

Be Informed:

Understanding “Proportionality” and “Distinction” as Defined by the Laws of War

Proportionality

As the war continues, you may hear the concept of “proportionality,” being used in ways that are wrong or misleading. “Proportionality” as a legal concept in the laws of war and as defined by International Humanitarian Law does **NOT require** that the force that a country uses against its enemy be proportional to the force used against it. A country may use as much force as is necessary to achieve its military objectives. It is also recognized that in war the loss of civilian life is inevitable. What “proportionality” requires is that a country refrains from using force in which **incidental civilian injuries would be clearly excessive in relation to the anticipated military advantage.**

From Wikipedia, “[Proportionality \(law\)](#)”:

[Luis Moreno-Ocampo](#) was the [Chief Prosecutor](#) at the [International Criminal Court](#) who investigated allegations of [war crimes](#) during the [2003 invasion of Iraq](#). He published an open letter containing his findings; in a section titled "Allegations concerning War Crimes", he elucidates this use of *proportionality*:

Under international humanitarian law and the [Rome Statute](#), the death of civilians during an armed conflict, no matter how grave and regrettable, does not in itself constitute a war crime. International humanitarian law and the Rome Statute permit belligerents to carry out proportionate attacks against military objectives,^[12] even when it is known that some civilian deaths or injuries will occur. A crime occurs if there is an intentional attack directed against civilians (principle of distinction) (Article 8(2)(b)(i)) or an attack is launched on a military objective in the knowledge that the incidental civilian injuries would be clearly excessive in relation to the anticipated military advantage (principle of proportionality) (Article 8(2)(b)(iv)).

Article 8(2)(b)(iv) criminalizes:

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;

Article 8(2)(b)(iv) draws on the principles in Article 51(5)(b) of the 1977 Additional [Protocol I](#) to the 1949 [Geneva Conventions](#), but restricts the criminal prohibition to cases that are “*clearly*” excessive. The application of Article 8(2)(b)(iv) requires, *inter alia*, an assessment of:

- (a) the anticipated civilian damage or injury;
- (b) the anticipated military advantage;
- (c) and whether (a) was “clearly excessive” in relation to (b).

From "[Department of Defense, Law of War Manual \(updated July 2023\)](#)," p. 61:

Proportionality generally weighs the justification for acting against the expected harms to determine whether the latter are disproportionate in comparison to the former. In war, incidental damage to the civilian population and civilian objects is unfortunate and tragic, but inevitable. Thus, applying the principle of proportionality in conducting attacks does not require that no incidental damage result from attacks. Rather, this principle creates obligations to refrain from attacks in which the expected harm incidental to such attacks would be excessive in relation to the concrete and direct military advantage anticipated to be gained and to take feasible precautions in planning and conducting attacks to reduce the risk of harm to civilians and other persons and objects protected from being made the object of attack.

Distinction

Another critical concept to understand in the laws of war is that of "distinction." Distinction requires that a country or combatant force clearly distinguishes between its own combatants and the civilians in the population that it controls. It also prohibits the use of civilians as hostages or as shields. Hamas, by embedding itself in the civilian population, and in its failure to distinguish itself or its vehicles in any way, blatantly violates the law of distinction. As David French writes (*What It Would Mean to Treat Hamas Like ISIS*," David French, NY Times Subscriber-Only email, Oct 12, 2023):

When Hamas abandons the principle of distinction, then Hamas is responsible for the civilian damage that results. If Hamas fights from a hospital — or stores munitions in a hospital — damage to that hospital is Hamas's responsibility. If Hamas fighters shoot at Israel Defense Forces from a home that contains a Palestinian family, then Hamas is responsible for the civilian casualties if that family is harmed in the resulting exchange of fire.

From "[Department of Defense, Law of War Manual \(updated July 2023\)](#)," p. 63-65:

Distinguishing a Party's Own Persons and Objects. Distinction enjoins the party controlling the population to use its best efforts to distinguish or separate its military forces and war-making activities from members of the civilian population to the maximum extent feasible so that civilian casualties and damage to civilian objects incidental to attacks on military objectives will be minimized as much as possible.

Parties to a conflict must: (1) take certain measures to help ensure that military forces and civilians can be visually distinguished from one another; (2) physically separate, as feasible, their military objectives from the civilian population and other protected persons and objects; and (3) refrain from the misuse of protected persons and objects to shield military objectives.

[...]

Parties to a conflict must not disguise their armed forces as civilians or as other protected categories of persons in order to kill or wound opposing forces.

[...]

Refrain From the Misuse of Protected Persons and Objects to Shield Military Objectives.

Parties to a conflict must refrain from the misuse of civilians and other protected persons and objects to shield their own military objectives. For example, it is prohibited to take hostages or otherwise to endanger deliberately protected persons or objects for the purpose of deterring enemy military operations.