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PROPORTIONALITY FOR MILITARY  
LEADERS

by

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### *Abstract*

Despite its preeminent position in just war tradition, the concept of proportionality is not well understood by military leaders. Especially lacking is a realization that there are four distinct types of proportionality.

In determining whether a particular resort to war is just, national leaders must consider the proportionality of the conflict, i.e., balance the expected gain or just redress against the total harm likely to be inflicted by the pending armed action. This proportionality consideration is called *jus ad bellum* proportionality. The second type of proportionality discussed is a continuing re-evaluation of the proportionality, taking into account the changing situation.

The last true proportionality discussed is a consideration of hostile action taking during a conflict, or *jus in bello* proportionality. This consideration weighs the expected military gain of a particular action against the collateral damage and injuries that are expected from the act.

Finally, the fourth category addressed is "political proportionality," which is not truly a proportionality consideration, but is rather self-interested deliberation on the possible political and military outcomes of actions. In some instances, it could be referred to as a measured response.

Better understanding of proportionality in all its forms will help military leaders to give appropriate and moral advice on the potential resort to war, as well as on the conduct of military actions in war.

# Proportionality for Military Leaders

*[S]oldiers also are not excused when they fight in bad faith.*

—Franciscus de Victoria

## Introduction

According to Geoffrey Best, the noble concept of proportionality is burdened with a "lumbering, unattractive and inexpressive" name.<sup>1</sup> Whether it is the name, or merely the complexity of the subject, proportionality has not received its due in the United States (US). Leaders here have failed to demonstrate an adequate understanding of the subject. This matters because proportionality is the single most important factor in waging moral armed conflict. Further, proportionality can be an integral aspect of waging efficient and effective war.

In this paper I will discuss why military members should care about justice in war, and why proportionality is the cornerstone of just war theory. The heart of the paper is the explanation of the four distinct concepts of proportionality, and an assertion that an understanding of all four is necessary for US leaders to make moral decisions about future armed engagements.

## **The Importance of Justice in War**

In 2000, the US is a hegemony with a military that appears to outstrip geometrically any potential threat to its security. Some might argue that questions about the justice of its military actions are irrelevant; after all, what entity can meaningfully criticize any moral or legal violations by the US? Despite the appearance of US invulnerability, there are good reasons for a policy of moral war-making.

One of the benefits of being "gentlemanly" in warfighting is reciprocity. Whereas not every enemy will strictly follow moral codes, they are certainly less likely to do so if US actions are questionable. Related to that is the harder-to-quantify advantage that obtains to beneficent combatants. If the US maintains a reputation for moral treatment of the enemy, the likelihood of surrender is increased while the likelihood of an enemy fighting to the death is decreased. In the Persian Gulf Conflict, hordes of Iraqis surrendered to coalition forces (including one group that presented themselves as captives to a US drone aircraft!).<sup>2</sup> The opposite has also proven true. Germans on the Western Front in World War II were more likely to surrender than those on the Eastern Front, largely due to the humane treatment of prisoners of war by the Western allies.<sup>3</sup>

Ensuring that wars are just and are prosecuted honorably will help to build and maintain coalitions. Fighting as part of a coalition team brought the US victories in both world wars and, arguably, honorable stalemates in Korea and Iraq.<sup>4</sup> Making its way without coalition partners beyond the "home team," the US went down to defeat in Vietnam. Despite the inherent difficulties involved in dealing with multiple governments and militaries, coalition warfare is here to stay. Those vital coalitions can be challenging to build for poor causes, and can be torn apart by atrocities in battle. Morality in war is part of the glue that binds coalitions together.

