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Proportionality 2.0: Evaluating Military Force in a Modern International Humanitarian Legal Framework

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PROPORTIONALITY 2.0:
EVALUATING MILITARY FORCE IN A MODERN INTERNATIONAL
HUMANITARIAN LEGAL FRAMEWORK

*Deborah Beth Medows**

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“An eye for an eye, a tooth for a tooth, a hand for a hand, a foot for a foot.”¹

According to the concept of proportionality, as rooted in Jewish Scriptures, solely non-excessive forceful measures may be utilized to achieve an objective.² The analysis of proportionality, a basic principle of customary international humanitarian law, is conducted on a fact-specific basis.³ Although there is no objective, definitive test under international law that adequately defines proportionality, this concept can be adumbrated by various models and standards in international legal jurisprudence that will be evaluated in this paper.

As applied in the context of warfare, the proportionality principle prohibits members of the military from conducting “attacks in

* Assistant Counsel, New York State Legislative Bill Drafting Commission. The author acknowledges the feedback of the fellow participants at the 2013 National Security Law Faculty Workshop at South Texas College of Law, where this paper was discussed. The author additionally dedicates this scholarship to Lee Medows, Ariella Michal Medows, Shirley Kahn, and Naomi Suberi-Busany.

¹ *Exodus* 21:24.

² Todd Landman, *Imminence and Proportionality: The U.S. and U.K. Responses to Global Terrorism*, 38 CAL. W. INT’L L.J. 75, 84–85 (2007).

³ Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT’L L. 715, 761 (2008).

which the expected civilian casualties will be excessive in relation to the anticipated military advantage gained.”⁴ In accordance with technological changes in modern warfare, such as the proliferation of cyber attacks, this paper explores how to assess compliance with regard to the use of force under the proportionality principle in conjunction with international humanitarian law and the applicable rules of engagement that operate within it.⁵

Part I of the paper explores the concept of proportionality as interpreted through a variety of legal frameworks by engaging in comparative legal models. Part II addresses the role of proportionality analysis in *jus in bello* and *jus ad bellum*, and highlights proposed legal frameworks for conducting these analyses. Part III addresses the role of proportionality analysis with regard to self-defense in a military context. Part IV explores the modern challenges posed by conducting a proportionality analysis within the context of applicable rules of engagement and international humanitarian law, and discusses relevant juridical standards for evaluating the sufficiency of a proportionality analysis.

I. DEFINING PROPORTIONALITY IN INTERNATIONAL CONTEXTS

The concept of proportionality is evaluated distinctively among various international legal cultures. Proportionality jurisprudence stems from German law, dating back three centuries.⁶ German jurists understand the application of the proportionality principle to encompass an ordering of constitutional values; as such, when there is a

⁴ Laurie R. Blank, *Rules of Engagement: Law, Strategy and Leadership* 1, 9 (Emory Public Law Research Paper No. 11-168, 2012), available at <http://ssrn.com/abstract=1872505> (citing Protocol Additional to the Geneva Conventions of 12 August 1949 art. 51 (5)(b), and Relating to the Protection of Victims of International Armed Conflicts, adopted by Conference June 8, 1977, 1125 U.N.T.S. 3 (prohibiting any “attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”)), damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”)).

⁵ *Id.* at 4–5.

⁶ Margit Cohn, *Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom*, 58 AM. J. COMP. L. 583, 608–09 (2010).

conflict in German law between interests and rights, “the main concern of proportionality, then, is to determine which of the interests best further the ultimate shared goals of the constitutional order.”⁷ Consequently, German proportionality analysis does not require differentiation between competing constitutional priorities.⁸ Rather, by evaluating rights under a tripartite model,⁹ German jurists consider whether the desired outcome of an action was suitable; whether the severity of the undertaken action was necessary under a means analysis; and whether the collective benefits of an action outweighed any injury to the petitioner.¹⁰

Proportionality in Germany is distinguished from proportionality in other legal systems by three significant factors. First, although other legal systems focus on identifying a goal or conducting an ends-means analysis, the German method of determining proportionality focuses primarily on the actual balancing *per se*.¹¹ Second, German jurists examine which of the rights or values further the German constitutional order by upholding human dignity. Finally, the proportionality analysis is conducted in an *ad hoc* manner.¹²

In the European Union, proportionality has been utilized in international public law, and has become a “powerful procedural tool.”¹³ Member states of the European Union are subject to the principles of proportionality and necessity under the European Union Founding Treaties and the Treaty of Lisbon.¹⁴ In Europe, the concept of proportionality encompasses three distinct connotations: the relationship between the objective and the means undertaken to reach that objective; whether there are appropriate alternative means available; and whether the rendered judgment is proportionate to the

⁷ Moshe Cohen-Eliya & Iddo Porat, *The Hidden Foreign Law Debate in Heller: the Proportionality Approach in American Constitutional Law*, 46 SAN DIEGO L. REV. 367, 392–93 (2009).

