective. And Walzer is right to say that *military objectives* and *lives* do not have an easy common denominator. What Walzer and others have not so clearly understood is the way that context also matters.

Because of the importance of context, proportionality is what philosophers sometimes call a *three-place predicate*. Proportionality is a weighing of what is likely to be lost, say, lives (x), compared to what is likely to be gained, say, a given military objective (y), in a specific context (z), say, if all other ways to achieve y have been exhausted. The contexts can include those in which other alternatives have been, or have not been exhausted; one State is significantly stronger, or weaker, than another State; one State is clearly defending, or aggressing, against another State; or a State, or non-State actor, is opposed by another State, or non-State actor. In each of these contexts, there will be at least slightly different assessments about how to compare lives lost and military objectives gained.

<sup>3</sup> MICHAEL WALZER, *JUST AND UNJUST WARS* 129 (1977).

## II. COMPARABILITY AND CONTEXT

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What is a proportionate response even in a two-person case often seems like an easy concept to understand, but it often turns out to be highly complex in application. Think about a case of two children, one of whom has just hit the other on the arm. If the second responds by hitting the first similarly on the arm, we may have an example of proportionate response. But it may be that the second child is entitled to do more than this—we may be a situation in which the threshold of self-defense is relevant. Yet without special considerations obtaining, such as a history of such aggressive behavior on the part of the first child, during which a similar response has not deterred future attacks, the proportionate response is the maximal response that can reasonably be justified as a response to the first attack. On this construal, proportionality of response sets a limit. And though it is sometimes justifiable to go beyond this limit, as in some cases of self-defense, to do so requires reference to special considerations.

Consider the problem of assessing weights. One standard proportionality question is whether a specific tactic is proportionate to its goal. Assume that the goal is achieving a particular military objective, such as securing a road so that military vehicles can proceed to their destinations. What is thrown into the balance is the loss of lives or damage to protected property as collateral damage from the road-securing operation. We are in the predicament of trying to ascertain how to weigh civilian lives risked against getting military vehicles moved expeditiously to legitimate military destinations.

But how is this weighing to be done? As we said, one typically looks for a common denominator. Perhaps the military objective can be reconceptualized in terms of lives as well. If so, perhaps proportionality will indeed be a simple matter. But military objectives rarely can be so readily translated into lives saved that they can be easily weighed against lives likely to be lost as a matter of collateral damage. In almost any conceivable tactical situation, there will also be relevant second- and third-order considerations that might well affect the proportionality balance in either direction. This thorny calculus is complicated by larger considerations over the most expeditious or advisable way to end the hostilities. The cessation of conflict is indeed often the only sure way to end the suffering and tremendous carnage caused by modern armed conflicts.

One of the most interesting recent debates about this topic concerns the context of whether or not the war to be fought is defensive or aggressive. Some within the Just War tradition have claimed that if one fights in an aggressive war, then whatever military advantages one anticipates from the use of a given tactic or weapon, those

advantages must be heavily discounted because they are themselves in the service of a larger war that is unjustified. If one accepts this argument, then the larger *jus ad bellum* context can make more of a difference in *jus in bello* proportionality assessments than any other factor. We will offer our reasons to doubt this destabilizing proposition, even as we recognize the pull it has on many people's intuitions about these issues.

To be clear, the term *proportionality* has legally distinct meanings and applications as a technical matter in both *jus ad bellum* (the law of resort to force) and within *jus in bello* (the legal doctrine applicable for using force in the midst of conflicts)—these involve the threshold considerations such as self-defense. Yet, the same term has very different meanings with very different and often profound implications. It is not a simple matter of mathematical or the unthinking extrapolation of a known premise, but not everything is up for grabs either. We will discuss these matters at length in our book.

