

**NEW VOICES:**

**CHALLENGING THE PERPLEXITY OVER JUS IN BELLO  
PROPORTIONALITY**

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*Contrary to the common claim that jus in bello proportionality is an obscure and intractable principle of modern warfare, this paper shows that proportionality balancing has a central role to play in assuring efficient military operations with a minimum number of casualties. Military commanders can and should want to understand proportionality as a requirement to measure military advantage in terms of lives saved and direct their operations toward the most life-saving operations. The targeted killing context in particular highlights the advantage of making proportionality analysis a central component of military strategy in asymmetrical conflicts.*

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**I. CHALLENGING THE PERPLEXITY OVER JUS IN BELLO  
PROPORTIONALITY**

This paper calls into question the central thesis that is ubiquitous in discussions of *jus in bello* proportionality: that the demand to balance military advantage and injury to civilians is extraordinarily difficult because we are asked to balance two incommensurable values.<sup>1</sup> The most simple

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<sup>1</sup> As Gabriella Blum has recently written: “Much has been written on the indeterminacy of the principle of proportionality and on the unworkable test of comparing the incommensurable values of military advantage and civilian lives.” Gabriella Blum, ‘On a Differential Law of War’ (2011)52 Harv. Int. Law J. 163, 189. See, eg Aaron Fellmeth, ‘The Proportionality Principle in Operation’, (2012)45 Israel L.R. 125, 127.

response to this claim would be to point out that the hallmark of legal practice today is balancing incommensurable values, e.g. privacy and free speech<sup>2</sup> or freedom of religion and national security.<sup>3</sup> Thus proportionality balancing cannot be *extraordinarily* difficult simply because it requires us to balance two incommensurable values. We balance incommensurable values all the time.

Such a response would be too facile, however, and would overlook the fact that there are, in fact, two theses embedded in the claim: that *jus in bello* proportionality imposes a particularly arduous burden and that it asks us to balance two incommensurable things. I want to show that both of these claims are false. Proportionality balancing *is* challenging, particularly as the state of theory now stands. However, unlike abstract values such as privacy, free speech, or religious freedom, proportionality asks us to measure and compare concrete things. If proportionality is approached as I will suggest it ought to be, it has the distinct possibility of being much more straightforward than other routine instances of legal balancing.

*Jus in bello* proportionality is all the more approachable when we recognise that its two prongs are far more commensurable than we might at first imagine. Preventing the loss of civilian life, injury to civilians, and damage to civilian objects is one of the central, if not the central, reasons for use of military force today. In a world where no state will use violent military force in the name of acquisition of territory or spoils, the only legitimate uses of force are defensive, to end conflict and restore peace and security. As the U.S. Army/Marine Corps Counterinsurgency Field Manual puts it, '[t]he moral purpose of combat operations is to secure peace.'<sup>4</sup> If we fight today to secure peace, then military advantage, particularly in the counterterrorism context, should be thought about explicitly in terms of preventing harm and saving lives.

Central to making proportionality analysis more concrete is showing that targeted killing and counterterrorism generally will be more successful if military advantage is approached in terms of saving lives. The traditional approach to thinking of military advantage in terms of depletion and attrition may have little or no place in the asymmetric conflicts fought against transnational terrorist networks where neither a peace treaty nor unconditional surrender is likely to be forthcoming. Indeed, attacks that temporarily deplete the enemy but also kill civilians or only low-level enemy

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<sup>2</sup> Eg C-131/12 *Google Spain v AEPD*, decision of 13 May 2014, nyr.

<sup>3</sup> Eg *W Virginia State Bd of Educ v Barnette*, 319 US 624 (1943).

<sup>4</sup> U.S. Army/Marine Corps Counterinsurgency Field Manual 2006 [hereinafter COIN], 7-26.

combatants may have a negative military advantage by serving to bolster enemy ranks.<sup>5</sup> As the COIN Field Manual insightfully notes, some actions that ‘provide a short-term military advantage’ may actually ‘help the enemy.’<sup>6</sup> Identifying those military actions that will actually shorten conflicts and save lives requires a more intelligent approach to military advantage than attention to attrition and depletion can provide.