⁸ *Id.*

⁹ Cohn, *supra* note 6, at 609.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Benedict Kingsbury, *The Concept of ‘Law’ in Global Administrative Law*, 20 EUR. J. INT’L L. 23, 33 (2009).

¹⁴ Cohn, *supra* note 6, at 610.

wrongdoing.¹⁵ The European Court of Justice and the European Court of Human Rights have recognized the role of proportionality in their jurisprudence.¹⁶ The European Court of Justice's proportionality analysis is similar to the American least restrictive means test.¹⁷

In order to ascertain whether state actions are proportionate, the European Court of Justice established a three-prong test. First, the purpose of a proposed measure or regulation must actually be imbued within the power of the governmental authority taking action. Second, the means themselves used to implement the regulation cannot be inappropriate. Finally, the regulation must be implemented through the least restrictive measures available.¹⁸

European jurisprudence accepts the distinct "margin of appreciation" doctrine, under which tribunals allocate to governmental entities "a degree of leeway in applying obligations or limitations" when evaluating the rights of disputing parties.¹⁹ The European Court of Human Rights first employed the margin of appreciation doctrine in *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) 5 (1976), in which the court held that governments could better assess moral regulations than the court because of international differences.²⁰ The European Court of Justice recognizes the concept of a "margin of appreciation" under the term "area of discretion."²¹

Countries that currently integrate the concept of proportionality into their jurisprudence include: Ireland, South Africa, Israel, Australia, and New Zealand, *inter alia*.²² Arguably, "the United States is the last system in the West to resist the appeal of the proportionality

¹⁵ Richard G. Singer, *Proportionate Thoughts About Proportionality*, 8 OHIO ST. J. CRIM. L. 217, 218 (2010) (reviewing E. Thomas Sullivan & Richard S. Frase, *PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS* (Oxford University Press 2008)).

¹⁶ Cohn, *supra* note 6, at 611.

¹⁷ Nathan Horst, *Creating an Ever Closer Union: The European Court of Justice and the Threat to Cultural Diversity*, 47 COLUM. J. TRANSNAT'L L. 165, 195 (2008) (citing *U.S. v. Carolene*, 304 U.S. 144 (1938)).

¹⁸ Franck, *supra* note 3, at 753–54.

¹⁹ *Id.* at 760.

²⁰ *Id.* at 761 (citing *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) 1, 5 (1976)).

²¹ Cohn, *supra* note 6, at 611–12.

²² Cohen-Eliya & Porat, *supra* note 7, at 381.

doctrine.”²³ The debate in the United States regarding the role of proportionality in American jurisprudence is referred to as “the question of American exceptionalism.”²⁴ Proponents of this model believe that American law is distinct from other international legal systems, and it is thus inapposite to study foreign jurisprudence to develop American constitutional analysis.²⁵ Under the methodological view of exceptionalism, whose proponents include Supreme Court Justice Antonin Scalia, American constitutional analysis is derived from a categorical approach that focuses on specific constitutional rights and whether those rights were abrogated.²⁶ This inquiry is distinct from the European law’s two-fold evaluation. The European model first examines whether a right was infringed upon, and then inquires whether the government met its burden of persuasion that the objective was legitimate and that the means used were proportionate.²⁷ Opponents of the American exceptionalism model, who include Supreme Court Justice Stephen Breyer, counter that American jurisprudence does not differ too markedly from other legal systems, and respond to similar challenges.²⁸

In contrast to the American legal system, Canadian jurisprudence is more accepting of the proportionality analysis. In *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (Can.),²⁹ the Supreme Court of Canada wrote that it needed to balance between competing principles in order to consider the entire Constitution and its values.³⁰ The case serves as evidence that contrary to American fears that “a similar subsequent adoption of the European organic conception of the state” could emerge from adopting the principle of proportionality, in Canada, “proportionality facilitates the infiltration of continental constitutional ideas into a common law judicial system.”³¹

²³ *Id.*

²⁴ *Id.* at 374.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 374–75, 385–86.

²⁸ *Id.* at 375, 381.

²⁹ *Reference re Secession of Que.*, [1998] 2 S.C.R. 217 (Can.).

³⁰ *Id.* at 220, 260.