Besides, engaging in just wars justly is the right thing to do. Churchill, when pondering the Allied decision to bomb German cities wondered aloud: "Are we beasts?"<sup>5</sup> Many today would answer his rhetorical question in the affirmative. It is possible that obliteration bombing brought Germany and Japan to their knees sooner, but it was nonetheless morally distasteful. "Bomber" Harris, the British architect of the bombing of Germany, was the only British service chief not awarded the customary honors after the war.<sup>6</sup>

Another advantage of moral warfighting is that just wars are easier to end. The US, along with coalition allies, has proven more than equal to the task of prevailing militarily in conflicts such as those in the Persian Gulf, the Former Republic of Yugoslavia and Haiti. The chapter that plagues the US the most is the final one – the inability of the US to get out of those countries after the shooting war ends has been an albatross around its neck. Morality in war, while certainly not a solution in and of itself, can prevent exacerbation of ethnic tensions. When civilians are killed in war, the grudge of surviving and future family members can span generations. This can only make achieving a permanent peace more difficult.

A final reason to maintain moral standards in war looks to the future. Put simply, times change. US dominance will not last forever. Conflicts arrogantly begun and prosecuted without regard for moral principles can create ill-will and make enemies around the world. With the turning of the seasons, asymmetric warfare, and decreasing support from the other nations of the world, the US could find itself isolated and vulnerable. Already, the "hegemony problem" and the perception that the US generally takes a selfish, "me-first" attitude toward foreign policy is beginning to erode the mandate the US inherited in the aftermath of the Cold War.<sup>7</sup> Perhaps the proper respect for morality in war will help prevent the fall of a future American Ozymandius.<sup>8</sup>

One of the great misunderstandings about rules of warfare is their purpose. It is **not** to assuage the consciences of liberal-minded civilians, but rather to protect combatants from the irrational and immoral behavior more likely to occur in war.<sup>9</sup>

Given, then, that waging our wars honorably is important, US leaders at all levels should be able to consider and discuss the moral implications of warfighting decisions. To do this, they must understand the concept of the "just war."

## **Just War Theory**

The National Conference of Catholic Bishops, relying on the works of Augustine and Aquinas, eloquently summarized the elements of modern just war theory in a pastoral letter on war and peace. A just resort to war requires just cause, an authority competent to decide to go to war, a consideration of comparative justice, the right intention, the exhaustion of more peaceful means, a probability of success, and proportionality.<sup>10</sup>

Although the Bishops chose the items to emphasize different elements of just war thought, two additional concepts, just cause and comparative justice, can be considered under the heading of proportionality. Proportionality involves considering all the evil that will result from a war, and weighing it against the good that will occur or the harm that will be avoided. The definition is discussed in more detail later. The remaining concepts – competent authority, right intention, exhaustion of peaceful means and probability of success – are interesting in their own right, but are beyond the scope of this paper. And, they all pale before the proportionality issue; i.e., a consideration of the justice of each belligerent's cause and the ills that will inevitably result from armed conflict. Proportionality is the keystone of just war theory.

If proportionality is the most vital tenet of just war theory, our decision makers must have a firm grasp on the concept. Unfortunately, the evidence does not support an optimistic view in this regard.

In September 1996, US Secretary of Defense William Perry promised a "disproportionate" response to Iraq's unsuccessful attacks on US and coalition aircraft patrolling the no-fly zones over Iraq.<sup>11</sup> Secretary Perry clearly did not wish to convey the impression that the US response would be unjust, but that is what he did. The popular press' use of the term also leads to confusion.

"Proportionality was the hallmark of the Vietnam War, where it was called 'escalation.' Disproportionate response, a.k.a. the 'Powell Doctrine' – inflicting massive, decisive, aggression-reversing damage at a scale of our choosing – was the hallmark of the Gulf War. Disproportionality works better."<sup>12</sup> The proportionality discussed in this quotation, and in Secretary Perry's statement above, is not the proportionality upon which just war theory is based. Proportionality does not preclude waging war to win. Misunderstandings over the term can lead to confusion in our military and diplomatic relations. The discussion below addresses the various forms of proportionality.<sup>13</sup>

### ***Ad Bellum* Proportionality**

*Jus ad bellum* is the justice of going to war in the first place.<sup>14</sup> A fundamental proposition of just war theory is that there is always a presumption in favor of peace, so exceptional justification is required to cross the threshold of war.<sup>15</sup> That justification is the corpus of *jus ad bellum*.