In the first part of the paper, I lay out the requirements of proportionality and show that nearly every nation, particularly those frequently involved in armed conflicts, has committed itself to *jus in bello* proportionality in treaty obligations, written the rule of proportionality into military manuals, and publically espoused adherence to proportionality. In the second part of the paper, I show that despite nearly universal recognition of proportionality as a central limitation on war, official legal assessments of proportionality characterise the rule as vague and indeterminate, effectively rendering proportionality an empty rule of warfare. In the third part of the paper, I set out an approach to proportionality that enables a more concrete application of the principle through a more rigorous approach to military advantage and the value of human lives. Once we see that military advantage can only be defined in relation to political goals, the value of a particular operation becomes much easier to measure and balance against harm to civilian lives. In conclusion, I discuss the extent to which the approach to proportionality sketched here can be applied more broadly to asymmetrical and conventional conflicts.

## II. THE UNIVERSAL ACCEPTANCE OF PROPORTIONALITY

The modern principle of proportionality was initially codified in the first Additional Protocol to the Geneva Conventions.<sup>7</sup> Article 51 prohibits attacks ‘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

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<sup>5</sup> As U.S. State Dept. spokesperson, Richard Boucher, said over a decade ago: “Israel needs to understand that targeted killings of Palestinians don’t end the violence but are only inflaming an already volatile situation and making it much harder to restore calm.” Jane Perlez, ‘U.S. Says Killings by Israel Inflammate Mideast Conflict,’ New York Times, 28<sup>th</sup> August 2001.

<sup>6</sup> COIN (n 4), A-28. See also A-37, 38.

<sup>7</sup> Many trace *jus in bello* proportionality to the Lieber Code, which allowed for “all direct destruction of life and limb of armed enemies, and of other persons whose destruction is incidentally unavoidable [...]” Instructions for the Government of Armies of the United States in the Field, Art. 15, prepared by Francis Lieber, promulgated as General Orders No. 100 by President Lincoln, 24<sup>th</sup> April 1863.

advantage anticipated.’<sup>8</sup> The principle of proportionality is a procedural requirement on those engaged in hostilities designed to temper the perceived demands of military necessity where civilian casualties can be anticipated. It presupposes the identification and distinguishing requirements of the principle of distinction<sup>9</sup> and adds an additional requirement to measure and compare the anticipated military advantage and anticipated civilian casualties.

The *jus in bello* requirement of proportionality has received almost universal acceptance, with 174 nations ratifying the first Additional Protocol and several non-ratifying nations, including the US and Israel, explicitly acknowledging their acceptance of proportionality as binding customary international law. Dozens of nations have taken the further step of directly writing the requirements of proportionality into their military manuals and rules of engagement.<sup>10</sup> For instance, the United States Air Force Doctrine Document, *Targeting*, states that:

The ‘law of war’ is a term encompassing all international law for the conduct of hostilities *binding* on the United States including treaties and international agreements to which the United States is a party, and applicable *customary international law*.<sup>11</sup>

The Air Force goes on to specify that ‘[t]argeting must adhere to the [law of war]’ which ‘rests on four fundamental principles that are inherent to all targeting decisions,’ among which are ‘proportionality’ and ‘distinction.’<sup>12</sup> Moreover, *Targeting* defines the ‘Role of the Judge Advocate’ as including ‘an affirmative duty to provide legal advice to commanders and their staffs that is consistent with the international and domestic legal obligations.’<sup>13</sup> Military lawyers are *required* to make a legal evaluation of distinction and proportionality before any strike. While commanders may override the judge advocate’s recommendation, commanders are still bound to adhere to the laws of distinction and proportionality.

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<sup>8</sup> Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1977, Art. 51(4) & 51(5)(b) [hereinafter: AP I]. Cf. AP I, Arts. 57(2)(a)(ii), 57(2)(b); the Rome Statute of the International Criminal Court Art. 8(2)(b)(iv).