³¹ Cohen-Eliya & Porat, *supra* note 7, at 412 (citing *Reference re Secession of Que.*, [1998] 2 S.C.R. 217 (Can.)).

In the New Zealand cases, which were heard together, *Ministry of Transp. v. Noort Police v. Curran*, [1992] 3 NZLR 260 (CA), the Wellington Court of Appeal incorporated Canadian law regarding proportionality into its own jurisprudence.³² The court held that the means to further a desired governmental objective “must be reasonable and demonstrably justified in a free and democratic society.”³³ The court defined its implementation of proportionality as requiring “a rational connection between the measures and the objective,” and identified the need for the least possible impairment of a right or freedom.³⁴ The court expounded that “the deleterious effects of the measures must be justifiable in light of the objective which they are to serve.”³⁵

The High Court of Ireland also applied the proportionality principle in *An Blascaod Mor Teoranta v. Comm'rs of Pub. Works*, [1998] I.E.H.C. 71. The court held that for a measure to be “regarded as necessary in a democratic society,” it must be “proportionate to the legitimate aim pursued.”³⁶ In conjunction with proportionality, the court noted the importance of safeguarding fundamental rights and balancing whether an infringement on a right was permissible due to a “pressing social need.”³⁷

Finally, the United States is not the only legal system worldwide that ostensibly rejects the proportionality analysis as part of its legal system. Japan is similar to the United States in rejecting the European proportionality analysis, as Japan does not overtly employ a widespread proportionality test in its legal system.³⁸ Rather, the violation of Japanese constitutional rights is illegal only if the government acted in an unreasonable or irrational manner.³⁹ Japanese jurisprudence is not concerned with the correlation between the

³² *Ministry of Transp. v. Noort; Police v Curran* [1992] 3 NZLR 260 (CA).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Blascaod Mor Teoranta v. Comm'rs of Pub. Works in Ireland*, [1998] I.E.H.C. 71, 150 [1998].

³⁷ *Id.*

³⁸ Craig Martin, *Glimmers of Hope: The Evolution of Equality Rights Doctrine in Japanese Courts from a Comparative Perspective*, 20 DUKE J. COMP. & INT'L L. 167, 245–46 (2010).

³⁹ *Id.* at 244.

objective of an asserted goal and the means employed to achieve that goal.⁴⁰ However, proportionality analysis has become more prevalent in dissenting opinions in Japanese jurisprudence, suggesting the development of case law upon the subject.⁴¹

II. EVALUATING PROPORTIONALITY IN *JUS IN BELLO* AND *JUS AD BELLUM*

In the context of warfare, a proportionality analysis encompasses a balance between protecting human rights and the need for military action.⁴² International humanitarian law, also known as the law of war and the law of armed conflict,⁴³ limits the means and methods of force, as the only legitimate purpose of military force is to “weaken the military forces of the enemy.”⁴⁴

In the context of the law of warfare, sources for proportionality stem from just war theory⁴⁵ and the bifurcation between *jus in bello*, which pertains to conduct during hostilities, and *jus ad bellum*, which refers to the commencement of such hostilities.⁴⁶ In *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27), the International Court of Justice held that even though Nicaragua instigated actions to which the United States responded, this response was illegitimate, as Nicaragua’s actions did not constitute an armed attack to which the United States could respond with defensive action.⁴⁷ The Nicaraguan court declared its power to evaluate whether force exerted during *jus ad bellum* was justified on an individualized basis, dependent upon the facts of the case.⁴⁸

The legality of measures taken in the context of *jus in bello* is independent from the initial legality of the use of force.⁴⁹ *Jus in bello* constraints apply to the types of weapons used and whether or not the

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Blank, *supra* note 4, at 6.

⁴³ *Id.* at 4.

⁴⁴ *Id.* at 6.

⁴⁵ Landman, *supra* note 2, at 83.

⁴⁶ Franck, *supra* note 3, at 719–23.

⁴⁷ *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

⁴⁸ *Id.* at 720–21.

⁴⁹ *Id.* at 723.

use of those weapons is excessive.⁵⁰ Under the Geneva Conventions, weapons may not cause excessive suffering to individuals, and article 35(3) of the 1977 Additional Protocol I to the Geneva Conventions provides that it “is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.”⁵¹

To examine proportionality of force under *jus in bello*, scholars have adopted three models: the “tit-for-tat-test,” the “cumulative test,” and the “deterrent proportionality test.” Under the “tit-for-tat-test,” the amount of force used must be limited in proportion to the amount of force in the preceding attack, as evaluated in terms of deaths and property destruction.⁵² Under the “cumulative test,” an inquiry into whether a military response is proportional encompasses both immediate and continuing acts of aggression.⁵³ Notably, this approach does not encompass either general or specific deterrence; there must be a rough equivalence with regard to casualties and property damages.⁵⁴ The third test is the “deterrent proportionality test,” under which responding force is evaluated together with the goal of deterring future use of force against the state.⁵⁵ Under this test, a state could lawfully use more force than was used by an initial aggressor, with the goal of preventing future attacks.⁵⁶

