

Making Proportionality Meaningful in Asymmetric Armed Conflicts: Some Observations
from the 2014 Gaza Conflict

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ABSTRACT

A staggering volume of legal scholarship has been dedicated in recent years to understanding the legal framework of war in the twenty-first century. This growing interest is testimony to the fact that something fundamental has changed in the landscape of war. Conventional wars, the kind that had shaped the rules and customs of war for centuries, hardly erupt anymore. Nowadays, conflicts are waged by new actors that had (and still have) no voice in shaping the rules under which wars are fought. These actors use new weapons and new tactics, they seek different goals, and they reject the western-minded scheme of the current legal framework. The type of warfare that these actors dictate captures a range of asymmetries between the warring parties and makes the task of regulating 'asymmetric' conflicts within the current legal framework extremely challenging.

The principle of proportionality assumes a key role in asymmetric conflicts. It serves as a humanitarian constraint to the use of force when civilians and civilian property are at risk. International law prohibits attacks that are expected to cause incidental loss of civilian life that would be excessive in relation to the concrete and direct military advantage anticipated. In practice, however, proportionality seems to be an open-ended standard that fails to provide a clear line between lawful and unlawful acts of hostilities. Frequently, people, objectively and in good faith, may reach different conclusions on whether certain actions are proportionate, mainly because proportionality requires scaling 'military advantage' against civilian suffering, a process that inherently involves subjective value determinations and seems to be less principled.

Against the challenges of regulating asymmetric conflicts on the one hand and applying proportionality in a principled manner in all types of armed conflicts on the other, this article explores the operation of proportionality in asymmetric conflicts. Asymmetric warfare features some unique challenges in applying proportionality while at the same time requires its application in practically every instance of attack. In an age in which hostilities have moved away from the frontlines into urban areas, incidental civilian loss is possible at

all times, and the task of mitigating the effects of war on the civilian population becomes vital. As evidenced by recent cases of asymmetric hostilities worldwide, virtually every time commanders order an attack, they must undertake proportionality assessment. And yet, international law actors, monitoring bodies and commentators seem to construe proportionality very differently in practice, a fact that threatens to undermine both its normative validity and practical value.

This article argues that in applying proportionality in asymmetric conflicts, three types of 'traps' should be avoided: (1) the 'asymmetric results' trap; (2) the 'formalist approach' trap; and (3) the 'absolutist' trap. In discussing ways to avoid these traps, the article advocates a purposive approach to the principle of proportionality in asymmetric conflicts, suggesting how proportionality can be adopted to the evolving war environment of contemporary conflicts while being faithful to its humanitarian core. The 2014 Gaza conflict between Israel and Hamas, codenamed 'Operation Protective Edge', shall be used as a test case for the analysis.