<sup>9</sup> AP I Art. 48. See also Arts. 44(3), 48, 51(3), 51(5)(a), 52(2), 57(2)(a)(ii), 57(3).

<sup>10</sup> See the ICRC’s *Customary IHL*, ‘Practice Relating to Rule 14. Proportionality in Attack,’ available at [www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule14\\_sectiona](http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule14_sectiona), accessed 12.01.2015.

<sup>11</sup> United States Air Force Doctrine Document, *Targeting*, 88. (emphasis added)

<sup>12</sup> *ibid.* The other two principles are military necessity and unnecessary suffering, or ‘humanity.’;

<sup>13</sup> *Targeting* (n 11) 95.

The requirements set out in the Air Force's *Targeting* document have been echoed by U.S. officials. In April 2012, then Assistant to the President for Homeland Security and Counterterrorism, John Brennan, in his remarks on the U.S.'s counterterrorism strategy stated that '[t]argeted strikes conform to the principle of proportionality—the notion that the anticipated collateral damage of an action cannot be excessive in relation to the anticipated military advantage.'<sup>14</sup> In March 2010, then Legal Adviser to the U.S. State Department, Harold Koh, stated in his address to the American Society of International Law:

[T]he principles of distinction and proportionality that the United States applies are not just recited at meetings. They are implemented rigorously throughout the planning and execution of lethal operations to ensure that such operations are conducted in accordance with all applicable law.<sup>15</sup>

Given the nearly universal acceptance of proportionality and claim by the world's most active militaries that they diligently apply and respect it, we might expect to find rich and detailed accounts of precisely what proportionality demands. One of the most disturbing contradictions in discussions of proportionality today is that the nearly universal subscription to it as a fundamental law of armed conflict is coupled with the claim that its demands are fundamentally unclear and difficult or impossible to apply in practice. Thus the most extensive legal discussion of *jus in bello* proportionality, the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, found that '[t]he main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied.'<sup>16</sup> Unfortunately, the NATO Bombing Report is not exceptional in finding the requirements of proportionality essentially vague and open to divergent interpretations.<sup>17</sup> As we will now see, proportionality has appeared vague and indeterminate primarily because the two elements it requires us to measure and balance, military advantage and civilian lives, have never been subjected to rigorous analysis.

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<sup>14</sup> John O Brennan, 'The Ethics and Efficacy of the President's Counterterrorism Strategy,' remarks at the Woodrow Wilson International Center for Scholars in Washington, DC on 30<sup>th</sup> April 2012.

<sup>15</sup> Harold Hongju Koh, 'The Obama Administration and International Law,' remarks at Annual Meeting of the American Society of International Law, Washington, DC 25<sup>th</sup> March 2010.

<sup>16</sup> Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, [48-50].

<sup>17</sup> *ibid.*, [50].

### III. THE PERPLEXITY OVER PROPORTIONALITY

The two most extensive legal discussions of proportionality stand in sharp contrast to the widespread affirmative commitment to proportionality, suggesting that it is not much more than a legal fiction. The NATO Bombing Report describes the problem thus:

It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective.<sup>18</sup>

In addition to locating the difficulty in the purported incommensurability of military advantage and civilian lives, the Report identifies a number of factors that remain under-theorized, but necessary, for assessments of proportionality. These include how to value military advantage and civilian casualties, how narrowly the assessment should be made in time and space, and to what extent a commander has an obligation to expose his own forces to danger in order to limit civilian casualties.<sup>19</sup> Unfortunately, the Report makes no attempt to resolve any of these questions by formulating legal standards or tests. Rather, the Report effectively throws up its hands and offers only the platitude that “[t]he answers to these questions are not simple. It may be necessary to resolve them on a case by case basis, and the answers may differ depending on the background and values of the decision maker.”<sup>20</sup>

The lack of definite criteria by which to evaluate the proportionality of an attack is also reflected in the recent German *Fuel Tankers* case. The case arose after a German colonel ordered an airstrike on two fuel tanker trucks that had been stolen by members of the Taliban in Afghanistan. By the time the trucks were bombed, however, the Taliban had abandoned them and the tanker trucks were surrounded by civilians syphoning off fuel for their own use. As a result, the bombs killed or severely injured more than one hundred civilians. Attempting to determine whether the attack on the tanker trucks was proportionate, the German Federal Court of Justice found that:

Even if the killing of several dozen civilians would have had to be

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<sup>18</sup> *ibid*, [48].