Some scholars propose combining the legal standards into a flexible and cumulative rubric in which “military retaliation is weighed against the immediately preceding attacks as well as the probability and magnitude of future attacks.”⁵⁷ This test is arguably the most appropriate standard to apply to the conflicts faced by modern democracies that deal with the all-too realistic threat of terrorism. It would be infeasible to suggest that such states should refuse to protect

⁵⁰ *Id.* at 725.

⁵¹ Protocol Additional to the Geneva Convention Relative to the Protection of Victims of International Armed Conflicts, art. 35 (3), June 8, 1977, U.N. Doc. A/32/144, Annex I (1977), reprinted in 16 I.L.M. 1391 (1977).

⁵² Zachary Myers, *Fighting Terrorism: Assessing Israel's Use of Force in Response to Hezbollah*, 45 SAN DIEGO L. REV. 305, 324 (2008).

⁵³ *Id.* at 326 (2008).

⁵⁴ *Id.*

⁵⁵ *Id.* at 327.

⁵⁶ *Id.*

⁵⁷ *Id.* at 328.

their citizens until after these states are attacked in order to ascertain just how much force would be proportionate, and hence, lawful. Further, this amalgamated standard may be applicable to modern security challenges due to the international nature of terrorism, the barriers to negotiations with terrorists, and the large supply of those willing to commit acts of terrorism.⁵⁸

III. PROPORTIONALITY AND SELF-DEFENSE IN THE MILITARY

The use of force must be distinguished between measures undertaken with the larger goal of defending a nation from an existential threat as opposed to those undertaken with a specific military objective.⁵⁹ In the former situation, proportionality constraints may not limit the use of defensive force, as even an “extreme measure might be justified” in the quest for state survival.⁶⁰ However, regarding the latter situation, the issue of proportionality may be disputed due to the decreased necessity that would justify the use of force in a particular situation.⁶¹

The use of force is regulated under international humanitarian law, as the rules of war, the Geneva Conventions, and customary law apply to every situation of armed conflict.⁶² Prohibitions on the disproportionate use of force include the International Committee of the Red Cross Commentary on Article 51(5)(b) of Protocol I of the Geneva Convention⁶³ and the International Criminal Court Statute Article 8(2)(b)(iv).⁶⁴ The Commentary on Article 51(5)(b) of Protocol I of the Geneva Convention, which addresses injuries to civilians, stipulates that military measures for which there is a vague or general advantage should not be implemented if they would incur civilian casualties.⁶⁵

⁵⁸ *Id.*

⁵⁹ Fletcher, *supra* note 47, at 532.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Blank, *supra* note 4, at 4–5.

⁶³ Amichai Cohen, *The Principle of Proportionality in the Context of Operation Cast Lead: Institutional Perspectives*, June 2009, 1, 30, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1423254&download=yes.

⁶⁴ Rome Statute of the International Criminal Court, 1998, Art. 8(2)(b)(iv).

⁶⁵ Cohen, *supra* note 63, at 30.

The concept of proportionality as utilized in the context of national self-defense differs from the standard of proportionality for armed conflict under international law, which focuses on the minimization of collateral damage.⁶⁶ The proportionality principle is critical in analyzing compliance under applicable rules of engagement, and despite their differences, laws regarding warfare are similar to those regarding self-defense.⁶⁷ The ICC has a high threshold for determining breaches of proportionality; for example, Article 8(2)(b)(iv) of the ICC Rome Statute forbids “clearly excessive” conduct.⁶⁸ The definition of self-defense may be particularized according to national laws and specific rules of engagement.⁶⁹ These rules are issued by states’ militaries and stipulate the conditions under which force may be used.⁷⁰

A state may resort to self-defense solely when non-forceful measures are not a viable option and the hostile act or intent remains present. All proportional means of self-defense in terms of “nature, duration, and scope of force” can be utilized (subject to limits under applicable rules of engagement).⁷¹ Proportionality analysis is a focal feature in determining the legality of self-defense; the traditional standard for the justification of self-defense under international law is when “the necessity of the self-defense is instant, overwhelming, and leaving no choice of means and no moment for deliberation.”⁷² International law limits self-defense in the context of rules of engagement, as such, force used in self-defense may only be exercised proportionate to the “intensity, duration, and magnitude of force to what reasonably is required to counter the attack or threat of attack.”⁷³

⁶⁶ ALAN COLE ET AL., INT'L INST. OF HUMANITARIAN LAW, RULES OF ENGAGEMENT HANDBOOK 1, 3–4 (2009), available at <https://www.usnwc.edu/getattachment/7b0d0f70-bb07-48f2-af0a-7474e92d0bb0/San-Remo-ROE-Handbook>.