We are concerned with proportionality in international law, especially in armed conflict. The example of the two children is apt in some ways, but also problematic in several other respects, if used as a complete guide to wartime situations. In war or armed conflict, we need to ask why retaliatory violence is indeed justified at all, and why it is that proportionate retaliation has a *prima facie* claim to be acceptable. To think from the perspective of the historical Jesus, one might well ask why the proper response to being hit is not merely “to turn the other cheek.” Hugo Grotius asked this question in the context of war at the beginning of his seminal 1625 book, *De Jure Belli ac Pacis*, seemingly because whether lethal violence can ever be an appropriate and justifiable response is a question that needs to be addressed before considerations such as proportionality can be broached.<sup>4</sup> In his classic work published in 1758, Emer de Vattel cautioned that “Whoever knows what war really is, whoever will reflect upon its terrible effects and disastrous consequences, will readily agree that it should not be undertaken without the most urgent reasons for doing so.”<sup>5</sup> Proportionality considerations, hence, are ones that arise in the middle of a discussion, as it were. Even in the seemingly simple case of the two children, we need to know whether one child is much bigger, stronger, or older than the other child. We also should have some knowledge of the relevant history of interactions between these children. Proportionality can only occur at

<sup>4</sup> HUGO GROTIUS, *THE LAW OF WAR AND PEACE*, at ch. 2 (Francis W. Kelsey trans., Oxford Clarendon Press 1925) (1625).

<sup>5</sup> EMER DE VATTEL, *LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE, APPLIQUÉ À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS* (*THE LAW OF NATIONS, OR PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS*), Bk. III. Ch. III §24 2.43 (1758) (trans. Charles G. Fenwick 1916).

the beginning, rather than the middle, of a conversation if little is known or at least, given what is known, there do not appear to be any special considerations. If there are no special considerations, proportionality is thought to be very important because it is seemingly a clear and uncontroversial way quickly to decide what responses are justified and what responses are unjustified.

Consider again the case of the two children. Assume that the children have been acting out roles in a play and the first child was supposed to hit the other child on the arm as a signal that the second child was to get up and sing. Given this context, it is not appropriate for the second child to hit the first at all, never mind in a way similar to how the first child hit her. Here is how context and special considerations matter even in very simple cases. In the complexity of warfare and shifting strategy, proportionality considerations may well warrant restraint that seems appropriate in the specific context, but seems utterly out of place in light of larger strategic considerations. Conversely, as we shall see in Chapter 12, some limitations articulated in terms of proportionality may well be undesirable from the standpoint of the actors under fire, but mandated by the larger political or strategic goals of the operation. This is especially problematic in the age of new media in which every incident will be reported, spun, and dissected across cultures and continents.

Inter-State relations are much more complex than interpersonal ones, but we can see another analogy between individuals and States that should give us pause. The expression “saber-rattling” is ages old and refers to the actions of States that seem seriously menacing but are really best seen as if they were scripted actions in a stage-play. The proper response to saber-rattling is either to ignore it or engage in similar saber-rattling. It is not appropriate to attack, even though that might be appropriate if a real threat had been initiated or is deemed to be imminent. Of course, trying to discern whether the context is one of saber-rattling, a prelude to aggressive war, or a genuine and completely lawful effort to deter an attack and thus preserve peace, is often very difficult.

Another matter to think about initially is that proportionality is often dependent on roles. Imagine that one party is a professional boxer, and the other party is not. The boxer may be trained to retaliate “blow-for-blow” against other boxers. But if one is outside the ring, the boxer’s retaliatory response to non-boxers must be muted compared with the retaliatory response appropriate to other professional boxers in the ring. Similarly, professional soldiers are trained to respond “blow-for-blow” against other professional soldiers while on the battlefield. But proportionate response will be very different for the professional soldier, as also for the professional boxer, when encountering people who do not have similar, and often lethal, retaliatory skills.



So, there might be two quite different conceptions of proportionate response here based on the roles the actors play.

The idea that *jus in bello* proportionality means that the commander must employ forces or fire in a “like for like” manner that allows the enemy to dictate the terms of battle and cedes the tactical initiative is deeply flawed. On the other hand, as we will discuss in detail in Chapter 6, the technical application of proportionality as a matter of *jus in bello* may well be complicated in practice by the application of human rights principles that derive from this role-based discrepancy.

On one level, it may be that nearly anything that a boxer does to a non-boxer in terms of the use of violent force is disproportionate. And, similarly, it could be argued that nearly any violent force used by soldiers against civilians is also disproportionate. If this is true, then proportionality can set very severe limits on what can be done in armed conflict. In any event, we can say that proportionality is about limits set when considering context.