<sup>19</sup> *ibid*, [49].

<sup>20</sup> *ibid*, [50].

anticipated (which is assumed here for the sake of the argument), from a tactical-military perspective this would not have been out of proportion to the anticipated military advantages. The literature consistently points out that *general criteria are not available for the assessment of specific proportionality because unlike legal goods, values and interests are juxtaposed which cannot be “balanced.”* Therefore, considering the particular pressure at the moment when the decision had to be taken, an infringement is only to be assumed in cases of *obvious excess* where the commander ignored any considerations of proportionality and refrained from acting “honestly,” “reasonably,” and “competently.” This would apply to the destruction of an entire village with hundreds of civilian inhabitants in order to hit a single enemy fighter, but not if the objective was to destroy artillery positions in the village. There is no such obvious disproportionality in the present case. Both the destruction of the fuel tankers and the destruction of high-level Taliban had a military importance which is not to be underestimated, not least because of the thereby considerably reduced risk of attacks by the Taliban against own troops and civilians. There is thus no excess.<sup>21</sup>

The Court rehearses the common refrain that proportionality cannot be assessed in specific instances because proportionality asks us to balance two incommensurable values. It goes on to draw the logical inference that proportionality is an all but empty requirement that would be violated only where a commander appears to ignore proportionality altogether. Given the claim that proportionality is essentially vague and indeterminate, it is difficult to understand why it would impose any legal requirement on commanders at all. It is thus particularly surprising that the Court unequivocally finds not only that there was no excessive civilian casualties in the bombing of the fuel tanker trucks, but that there are other clear cases in which civilian casualties could be judged as excessive or justified.

There are clearly several elements of the *Fuel Tankers* case that do not add up. Aside from the obvious result of reducing disproportionate attacks to wholly indiscriminate attacks and thus making the proportionality requirement superfluous, a legal system that routinely balances incommensurate values in other contexts seems to overstate the hardship of balancing military advantage and civilian casualties.<sup>22</sup> As we have already

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<sup>21</sup> Germany, Federal Court of Justice, the Federal Prosecutor General, *Fuel Tankers* case, Decision, 16<sup>th</sup> April 2010, 66 (internal citations omitted; emphasis added).

<sup>22</sup> Among some of the well known cases from the German Constitutional Court are BVerfGE 7, 198 (the “Lüth”-decision): balancing free speech vs. “right to

seen, even if military advantage and civilian casualties have no common denominator, there is no reason to think they could not be balanced in the way that other apparently incommensurable values are balanced in constitutional rights cases. Second, the opinion conflates the legal standard of proportionality with the evidentiary requirements of holding someone criminally liable for its violation. While it may be right to think that criminal liability should be reserved only for the most egregious violations of the law, there is no reason to think that the criteria of criminal liability define the threshold of proportionality violations. There may well be a range of violations of proportionality for which damages or reparations rather than criminal liability is the appropriate response.<sup>23</sup>

Perhaps the most troubling aspect of the *Fuel Tankers* judgment is that, despite having abjured the possibility of assessing proportionality in specific cases, the court is quite prepared to pronounce both on the case at hand and its own hypotheticals. But here it is not at all apparent on what principles or criteria the court is relying. What makes bombing a village to kill a sniper excessive? What if the sniper reliably could be anticipated to kill hundreds of soldiers and civilians in the coming months? Likewise, what makes the court so sure that the destruction of artillery positions would warrant killing hundreds of civilians in the village? It seems the court is relying on the vague notion that artillery are generally capable of more destruction than a single sniper. That seems reasonable enough. The question, however, is what makes the killing of hundreds of civilians excessive in one case but not in the other. Here the court seems to resort to no more than a vague feeling. We do not know why, but we are convinced killing hundreds of civilians to kill a sniper is disproportionate. Likewise, we do not quite know why, but we might more readily accept the same number of civilian deaths to eliminate artillery positions. Under its 'vague feel' standard, the court suggests, only 'cases of obvious excess' could allow us to infer that the commander failed to fulfill the minimal requirements.