⁶⁷ Fletcher, *supra* note 47, at 531.

⁶⁸ Cohen, *supra* note 63, at 35.

⁶⁹ COLE, *supra* note 66, at 3.

⁷⁰ COLE, *supra* note 66, at 1.

⁷¹ *Id.* at 3–4.

⁷² Amos Guiora, *The Military Commissions Act of 2009: Pre-empting Terror Bombings—A Comparative Approach to Anticipatory Self-Defense*, 41 U. TOL. L. REV. 801, 816 (2010) (citations omitted).

⁷³ Major Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 3, 30 (1994).

Critically, when evaluating the proportionality of prospective forceful measures, civilians may not be disproportionately endangered.⁷⁴

International legal sources for national self-defense in the context of proportionality, as applied in combat, include Article 51 of the United Nations Charter, which adds an exception to the Article 2(4) general prohibition on force.⁷⁵ While Article 2(4) of the United Nations Charter broadly precludes the legitimization of one state's forceful measures against that of another state, Article 51 provides an exception when the force is deployed for defensive purposes.⁷⁶ Article 51 authorizes the use of defensive force only in the case of a substantial armed attack.⁷⁷ Such attacks are described in the Article as a "qualitatively grave use of force."⁷⁸ Generally, a state may take international defensive action only after the instigating state has already used force.⁷⁹ The presumption of legality is strengthened if the defending state's territory was threatened.⁸⁰ Proportionate defensive force can also be considered legitimate when it is in response to threats against political independence.⁸¹ The proportionality requirement continues to encompass the "respect for the sovereignty of the targeted state as far as the effective prevention it poses permits."⁸²

Article 31 of the Rome Statute of the International Criminal Court expressly mentions the need for proportionality in conjunction with self-defense.⁸³ Under the statute, the lawfulness of military measures should be determined by balancing the advantages of forceful measures against casualties, rather than by narrowly focusing on the

⁷⁴ Fletcher, *supra* note 47, at 531.

⁷⁵ Franck, *supra* note 3, at 719.

⁷⁶ *Id.*

⁷⁷ Guiora, *supra* note 72, at 817.

⁷⁸ James A. Green & Francis Grimal, *The Threat of Force as an Action in Self-Defense under International Law*, 44 VAND. J. TRANSNAT'L L. 286, 300 (2011).

⁷⁹ Derek W. Bowett, *SELF DEFENCE IN INTERNATIONAL LAW* 79 (Manchester University Press 1958).

⁸⁰ *Id.* at 29.

⁸¹ *Id.* at 84.

⁸² Robert J. Delahunty & John Yoo, *The George W. Bush Administration: A Retrospective: The "Bush Doctrine": Can Preventive War be Justified?*, 32 HARV. J. L. & PUB. POL'Y 843, 865 (2009).

⁸³ Fletcher, *supra* note 47, at 531.

number of deaths.⁸⁴ The balancing model is flawed due to its inherent subjectivity and because of the argument that “whenever there is a military scenario with asymmetric capabilities, the principle of necessity should become subordinate to the principle of proportionality.”⁸⁵

IV. CHALLENGES IN EVALUATING THE PROPORTIONALITY OF MODERN WARFARE IN THE INTERNATIONAL HUMANITARIAN LEGAL FRAMEWORK, AND EXAMINING APPROPRIATE LEGAL STANDARDS

The concept of proportionality must be utilized in a realistic and practical manner. Current rules of engagement arguably “overemphasize proportionality while largely ignoring and thereby inhibiting the soldier’s right to self-defense.”⁸⁶ Many rules of engagement are impracticable in their current form. This fact was evidenced in the battlefield in Iraq, where soldiers could not lawfully defend themselves adequately, lacking the time to determine if a person was a civilian or a combatant.⁸⁷ It follows that “even when defined, terms ‘that confound even seasoned scholars of international law’ are difficult for a twenty-year-old soldier with limited armed combat experience to understand and apply in an instant.”⁸⁸

To address relevant standards of proportionality, rules of engagement must take into account the changing face of warfare, including the threat of cyber attacks, a modern method of warfare that can damage critical, wide-reaching infrastructure.⁸⁹ Cyber attacks,

⁸⁴ Symposium, *When Does Collateral Damage Rise to the Level of a War Crime?: Expanding the Adequacy of Laws of War Against Contemporary Human Rights Discourse*, 41 CREIGHTON L. REV. 679, 699 (2008).