Before a war has begun, its proportionality is considered, as "it is not every cause that is sufficient to justify war, but only those causes which are serious and commensurate with the losses that the war would occasion."<sup>16</sup> In other words, the good resulting from correcting every wrong does not necessarily outweigh the evil effects of armed conflict. That consideration does not close the book on the issue, however. During the course of an armed conflict, the situation can change so that continuing the fight would be disproportionate. I address both of these senses of *ad bellum* proportionality below.

### **Proportionality before the Conflict**

Earlier in history, the justice of resorting to war was considered in each case before the fighting began. The rightness of a cause was a prerequisite for initiating conflict. The Greeks and Romans both had sophisticated rituals for determining the justice of a war.<sup>17</sup> Saints Augustine and Aquinas labored to refine the Christian theory of proper resort to war. In the seventeenth century, Hugo Grotius, considered the father of international law, waxed eloquent on the justice of resorting to war as well as justice during war. As the years passed, the balance tipped away from *ad bellum* proportionality. That shift was at least partly due to the loss of an international "honest broker;" as the power of the Roman Catholic church ebbed, the authority of the Pope to declare causes just became less convincing.<sup>18</sup> When every political authority in Europe looked to Rome for guidance, there could be in some sense a common vision of justice. Of course, politics were important in the church, and the edicts issued could be at odds with the common perception of justice, but there is something to be said for certainty. No other

institution has been able effectively to assume the role of the Roman Catholic church in this regard, although the United Nations continues to try.

Perhaps because of the lack of a neutral arbiter, or because *ad bellum* proportionality is the more complex, the continuing trend is to consider proportionality only as it relates to actions taken during the course of armed conflict. This has led to a formal assumption that both sides in a conflict are morally equivalent, at least at the start of hostilities. "Most modern theorists ... devote little attention to the question of **whether** war is justified; they assume that it is and ask only ... how it is to be conducted justly."<sup>19</sup> While this is theoretically the current state of affairs, states recognize that war can be more effective and more successful if they can present a case for *ad bellum* proportionality. For example, US participation in World War II clearly wore the mantle of proportionality – a just war against illegal aggression. The Vietnam Conflict presents a mirror image, an example of what can happen when a nation wages war for dubious reasons.

Oddly enough, some argue that establishing the justice of a cause is contrary to humanitarian interests. That line of argument runs that combatants who are endowed with an undeniable sense of righteousness will be less constrained in their actions. When simple armed conflict becomes a holy war, a war that **must** be won, atrocities can be justified.<sup>20</sup> The problem with this argument is the converse: should we then convince troops that their cause is **unjust** to get them to behave? The idea that righteous soldiers are more wanton may have carried more weight in centuries past. The modern soldier, at least in the developed world, is less driven by religious imperatives than the typical eleventh century combatant. A better answer, in my opinion, is to provide good military leadership and education in the laws of war for all combatants, and then do everything possible to ensure the rules are followed. With these

behavioral constraints in place, the knowledge of troops that their cause is noble should not lead to more abuses in war.

Although most of the focus recently has been on the justice (and proportionality) of actions taken during the course of a conflict, it is a serious failing to ignore the justice **of** the war in favor of strong rules **in** the war.

Once a nation makes a decision to go to war, the stage is set for a long series of terrible choices. Many times in war, none of the available options is good. It is important that war be waged only when the cause is worth killing and dying for. Once the lights go out and war begins, everything changes. It is easy to justify "collateral casualties" to save a trapped platoon, rescue a downed airman, or prevent friendly deaths, and on the smallest scale, those decisions might be right. They can hardly be just, though, if the conflict is an illegal aggressive action and the victims are merely fighting in the defense of their homeland. The idea behind considering *ad bellum* proportionality is to ensure that the inevitable losses to both sides that will result from a conflict are justified by the importance of the cause. Behaving honorably in a conflict, while certainly laudable, is insufficient to rectify an unjust beginning. "Following the rules is not exculpatory if you should not be involved in the enterprise in the first place."<sup>21</sup>