The problem with this approach is not only that it lowers the bar of proportionality to making a mere consideration rather than an actual assessment, it also renders entirely opaque just how cases of obvious excess can be identified. The Court offers no account of what would make one attack clearly excessive and another not. There is thus no way to assess its

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personality"/personal honour; BVerfGE 90, 145 ("Cannabis-Urteil"): balancing general liberty to consume drugs vs. public health; and BVerfGE 104, 337 (on halal slaughter of animals): balancing religious freedom vs. animal rights.

<sup>23</sup> See 'Basic Principles and Guidelines of the Right to a Remedy and Reparations for Victims of Violations of International Human Rights and Humanitarian Law.' General Assembly Resolution 60/147 (16<sup>th</sup> December 2005).

ultimate finding that the death or severe injury of over one hundred civilians in the bombing of two stolen fuel tanker trucks exhibited ‘no excess.’ Although neither the German military nor the government admitted wrongdoing, the government did subsequently agree to a settlement of roughly \$5,000 to each victim’s family.<sup>24</sup> It would thus seem, at the very least, that the German government felt it made a mistake in assessing the relative value of military advantage and civilian casualties. Presumably, if military commanders had known the tankers were abandoned by the Taliban and surrounded by civilians, they would have called off the airstrike. But the Court suggests that even if several dozen civilian casualties had been anticipated, the strike still would not have violated proportionality. Yet the Court offers no way to even begin to draw the line between cases of ‘obvious excess’ and cases of ‘no excess.’

Military commanders can and should want to do better. War will be fought more successfully and efficiently if military advantage is well articulated and enemy civilians are not disproportionately harmed by attacks. In the remainder of this paper I want to show how the values of military advantage and civilian casualties can be analysed and balanced.

#### **IV. UNDERSTANDING AND BALANCING MILITARY ADVANTAGE AND CIVILIAN LIVES**

As we have seen, *jus in bello* proportionality prohibits attacks

[W]hich 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.<sup>25</sup>

Proportionality is a principle designed both to protect civilians in armed conflict and to foster accountability by establishing a mechanism that guides military commanders to take account of both anticipated civilian casualties and military gains before conducting an operation. Military forces are thus barred from undertaking military operations absent some (quantifiable) assessment of what is at stake in the operation itself. As with military necessity, when the survival of a state is truly at issue, as was arguably the case for many European nations during World War II,

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<sup>24</sup> Matthias Gebauer, ‘Aftermath of an Afghanistan Tragedy’ (Spiegel Online International) <[www.spiegel.de/international/germany/aftermath-of-an-afghanistan-tragedy-germany-to-pay-500-000-for-civilian-bombing-victims-a-710439.html](http://www.spiegel.de/international/germany/aftermath-of-an-afghanistan-tragedy-germany-to-pay-500-000-for-civilian-bombing-victims-a-710439.html)> accessed 15.12.2014.

<sup>25</sup> AP I, Art. 51(4) & 51(5)(b).

anything that weakens the military capability of the enemy could bolster military advantage. However, outside of a 'total war' where the survival of a nation is not seriously in question, we must know what the goals of the use of force are in order to know what serves military advantage. In the age of the U.N. Charter, uses of military force are supposed to be for the purpose of restoring peace and security.<sup>26</sup> As is particularly clear for targeted killings in counter terrorism operations, the elimination of terrorist threats is for the purpose of saving lives. A strike that merely damages the enemy but has no anticipated effect of saving lives or restoring peace and security may not have any positive military advantage. Because the military advantage of a targeted killing is fundamentally linked to saving lives, I will argue that what at first appears to be a balancing of two incommensurable values, military advantage and excessive civilian casualties, actually has a common denominator at least in cases of targeted killing, if not in most conflicts today.