⁸⁵ *Id.* at 700.

⁸⁶ Karen P. Seifert, Note, *Interpreting the Law of War: Rewriting the Rules of Engagement to Police Iraq*, 92 MINN. L. REV. 836, 882 (2008).

⁸⁷ *Id.* at 856.

⁸⁸ *Id.* at 856–77 (quoting C. Peter Dungan, *Rules of Engagement and Fratricide Prevention: Lessons from the Tarnak Farms Incident*, 9 UCLA J. INT’L L. & FOREIGN AFF. 301, 312 (2004)).

⁸⁹ See Dan Rivers, *On the Frontline of Cyber Warfare*, CNN TECH (Nov. 4, 2010, 4:48 AM), <http://www.cnn.com/2010/TECH/web/10/28/malaysia.cyber.security/index.html> (“In the future, warfare may shift from a battlefield to a keyboard. Superpowers might deem a nuclear exchange too destructive, but already they are developing Weapons of Mass Disruption; software viruses that are designed to cripple the operating systems of power stations, dams, traffic lights and public transport.”).

which are modern forceful measures, differ from more conventional acts of warfare.⁹⁰ The current legal framework that regulates warfare under international law, as established by the Geneva Conventions, is not relevant because the laws in their current form do not adequately or appropriately address the current, cutting-edge challenges posed by cyber warfare,⁹¹ although Articles 2(4) and 39 of the Charter of the United Nations may provide a lawful basis for defense of cross-border cyber attacks.⁹²

In today's era with its ever-growing potential for new technological threats, liberal democracies "suffer a disproportionate number of terrorist attacks," resulting from the "natural tension between the values of liberal democracy and the need for greater security."⁹³ There appears to be a "trade-off between the risk of future terrorist attacks" and balancing "the curbing of civil liberties."⁹⁴ The resounding question is, what actions may a state take to proportionally and lawfully defend its territory?

A case study of a state that currently faces this very dilemma is Israel, which grapples between the dichotomy of balancing the modern democratic values advanced by the nation's widely acknowledged liberal Supreme Court, and the contemporaneous need for defense from the serious and realistic threat of terrorism.⁹⁵ States that struggle with security challenges similar to those faced by Israel must grapple

⁹⁰ See William J. Lynn III, *Defending a New Domain: The Pentagon's Cyberstrategy*, 89 FOREIGN AFF. 97, 99 (2010); see also Kim Zetter, *Former NSA Director: Countries Spewing Cyberattacks Should be Held Responsible*, WIRED (Jul. 29, 2010, 3:52 PM), <http://www.wired.com/threatlevel/2010/07/hayden-at-blackhat/>.

⁹¹ Deborah B. Medows, *The Sound of Silence: The Legality of the American "Kill Switch Bill,"* 4 CASE W. RES. J. L. TECH. & INTERNET 59, 62 (2012) (citing Patricia Donovan, *Cyberwars: Already Underway with No Geneva Conventions to Guide Them*, UNIV. OF BUFFALO NEWS CTR. (Oct. 14, 2010), <http://www.buffalo.edu/news/11862>).

⁹² *Id.* (citing Antonio Segura-Serrano, *Internet Regulation and the Role of International Law*, 10 MAX PLANCK Y.B. U.N.L. 191, 221 (2006)).

⁹³ Landman, *supra* note 2, at 85–86.

⁹⁴ *Id.* at 87.

⁹⁵ In the interest of full disclosure, this author served as a Foreign Law Clerk to Justice Neal Hendel at the Supreme Court of Israel in 2011. This article solely reflects the views and scholarship of the author and does not necessarily reflect the views of the Court.

with the question of to what extent the country's military may lawfully employ force to protect its citizenry.