What, then, are the factors a state must consider before resorting to war? "The probable good to be achieved by successful recourse to armed coercion in pursuit of the just cause must outweigh the probable evil that the war will produce."<sup>22</sup> In other words, nations should not go to war over trivial matters. Importantly, the consideration of the harm that will likely be caused by the war must include harm to all parties, not just the considering nation.<sup>23</sup>

Determining the relative good and bad of a potential future conflict is much simpler in theory than in practice. Fallible people with an imperfect view of the future are responsible for

these difficult decisions.<sup>24</sup> "Proportionality is about the comparison of *moral* goods or values, and not physical or material harms and benefits as such."<sup>25</sup> Weighing economic destruction and especially human lives against what might be intangible moral good is a daunting task. Its difficulty does not excuse its accomplishment, however; national leaders must make this determination to the best of their ability before engaging in armed conflict.

The Falklands War offers an example of the questions that arise with regard to the justice of resorting to war.

In April 1982 Argentina asserted a claim of sovereignty over the Falkland Islands, a British possession since at least 1833. Known as Las Malvinas in Argentina, the islands are 400 miles off the Argentinean coast. The islands were home to fewer than 2000 people. Argentina invaded the Falklands on April 2, 1982; on June 14 Argentina surrendered to Britain. There were a total of about 900 combatants killed in action, as well as many wounded.<sup>26</sup>

Most would agree that Argentina had violated British sovereignty, lending just cause for Britain's armed response. The proportionality of the war was less certain. We will not consider the proportionality of Argentina's opening of hostilities, but will consider the questions from Britain's point of view.

Tending to restrain British military action, the islands were of little strategic or economic interest. A war, however small, would result in some casualties; considering the possibilities prewar, a higher number of casualties than what actually occurred might well have been expected. British trade in the area would probably suffer from the resultant ill-will.<sup>27</sup>

Balanced against the evil that would result from an armed conflict, was that Britain could thereby preserve its sovereign rights over the islands, protect the interests of the British subjects, and conserve British prestige at home and abroad.

It would have been difficult for Britain to refrain from all military action in the face of Argentina's violation of its sovereignty, and I offer no judgment on the conclusion reached by the British government. The case is presented to illustrate the proportionality element in the decision to go to war, and how some causes, just on their faces, may still be debatable.

### **Proportionality in Continuing Conflicts**

The determination of a nation that the expense in blood and treasure of a particular war is outweighed by the good that will result does not end the *ad bellum* proportionality issue. The "calculus of proportionality ... is a continuing one," and must "be reviewed at critical points along the process of waging the war."<sup>28</sup>

During the course of a war it is possible, indeed likely, that the situation will change materially. Even in the absence of an enemy's surrender, its ability to make offensive war may be degraded to nil. In those cases, the harm that was to be avoided by war has been prevented and the armed action should end. In every case, the enemy's ability to reconstitute its forces and again pose a threat must be considered. Nevertheless, every war should begin with an end-state in mind, and when the end is reached, even just wars must stop.

Technically, this is not a separate category of *ad bellum* proportionality, but it seems to be so often forgotten that it deserves separate consideration. In a righteous rage a nation may let the desire for retribution take control. The moral course is to prevent or stop the subject harm while causing as little additional harm as possible, and then stop the fighting.

An example of continuing a just conflict beyond its "sell by" date may be the action against Iraq. Nine years after Iraqi international aggression was halted and the Iraqi armed

forces were decimated, the US and some coalition allies remain at war against Iraq. Active hostilities in the Persian Gulf Conflict ended on February 28, 1991 with a cease-fire agreement.<sup>29</sup> There have been periodic flare-ups since that time; e.g., Operation Desert Fox in December, 1998. US-led coalition forces still conduct small strikes against Iraq periodically in response to aggressive Iraqi acts against enemy warplanes flying over its territory, in what has been characterized as a low-level war of attrition.<sup>30</sup> Additionally, economic sanctions continue, arguably resulting in as many as 560,000 civilian deaths.<sup>31</sup>

The bottom line is "the causes justifying a war may cease to do so."<sup>32</sup> A nation waging moral war must reexamine periodically the justification for the war; it can change at any time.