Before looking more closely at the two prongs of proportionality, it will be useful to clarify some of its technical aspects. First, actual results are not what is in question: 'The legal question is the relationship between expected harm and anticipated advantage in the operation as planned, not that which eventuated.'<sup>27</sup> Second, proportionality analysis is based on a reasonableness standard. As the ICTY held in *Galić*, the question is 'whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.'<sup>28</sup> Third, giving an account of the anticipated military advantage and civilian casualties depends on having already identified and distinguished military from civilian targets. The military target must then be connected to a military advantage by giving a credible account of how a particular attack, such as an attack on a line of communication, will yield a concrete military advantage. While giving a credible explanation in a conventional conflict may be relatively straightforward, targeted strikes in

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<sup>26</sup> This is not to say that the many other coercive measures deployed in international relations today are or should be guided primarily by considerations of peace and security. A variety of 'carrots' and 'sticks' may be used, for instance, in economic trade negotiations or environmental treaty negotiations, as well as for direct peace and security interests. However, when military force is deployed, with its immediately destructive and violent effects, it is acceptable today only when peace and security interests are directly at stake. Thus military force for economic gain, or to coerce another state into joining an environmental treaty, or even to coerce a state into joining a sanctioning regime, is fundamentally unacceptable.

<sup>27</sup> Michael Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance,' 50 *Va J Intl L* 795, 825 (2010).

<sup>28</sup> Case No. IT-98-29-T *Prosecutor v Galić*, Judgement and Opinion, [58] (ICTY, 5<sup>th</sup> December 2003).

a counter-terrorism operation do not adhere to the same logics of depletion and attrition. Killing one terrorist may well spawn two new ones, particularly if injuries to civilians and minors are involved.<sup>29</sup> The U.S. military states the new approach succinctly in their 2006 Counterinsurgency Field Manual:

[T]he number of civilian lives lost and property destroyed needs to be measured against how much harm the targeted insurgent could do if allowed to escape. If the target in question is relatively inconsequential, then proportionality requires combatants to forego severe action, or seek non-combative means of engagement.<sup>30</sup>

As with counterinsurgency, a different approach to proportionality is needed in the targeted killing context, one that accounts for the anticipated lives saved and lives lost on each side.

Once military targets have been identified and expected civilian casualties assessed, expected military advantage must be weighed against civilian losses. As we have seen, many practitioners and scholars presume that any hope for a rigorous balancing of military advantage and civilian losses necessarily gives way to a vague assessment of incommensurables. For example, Michael Schmitt argues that it is wrong to understand proportionality analysis as balancing. He explains that the test calls us to focus on excessiveness in order to

[A]void [...] the legal fiction that collateral damage, incidental injury, and military advantage can be precisely measured. Ultimately, the issue is reasonableness in light of the circumstances prevailing at the time.... and nothing more.<sup>31</sup>

Schmitt's analysis is misleading, particularly in the context of modern warfare. It is true that civilian casualties and military advantage can only be estimated using methods and criteria that must ultimately be judged for their reasonableness. However, modern technology and data analysis can and should be employed to enable proportionality analysis that rests on more than a vague feeling of the commander. For example, given the hundreds of drone strikes carried out in the last decade, data on civilian casualties, militant casualties, threats avoided, and increases or decreases in enemy numbers can and should be brought to bear on proportionality

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<sup>29</sup> Gabriella Blum and Philip Heymann refer to this phenomenon as the 'Hydra effect.' See 'Law and Policy of Targeted Killing,' (2010) 1 *Harv Nat'l Sec J* 145, 165.

<sup>30</sup> COIN (n 4), [7-32].