In 2006, Israel responded to attacks by an armed terrorist group, Hezbollah,⁹⁶ by stating that the presence of civilians "will not render military objects immune from attack for the mere reason that it is impossible to bombard them without causing injury to the other non-combatants."⁹⁷ After other states accused Israel of violating the precept of proportionality, the salient inquiry was whether Israel's countermeasures had to be limited in a scope proportionate to the latest raid by Hezbollah or to the totality of hostilities imparted upon Israel over a number of years.⁹⁸ Notably, Israel did not ratify the Additional Protocol of 1977 to the Geneva Conventions, the only Protocol that contains an express requirement regarding proportionality, although this requirement could be binding under international customary law.⁹⁹

Assuming that Israel does need to comply with proportionality requirements under international law, the question remains as to how Israel's modern military can lawfully protect the country from current threats, in conjunction with the proportionality principle, while deterring prospective ones. Israel is surrounded by enemy states that have posed risks to its very existence since the 1948 War of Independence,¹⁰⁰ and the country faces threats of intrastate terrorist attacks.¹⁰¹ Meanwhile, Iran has threatened to "wipe Israel off the

⁹⁶ See Jonathan Masters, *Hezbollah*, COUNCIL ON FOREIGN RELATIONS (November 7, 2013, 6:00 PM), <http://www.cfr.org/lebanon/hezbollah-k-hizbollah-hizbullah/p9155> ("The U.S. government and its European allies consider Hezbollah a global terrorist threat and a menace to regional stability.").

⁹⁷ Franck, *supra* note 3, at 732–33 (citations omitted).

⁹⁸ *Id.* at 733.

⁹⁹ *Id.* at 734.

¹⁰⁰ See *Worried Israel: Encircled by Enemies Again?*, THE ECONOMIST (November 7, 2013, 6:00 PM), <http://www.economist.com/node/18186996>.

¹⁰¹ See *Suicide and Other Bombing Attacks in Israel Since the Declaration of Principles (Sept 1993)*, ISR. MINISTRY OF FOREIGN AFFAIRS (November 7, 2013, 6:00 PM), <http://mfa.gov.il/MFA/ForeignPolicy/Terrorism/Palestinian/Pages/Suicide%20and%20Other%20Bombing%20Attacks%20in%20Israel%20Since.aspx>.

map,"¹⁰² and Israel understands Iran's developing nuclear capabilities to be a threat to its existence and regional stability.¹⁰³

One measure to potentially evaluate the proportionality of force as used by the Israel Defense Forces is to apply the Learned Hand formula.¹⁰⁴ Under this method, precautions should be taken if it is "cheaper, economically and morally, for a person responsible for creating the harm to take certain precautions against injury than it is for someone who is likely to be harmed and whose injury will be extensive."¹⁰⁵ As applied to international law, a strike is not precluded when "an armed response is more likely to reduce loss of life through narrowly targeted strikes."¹⁰⁶ As such, under the rubric of the Learned Hand formula, Israel would comply with the international requirement of proportionality if more lives would be saved by targeting terrorists than by incurring loss of lives from failure to take action.

Other countries similarly facing the existential threat of terrorism have considered various factors in addressing the amounts of force that their militaries may proportionally use to protect their citizens. Such factors used to weigh the proportionality quotient include evaluating "the nature of the measures" aims, the nature of the right(s) the measure infringes, and whether the individuals or groups the measure targets are objects of antipathy and negative stereotypes or lack political power."¹⁰⁷

¹⁰² See Nazila Fathi, *Wipe Israel 'Off the Map' Iranian Says*, N.Y. TIMES (November 7, 2013, 6:00 PM), http://www.nytimes.com/2005/10/26/world/africa/26iht-iran.html?_r=0.

¹⁰³ See *At UN, Israel Insists Tough Sanctions Must Remain to Deter Iranian Nuclear Threat*, UN NEWS CTR. (November 7, 2013, 6:00 PM), <http://www.un.org/apps/news/story.asp?NewsID=46167&Cr=general+debate&Cr1=#.Un0tcp0o75o> ("Iran wants to be in a position to rush forward to build nuclear bombs before the international community can detect it and much less prevent it," he [Netanyahu] continued, expressing his belief that recent pledges from Iran's new President to cooperate with the international community on the issue are 'a ruse.'").

¹⁰⁴ Saad Gul and Katherine M. Royal, *Burning the Barn to Roast the Pig? Proportionality Concerns in the War on Terror and the Damadola Incident*, 14 WILLAMETTE J. INT'L L. & DISPUTE RES. 49, 52 (2006).

¹⁰⁵ *Id.* at 66.

¹⁰⁶ *Id.*

¹⁰⁷ Lise Johnson, "You can Violate the Rights of Undocumented Persons with Impunity": *The Shocking Message Arizona's Constitution Sends and its Inconsistency with International Law*, 13 J. GENDER RACE & JUST. 491, 515 (2010).