### ***In Bello Proportionality***

Unlike the pre-war nature of *jus ad bellum*, *jus in bello* governs what you do when you get to war.<sup>33</sup> All the rules about appropriate weapons and methods, avoidance of civilian casualties and collateral damage, and everything that governs moral military conduct during the course of a war is part of the *jus in bello*. It is, succinctly, the justice of actions taken during war.

Soldiers, even if they are engaged in a just and lawful conflict, still must obey certain rules. "Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God."<sup>34</sup>

Both Grotius and Vattel recognized the importance of rules governing military actions in war. They considered the possibility that a war might be just for both sides; in such a case, *jus in bello* might be the most important consideration. Vattel in particular emphasized moderation in conduct of war.<sup>35</sup>

With the decline of discussion regarding the justice of resorting to war, consideration of justice in the war increased.<sup>36</sup> In the eighteenth and nineteenth centuries, guidelines for the proper conduct of war were passed down informally in Europe. The rules were largely custom and past practice, but they formed the basis for what was later codified into a more formal law of war. Despite the advances in the moral conduct of war, it became evident that trying to govern only the conduct in the war without reference to the morality of the action itself was ineffective.<sup>37</sup>

Once war begins, perceptions of appropriateness change drastically. Things that might never have been considered during peacetime can become commonplace. In short, when the shooting starts, "military necessity" rears its ugly head. Military leaders may find it necessary to cause collateral casualties in order to destroy militarily important targets, for example. The problem of ignoring *ad bellum* proportionality is that a nation can be placed in a position to act in what Michael Walzer calls a "supreme emergency."<sup>38</sup> The purpose of considering proportionality before resorting to war is to ensure that the "supreme emergency" will be justified, not only by the circumstances immediately surrounding it, but by the underlying ill that caused the resort to war in the first place. If proportionality does not come before necessity, necessity will trump it every time. For example, if in the course of an illegal war I set your house ablaze, "[w]hen your wife tries to put the fire out, she becomes a 'warrior' and I can kill her."<sup>39</sup>

Before continuing it would be useful to discuss a line of reasoning that says military members have no need to think about *jus ad bellum*. After all, properly appointed civilian leaders send us to war; we have no choice but to go. Only with the *jus in bello* can military members control morality in war, the argument says. A position contrary to the quotation

beginning this paper is that "[m]embers of the armed forces are not concerned with the manner in which a conflict begins, nor whether it is legal or illegal."<sup>40</sup> One scholar goes even further, asserting that "it is profoundly arrogant for officers to take the view ... that after the national debate takes place, and after the President and Congress have decided to act, then the officer should have the latitude to follow his or her own conscience."<sup>41</sup> There are a couple of responses to this.

First, such a position is morally wrong. There is nothing inconsistent about military service with a conscience. It is frightening to think that military members must become amoral automatons in order to serve. Nothing about patriotism or military duty renders objective morality irrelevant. In fact, I believe the opposite is true.

Further, it may be impossible for military members to ignore the injustice **of** a war while scrupulously obeying imperatives of justice **in** the war. We demand that military members follow rules in war and that they disobey illegal military orders.<sup>42</sup> It seems unlikely that a person could completely turn off his morality for one purpose but switch it right back on for another. Arguing that service to country is a higher morality is unconvincing; Pol Pot's minions perhaps felt that way, but their immorality in carrying out mass slaughter is not thereby excused.

Even if military members decide they can turn off their consciences if necessary during the decision to resort to armed action, they still must concern themselves with the decision process. Military leaders have an obligation to provide advice to civilian leaders. That advice must go beyond military strategies and capabilities; military leaders must also address issues of justice and morality, at least before civilian authorities have made the final decision. "The *ius ad bellum* is addressed to the leaders of a state, its policy makers both civilian and military."<sup>43</sup>

Any individual can be held legally responsible for "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties."<sup>44</sup> Military members are not excluded from the rule, so high-ranking members could certainly be liable. This legal requirement merely gives incentive to follow the moral dictates of one's conscience.