<sup>31</sup> Michael Schmitt, *Essays on Law and War at the Fault Lines* (Springer 2012), 190.

assessments. Doing so will not only enable more rigorous compliance with proportionality, it will also enable militaries to use force more effectively. Given limited resources and budget constraints, more effective use of force through data-driven assessment of military advantage should be attractive to any military.

As the discussion thus far has sought to highlight, proportionality analysis has been notorious for its difficulty largely because we lack a systematic approach to assessing military advantage and the value of civilian lives. As with any hard problem, much of the difficulty can be mitigated by identifying the component variables and understanding how they interact. In the case of military advantage, we can identify three central variables. First, the anticipated military advantage must be measured in terms of the value of eliminating the target in question. If, say, the target is Hitler and the data show that killing him will likely shorten the conflict considerably and save hundreds of thousands of lives, then killing him will have very significant military advantage. Second, the anticipated military advantage must be adjusted for likelihood of success. If the advantage of killing Hitler by aerial bombardment during WWII would have been great, but the likelihood of success miniscule, then the assessment of *anticipated* military advantage must be adjusted accordingly. That is, one cannot assess anticipated military advantage based on the unrealistic presupposition of 100% success rate for an operation. Third, the anticipated military advantage should be assessed on a scale of anticipated opportunity from unique or very limited, to highly repeatable. Unique opportunities to strike a military target will have greater military advantage than strike opportunities that are standing or which are anticipated to recur frequently in the future.

An assessment of military advantage that takes each of these three variables into account will enable a reliable measure of how many lives are likely to be saved by carrying out a particular strike. Moreover, accounting for these variables should not place any additional burden on military targeting than what is already accepted. The language surrounding U.S. targeted killing, for example, is replete with references to 'high value targets,' assessments of uniqueness of opportunity, and a recognition that not all strikes will be successful. By making these valuations explicit in the assessment of military advantage, commanders will have a more concrete sense of the lives at stake in the choice of targets and be able to channel their resources most effectively.

The valuation of civilian casualties requires at least as much clarification as the valuation of military advantage. Focusing just on civilian deaths for the moment, it is a daunting task to assess the value of human lives. It is

helpful to bear in mind, however, that the actors bound by proportionality will be, in principle, engaged in defensive war designed ultimately to save civilian lives and property. Given that the intent of defensive war is protection of a state's own people, there are two relatively straightforward principles that should govern proportionality assessments. The first is an adaptation of crude utilitarian principles that sidesteps a direct valuation of human life and proceeds directly to the weighing of relative outcomes. Given that military targeting is designed to weaken the enemy and bring hostilities more quickly to a close, commanders should ask how many lives the strike in question can be anticipated to save by bringing the conflict to a swifter end or by eliminating a terrorist threat likely to harm fellow civilians or military personnel. I acknowledge that in many instances such a calculation may only be made with limited certainty and approximation. However, in the targeted killing context, an assessment of the number of lives saved by eliminating a particular threat is essential to identifying and prioritizing the most significant threats. Moreover, in many instances such a calculation will not be prohibitively difficult. For a state engaged in a defensive war, data on rates of their own civilian and military casualties resulting from the armed conflict should be readily available. The anticipated military advantage should, in turn, relate to some assessment of the length of time the conflict is likely to be shortened by the strike, adjusted for likelihood of success. The consequent shortening can then be compared to the rates of civilian and military deaths. Thus on a crude utilitarian calculation, if the anticipated shortening of the conflict would save 20 civilian and military lives (at present rates of loss), then it would be excessive to kill 21 or more civilian lives in the process. Thus, if 21 or more civilian deaths are anticipated, the rule of proportionality in this case would dictate abandoning the strike.