In order to evaluate whether states' military's actions are proportional under international humanitarian law, judicial systems must consider a variety of factors. Judicial review of military actions regarding proportionality is extremely rare, resulting from the subjectivity of the actions themselves.¹⁰⁸ *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgment of Trial Chamber, ¶507 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000), was the only significant case in the International Criminal Tribunal for the Former Yugoslavia ("ICTY") where lack of proportionality was a consideration in the defendant's conviction.¹⁰⁹ Due to the ambiguity in ascertaining whether a measure was proportional, the Prosecutor's Office of the ICTY declared that it would only prosecute cases involving disproportionality where "the excessiveness of the incidental damage was obvious"¹¹⁰ and "the relative number of civilian deaths [are] so clearly disproportional that no reasonable military commander could argue its legitimacy."¹¹¹

In judging *ex post facto* whether the civilian casualties incurred as a result of military force were proportional, investigations should be conducted by qualified military personnel.¹¹² This method of determining the proportionality of military force is sensible, as those who are trained in warfare and are familiarized with first-hand experience about the practical implementation of the rules of engagement would comprehend to what extent others had complied with those rules. As discussed above, under international humanitarian law, actions may be deemed to be proportionate even if civilians were killed, but it is critical that civilians may not be deliberately targeted.¹¹³

Another method of judicially evaluating proportionality was recognized in the 2003 ICTY *Prosecutor v. Galic*, No. IT-98-29-A, ¶¶6-7 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006). The Galic' Court formed a reasonable person standard in conjunction with

¹⁰⁸ Cohen, *supra* note 63, at 34-35.

¹⁰⁹ *Id.* (citing *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgment of Trial Chamber, ¶ 507 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000)).

¹¹⁰ Aaron Xavier Fellmeth, *Questioning Civilian Immunity*, 43 TEX. INT'L L.J. 453, 489 (2008) (citing Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, Final Report to the Prosecutor, June 13, 2000, para. 21).

¹¹¹ Fellmeth, *supra* note 105, at 489.

¹¹² Cohen, *supra* note 63, at 36-37.

¹¹³ Guiora, *supra* note 72, at 826.

international law.¹¹⁴ It reasoned that rather than evaluating a case in hindsight, jurists need to consider whether a person in the same circumstances as the defendant would have “expected excessive civilian casualties to result from the attack.”¹¹⁵ The ICTY further developed the reasonable person standard, holding that the method to determine lawfulness of proportionality is justification “by military necessity.”¹¹⁶ As discussed above, the practicality of this decision is questionable, given the right of soldiers to self-defense,¹¹⁷ and the impracticability of such rules of engagement in their current form.¹¹⁸

In *Isayeva v. Russ*, App. No. 57950/00, Eur. Ct. H.R. (2005), the European Court of Human Rights established a four-pronged test to assess the proportionality of military actions.¹¹⁹ These criteria included the independence of the investigating body, the ability to appropriately remedy any wrongdoing, the punctuality of the investigation, and the public’s ability to scrutinize the matter.¹²⁰ Complicating this ostensibly straightforward formula is the precise nature of measuring the human element of proportionality itself. Remaining unanswered is how to apply the proportionality test, which is performed *ex ante* and often involves a subjective analysis of various risks, as well as the following questions:

What values should one assign to each of the competing variables? In particular, how should one measure each military advantage against human lives? How should one assess the worth of human lives on both sides of the conflict? Are the parties entitled to protect their own citizens or

¹¹⁴ Franck, *supra* note 3, at 737.

¹¹⁵ *Id.* (quoting *Prosecutor v. Galic*, Case No. IT-98-29-A, ¶¶ 6–7 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006)).

¹¹⁶ *Id.* (quoting *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2--A, ¶426 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004)).

¹¹⁷ Karen P. Seifert, *Interpreting the Law of War: Rewriting the Rules of Engagement to Police Iraq*, 92 MINN. L. REV. 836, 882 (2008).

¹¹⁸ *Id.* at 856–57 (quoting C. Peter Dungan, *Rules of Engagement and Fratricide Prevention: Lessons from the Tarnak Farms Incident*, 9 UCLA J. INT’L L. & FOREIGN AFF. 301, 312 (2004)).

¹¹⁹ *Isayeva v. Russ*, App. No. 57950/00, Eur. Ct. H.R. (2005).

¹²⁰ Cohen, *supra* note 63, at 34–35.

soldiers at the cost of endangering uninvolved enemy civilians, and if so, at what ratio?¹²¹

V. CONCLUSION

Many international legal systems abide by proportionality limitations, and under international humanitarian law and applicable rules of engagement, members of the military are obligated to limit the use of force. Determining what measures are proportionate is difficult because of the modern changes in warfare and the inherent subjectivity of the proportionality analysis, although several suggested juridical models serve as guidance on the matter.

¹²¹ *Id.* at 29.