Grotius, too, wrote of the dilemma of the military member's potentially conflicting duties of military orders and conscience *ante bellum*. He divided military members into two groups: leaders (those responsible for the war) and followers. Those responsible for the war were potentially liable if the war was obviously unjust.<sup>45</sup> Other international law scholars argued that, in an unjust war, while captured common enemy soldiers might be set free, captured leaders should be killed.<sup>46</sup> Law is not the same as morality, but law often has its genesis in moral ideals. De Victoria held military members responsible for considering the morality of wars in which they were employed. "If a subject is convinced of the injustice of a war, he ought not to serve in it, even on the command of his prince."<sup>47</sup>

Taking the argument to its extreme, the chief prosecutor for France at one Nuernberg trial opined that every action taken by the aggressors in an illegitimate (unjust) war is illegal.<sup>48</sup> The court rejected this argument. In another case, the International Military Tribunal at Nuernberg made clear that the rules still applied, even in an illegal war.<sup>49</sup> Some of the highest German military leaders were convicted at Nuernberg of *jus ad bellum* violations, but other military members were spared that fate.

So, even though military members have an obligation to concern themselves with decisions to resort to war, most members actually involved in combat will be far enough removed from national command authorities to be absolved of legal liability for violations of the *jus ad bellum*. In those cases, even if national leadership was wrong in the decision to resort to

war, individual combatants can protect themselves from war crimes convictions by following the rules in war. An unjust war is not justified by its being properly waged, but an immoral beginning to a conflict also does not void the necessity for acting appropriately in it.<sup>50</sup>

A similar rationale applies to the prohibition on bombing enemy civilians indiscriminately. Poor decisions at the national level do not strip the entire civilian population of their protection under moral norms; i.e., there is no death penalty for patriotism. Not everyone resident in a nation is responsible for the actions of that nation. Like ordinary soldiers, most citizens are responsible only for their own actions, not those of their national leaders. It is better to protect culpable civilians along with innocent ones than to kill all of them alike. This leads to the proportionality rule that requires a balance between expected military gain and collateral damage.<sup>51</sup> "[I]t is never right to slay the guiltless, even as an indirect and unintended result, except when there is no other means of carrying on the operations of a just war."<sup>52</sup>

The need to balance military gain against collateral harm, and to avoid unnecessary collateral damage, may not be well understood by all the US military leadership. During the NATO action in Kosovo, at least one US Air Force leader advocated a relatively unrestricted air campaign against Serbia. "Just think if after the first day, the Serbian people had awakened and their refrigerators weren't running, there was no water in their kitchens or bathrooms, no lights, no transportation system to get to work ... ." <sup>53</sup>

While this line of reasoning is morally defunct, another goes too far in the other direction, arguing that proportionality requires that the military force employed must resemble that of the enemy, to avoid excess enemy combatant casualties.<sup>54</sup> "Proportionality, in its *jus in bello* sense of opposing force with similar force ... ." <sup>55</sup>

I disagree with this reading of proportionality. If the cause is just, there is no need to refrain from killing enemy troops just because the cause isn't just "enough." There is a fundamental distinction between killing enemy combatants and killing civilians of any ilk. War involves killing and, whereas that does not mean that every cause must justify global thermonuclear war, every cause must support a customary level of the application of conventional arms. The only exception might be opposing an enemy nation that forcibly conscripts its military, but even at that there are issues of self-defense and the inability to distinguish between those lawful combatants who wish good or ill, leaving us where we started: all enemy combatants are lawful targets.