An important difficulty, when faced with issues concerning war and armed conflict, is that the values often appear incommensurable. Chapter 5 provides the detailed historical evolution of this familiar dimension of the *jus in bello* practice. In order subjectively to assess the values, then, one must to a certain extent defer to the perspective of the reasonable decision maker, or at least acknowledge the reality that decisions are often made under suboptimal conditions with often imperfect or inaccurate information. And in order to do such weighing or comparing, context matters to the extent that the values we place on these two factors will vary considerably from situation to situation. Nonetheless, the framework is meant to be fixed and consistent.

In the modern era of accountability, it can be reasonably forecast that a court or arbitral panel may well engage in a post hoc reassessment of the initial valuation. This fact raises a series of complex decisions regarding the information available to the actor at the time, the discernible intent, the role of bias or preconceptions, and perhaps most importantly of all, the appropriate degree of deference due to those who had to decide after the fact. To consider this matter in more detail we turn to the way an important tribunal, the ICC, in light of Protocol I of the Geneva conventions, has come to understand proportionality.

### III. PROPORTIONALITY AT THE INTERNATIONAL CRIMINAL COURT AND PROTOCOL I

In his seminal work *War and Law Since 1945*, Geoffrey Best pointed out that “proportionality is certainly an awkward word. It is a pity that such indispensable and

noble words as proportionality and humanitarian(ism) are in themselves so lumbering, unattractive and inexpressive.”<sup>6</sup> Proportionality is, nevertheless, a deeply embedded and indispensable aspect of decision-making during war or armed conflict. Although proportionality might once have been an arcane concept embedded in military practice far removed from public awareness or debate, its modern application is anything but disconnected from public (and often politicized) critiques. The modern use of drones in geographic areas removed from immediate hostilities on the ground has exacerbated the political and legal sensitivity associated with proportionality determinations, as we will see in Chapter 10.

By some measures, proportionality should rarely be a major factor since it is so difficult to calculate it. According to the Rome Statute of the ICC, the war crime of disproportionate strikes is committed by

Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be *clearly* excessive in relation to the concrete and direct *overall* military advantage anticipated.<sup>7</sup> (italics not in the treaty text)

Chapter 5 will describe the history of this accepted and uncontroversial articulation of *jus in bello* proportionality. For the moment, it should be noted that this treaty based criminal definition was intended to provide the comprehensive and modern articulation of the proportionality principle (at least as understood in the context of armed conflicts).

Perhaps more tellingly, all States Party to the ICC joined with the major non-Party States, including the United States, India, and China, to provide a consensus on the

<sup>6</sup> GEOFFREY BEST, WAR AND LAW SINCE 1945 324 (1994).

<sup>7</sup> Rome Statute of the International Criminal Court art. 8(2)(b)(iv), July 1, 2002, 2187 U.N.T.S. 90 (emphasis added). Early in the history of the ICC, the extension of potentially unchecked international power over actors representing sovereign States was cited as one of the primary reasons the United States was originally unwilling to go forward with the Rome Statute “in its present form.” D. J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT’L L. 14, 21 (1999). On December 31, 2000 which was the last day permitted by the treaty, Ambassador Scheffer signed the Rome Statute at the direction of President Clinton. See Rome Statute art. 125(1) (stipulating that states may accede to the Statute at a later time, but that signature was permissible only until December 31, 2000). The White House statement clarified that President Clinton ordered the signature because the United States seeks to “remain engaged in making the ICC an instrument of impartial and effective justice in the years to come,” and reaffirmed America’s “strong support for international accountability.” President William J. Clinton, *Statement on the Rome Treaty on the International Criminal Court*, Dec. 31, 2000, 37 WEEKLY COMP. PRES. DOC. 4 (Jan. 8, 2001), reprinted in S. D. MURPHY, UNITED STATES PRACTICE IN INTERNATIONAL LAW, vol. 1, 1999–2001, at 384 (2002). Nevertheless, the President’s statement made clear that he would “not recommend that my successor submit the treaty to the Senate for ratification until our fundamental concerns are satisfied,” *Id.*

Elements of Crimes of the ICC. Hence, the treaty based crimes are buttressed by detailed definition and clarification of the constituent details that must be proven beyond a reasonable doubt to warrant conviction for the war crime of engaging in a disproportionate attack. This is important because the elements provide a detailed composite of the acts and mental requirements needed to prove every crime found in the Rome Statute.