The first utilitarian principle that I have outlined is a good starting criterion, but may give way to bias toward one's own civilians or military personnel and a desire to shift the risk onto foreigners with whom we feel no relation. The principles of distinction and proportionality are supposed to check those biases. It is for that reason that we must recall what lies at the basis of protecting civilian lives. Just as we no longer embrace the 'Napoleonic dictum that soldiers "are made to be killed,"<sup>32</sup> we are no longer supposed to embrace the total war doctrine that civilians in enemy territory can be sacrificed en masse to save our fellow civilians. Thus, I want to suggest that at the basis of the law of war today is recognition of the inherent value, or dignity, of all human lives. We do not seek to save lives because they are our own, a logic that would apply better to cattle

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<sup>32</sup> Larry May, 'Jus Post Bellum Proportionality and the Fog of War,' (2013)24 EJIL 315, 321.

than to humans today. Rather we seek to save lives because we recognise their inherent dignity. As such, the second principle that should govern the assessment of loss of human life in the proportionality calculation is an adaptation of the Golden Rule that also sidesteps a direct valuation of life and instead focuses on the targeting community's own assessment of acceptable civilian death. There are at least two important implications of this principle. First, as in the utilitarian calculus, those contemplating the strike are required to value the lives of enemy civilians to the same extent that they value the lives of their own civilians and military personnel. What this means is that we should not understand any opposition between protecting one's own civilians and protecting other civilians. Following this logic, the loss of two enemy civilians to save a single civilian or military person is disproportionate. Second, the Golden Rule requires the attacking force to put themselves in the shoes of those on the receiving end and ask whether they would abide such an attack as legitimate. The purpose of such self-assessment is not simply to act as a check on excessive uses of force and the discounting of enemy civilian lives in relation to the lives of fellow citizens. Adhering to these principles is the only way to systematically abide by the principle of proportionality. For if military advantage is ultimately measured in numbers of lives saved, a coherent determination of excessive civilian casualties from an attack can only take place if foreign civilians are valued equally with fellow civilians and military personnel. The reason that the lives of fellow and foreign civilians should be valued equally is because the value of their lives derives from a feature common to both, ie their dignity, and not secondary considerations of citizenship or allegiance. Citizenship by itself, whether fellow or foreign, tells us nothing about whether we should guard the life of the person who possesses it. Because respect for life is both more fundamental and universal than citizenship and rests on the peculiarly human attribute of dignity, each life, whether fellow or foreign, should be valued equally.

Beyond its usefulness in helping to clarify how lives should be valued, the further advantage of adopting these principles is that it forces military strikes to be contemplated in terms of actual outcomes in relation to the conflict at hand. Commanders should ask whether and by how much contemplated actions will shorten the conflict and save lives. The great advantage of this approach to proportionality is that it defines military advantage concretely, and does so such that military advantage and civilian casualties can be commonly measured in lives saved and lost.

I have argued that once military targets have been properly identified and distinguished from civilian targets, the military advantage of striking those targets should be assessed in terms of what can be reasonably claimed to shorten a war and save lives. Requiring an explicit focus on saving lives,

particularly where enemy civilian lives are valued equally with fellow citizen lives, achieves the purposes of protecting civilians in conflict, holding parties to conflicts accountable for their actions, and enabling military commanders to direct their focus on the most valuable targets and thereby fight more effectively.

## **V. CONCLUSION**

My focus on targeted killing highlights the extent to which proportionality analysis is centered on the common denominator of saving lives and can be carried out in an intelligent, data-driven manner. Because targeted killing consists of a pre-planned attack in a particular place against specific persons, a great deal of information can be assessed that may not be available ‘in the heat of battle.’ Targeted killings thus allow a more accurate application of proportionality supported by greater intelligence information. The fact that proportionality can be assessed more carefully and on the basis of more data in the targeted killing context does not, however, invalidate it as a model for more complex contexts such as asymmetrical conflicts or conventional wars. Although proportionality assessments in these other contexts may have to be made on the basis of less available information, the process and approach I have outlined should still serve to improve both the protection of civilian lives and the attainment of military goals. Every military should be interested in more effectively eliminating enemy threats and protecting and saving lives. By evaluating military advantage and proportionality in the light of all of the data at its disposal, militaries will fight shorter conflicts with fewer civilian casualties.