An example that is sometimes cited to illustrate a violation of *in bello* proportionality occurred during the Falklands War: Britain's sinking of the Argentine cruiser *General Belgrano*.<sup>56</sup>

In May 1982, during active hostilities between the belligerents, a British submarine torpedoed the *Belgrano* which subsequently sank. Well over 300 crewmembers were killed.<sup>57</sup> The argument can be made that Britain's action was disproportionate. If Britain thought that the Argentine navy posed no real threat and that the war would soon be over, it should have refrained from sinking the *Belgrano*. The facts surrounding the case do not strongly bear out this conclusion, however.

Once Argentina decided to engage Britain in armed conflict by invading the Falklands, it *de facto* decided that the cause justified killing and dying. The Argentine armed forces, including the *Belgrano*, represented some threat to Britain. Only two days after the *Belgrano* was sunk, *HMS Sheffield* fell victim to an Argentine Exocet missile.<sup>58</sup> *Belgrano* and all her crew

members were lawful military targets. Given this reading of the situation surrounding the *Belgrano's* sinking, Britain's action seems proportionate.

A true example of the failure of *in bello* proportionality was the Allied decision to bomb Dresden in February, 1945. Dresden had no military facilities (other than a rail yard), and an Allied victory in the war was a foregone conclusion. The city had also become a home for thousands of civilian refugees. Nevertheless, the Allies chose to bomb the city repeatedly. The three air raids were armed with high-explosive bombs to "crack open" the city and with incendiaries to burn it down. The raids were intentionally scheduled far enough apart so that fire brigades and rescue teams could make their way from outside the city to their demise in the subsequent attacks.<sup>59</sup> Although the number cannot be estimated with precision, perhaps 35,000 people died in Dresden, nearly all of them civilians, for no substantive military gain.<sup>60</sup> This action clearly failed the *in bello* proportionality examination.

### **Political Proportionality**

The fourth and final type of proportionality, "political proportionality," is not proportionality in the same sense as the three types discussed above. Nevertheless, it is important to address as it is an area ripe for confusion. Proportionality in this sense is responding to enemy actions in a way that is essentially equivalent. It might more properly be called "measured response."

There may be many good reasons to respond in kind, rather than overwhelmingly, to a provocative act. Most commonly, measured response is a form of escalation control; a way to prevent the conflict from becoming more heated.<sup>61</sup> A measured response may also maintain an

environment more conducive to peace negotiation. It is important, however, to distinguish this political decision from the legal and moral realm. It is not violative of *jus in bello* to respond to armed aggression with superior force, as the US did in the Persian Gulf Conflict. In fact, "it would have been contrary to the very nature of war for the allies to have ensured a level killing field by voluntarily forgoing their greatest military advantage."<sup>62</sup> Nations are not obligated to fight with one arm tied behind them. The US could respond to a company-strength invasion of its territory with the might of the entire US Air Force without moving beyond the bounds of the law or morality of war. It was to this type of action that Secretary Perry was referring when he said the US would respond "disproportionately."<sup>63</sup> The vital distinction is that a failure of proportion is a violation of international law and morality; a less measured, overwhelming response to illegal aggression is not.

An example of exercising a measured response for political reasons is the continuing military action in Southern Iraq, Operation Southern Watch. As part of that mission, US and coalition warplanes fly daily sorties in Iraq's national airspace to ensure that Iraq complies with the US-demanded no-fly and no-drive zones. Iraq sometimes uses its surface-to-air systems to threaten coalition planes. The US, arguably flying legal, UN-authorized missions, could respond to Iraqi aggression with all-out attacks in response. Instead, for political reasons, the US has established restrictive rules of engagement that prevent extreme responses. Instead, pilots who are threatened or attacked are limited to striking any Iraqi defensive system in response.<sup>64</sup> The example assumes that Iraq is the aggressor in that situation, and that the US acts in self-defense, although nearly ten years after the original UN resolutions authorizing the use of force against Iraq, those assumptions might be debatable, as earlier discussed. Although it is important, political proportionality is completely outside the realm of law and morality. It represents

strategic and diplomatic conclusions, and may be considered or ignored without moral compromise.