The very certainty of the legal formulation nevertheless contains the seeds of highly controversial evaluations. Indeed, the most modern articulation added the words “clearly” and “overall” that are emphasized above. As we will develop in Chapter 5, the formulation in the Rome Statute accords perfectly with the developed state of customary international usage of the term proportionality in the *jus in bello* context. Some seem to believe that very little if any damage or loss is “clearly excessive” given the difficulties of comparing seeming incommensurables. This challenge is even more sharply raised by those who would advocate an automatic deference to the subjective evaluations of the military or paramilitary commander in all, or almost all, circumstances.

During the negotiations that led to the Protocol I formulations of proportionality in 1977, some delegations warned that the rule should be clear enough to preclude giving military commanders a practically unlimited right to launch any attack based on their subjective assessment of military advantage.<sup>8</sup> Others argued that the clear treaty prohibitions are important in the quest to express proportionality as a valuable tool for humanitarian protection that does not create an unrealistic ban on attacks and that can be followed by combatants.<sup>9</sup>

The problem in practice is not just with the need to show that a projected loss of civilian life, for instance, is excessive, but that it is “clearly” so. The problem of seeming incommensurability is not a complete bar to engaging in the comparisons needed to be made in proportionality calculation. Instead, the problem is that it seems to be rare indeed that such calculations will be “clear” in the sense that they are beyond controversy, and in a criminal law setting “beyond a reasonable doubt.”

This calculus is further clouded by the lack of any agreement, and little discussion of the nexus between moral and legal considerations. The very high bar to establishing the crime of disproportionate use of force is completely uncontroversial as a matter of international criminal law. Does that settle the matter? Does the accepted international criminal law articulation of proportionality provide the appropriate framework for all proportionality calculations or is there a set of overriding moral

<sup>8</sup> Int’l Comm. of the Red Cross, 14 Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977), at 61 (para. 13) (1978) (referencing concerns raised by the Polish delegation among others).

<sup>9</sup> *Id.* at 64 (para. 48).

values that is relevant? If so, how does one decide the relevant evaluative standards? Can child soldiers even think in these terms? Should an uneasy and largely uninformed public set the terms of debate? Is it more appropriate to channel these issues through the prism of legislative process or anxious political dialogue? What is the connection between acceptability of proportionate strikes as a popular matter and the fact that the relevant criminal bar is rarely reached?

Instead of merely focusing on what is clearly excessive in the criminal sense, we will develop a different language, namely, that of thresholds. And in establishing thresholds, we will be mindful of the fact that proportionality assessments are always somewhat unclear in that they involve probability factors as well as the seeming incommensurables to which we have already alluded. Probabilities are an integral part of proportionality since, as one can see in the ICC Rome Statute text reprinted above, the factors to be considered are ones that can be anticipated, albeit imperfectly. In most situations, proportionality assessments are made “before the fact” and in almost every context, proportionality assessments are made on the basis of imperfect information and often with too much stress and too little time from the perspective of the decision-maker.

Hence, the word in the accepted ICC definition “anticipated” may be both controversial in hindsight yet completely conventional in the sense that it reflects well established customary international law and military practice. Even if proportionality assessments are made in judgment of past events, what is being judged is whether one has in the past engaged in reasonable assessments of what was predicted to occur if a war was initiated, or a certain tactic was employed, or a postwar strategy was adopted.

Accepting the premise that humanity will not celebrate the end of armed hostilities in our lifetimes, the essential goals of constraining the adverse effects of those conflicts to the smallest subset of humankind over the shortest period of time must remain a key legal and moral objective. We will discuss specific tactical problems, such as counterinsurgency (in Chapter 8), the use of human shields (in Chapter 9), targeted killings by drones (in Chapter 10), or cyber war (in Chapter 11), in which a clearer understanding of the parameters of *jus in bello* proportionality is well in order. In the longer scope of history and jurisprudential development, the very reasons for proportionality and the rule of law, even in the midst of conflict, cannot be overlooked or overcome by the press of expediency.

To that end, we will develop a theory of thresholds. Thresholds of proportionality establish a range of reasonable behavior that counts as satisfying the probability requirement, and a corresponding range of unreasonable behavior that fails to satisfy the proportionality requirement (and is thus disproportionate). Within the range, some behavior will be more, and other behavior less, *clearly* proportionate. At