## Conclusion

There is a school of thought that morality in war is, in the long run, inhumane. "It is well that war is so terrible – we would grow too fond of it."<sup>65</sup> If that reasoning is so, if less suffering and fewer civilian deaths make war more palatable, then proportionality **should** go out the window. I tend to look at it differently.

War and violence have been a part of the human experience since earliest recorded history. No matter how awful war becomes, there will be those who will wage it. If we continue to build peaceful problem-solving methods and to restrict war-making, someday war as a method of resolving differences might become rare (and humane even in those few instances). In that hopeful regard, proportionality helps ensure that war is as humane and moral as possible.

Military members must be engaged at every level to ensure that our nation's wars are moral. Before and during conflicts, they advise on the proportionality of engaging and continuing in the fight by weighing the likely good against the likely evil effects of the war. The pre-war military perspective helps determine whether a given objective is worth the killing and dying that will inevitably result from armed action. During a conflict, military leaders ensure that the expected military gain of every engagement outweighs the anticipated collateral damage. Finally, they balance the benefits of using overwhelming force against those of a more measured response and advise on the best course of action.

Military leaders have an obligation to demand that blood be spilled only for the best of reasons. Proportionality provides a moral framework within which to reason through the equation balancing the dreadful cost of war and the factors compelling armed action. Military members' understanding of proportionality in all its forms is a first step toward protecting against an unnecessary loss of life.

### Notes

<sup>1</sup> Geoffrey Best, *War and Law Since 1945* (Oxford: Clarendon Press, 1994), 324.

<sup>2</sup> John Witherow and Aidan Sullivan, *War in the Gulf* (New York: St. Martin's Press, 1991), 155.

<sup>3</sup> "In Russia, I could imagine nothing but fighting to the last man. We knew that going into a prison camp in Russia meant you were dead. In Normandy, one always had in the back of his mind, 'Well, if everything goes to hell, the Americans are human enough that the prospect of becoming a prisoner was attractive to some extent.'" Stephen E. Ambrose, *Citizen Soldiers* (New York: Simon and Schuster, 1997), 33, quoting Corporal Friedrich Bertenrath, 2d Panzer Division.

<sup>4</sup> Both of these conflicts are officially paused under a cease-fire agreement, although the Korean "pause" has lasted for nearly 50 years.

<sup>5</sup> Winston Churchill, quoted in Martin Gilbert, *The Second World War* (New York: H. Holt, 1989), 441.

<sup>6</sup> Alexander McKee, *Dresden 1945* (New York: Dutton, 1984), 310.

<sup>7</sup> Tyler Marshall and Jim Mann, "Goodwill toward U.S. is Dwindling Globally," *Los Angeles Times*, Mar. 26, 2000, 1.

<sup>8</sup> I met a traveler from an antique land  
Who said – "Two vast and trunkless legs of stone  
Stand in the desert ... Near them, on the sand,  
Half sunk a shattered visage lies, whose frown,  
And wrinkled lip, and sneer of cold command,  
Tell that its sculptor well those passions read  
Which yet survive, stamped on these lifeless things,  
The hand that mocked them, the heart that fed;  
And on the pedestal, these words appear:  
My name is Ozymandius, King of Kings,  
Look on my Works, ye Mighty, and despair!  
Nothing beside remains. Round the decay  
Of that colossal Wreck, boundless and bare  
The lone and level sands stretch far away."  
-- Percy Bysshe Shelley (1817)

<sup>9</sup> Martin van Creveld, *The Transformation of War* (New York: The Free Press, 1991), 89.

<sup>10</sup> National Conference of Catholic Bishops Pastoral Letter, *The Challenge of Peace: God's Promise and Our Response* (Washington: National Catholic News Service, 1983), 28-31.

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<sup>11</sup> "Saner Voices," *The Economist*, Sept. 21, 1996, 45.

<sup>12</sup> Charles Krauthammer, "The Perils of Proportionality," *Time*, Sept. 30, 1996, 43.

<sup>13</sup> It is my intention to discuss morality as opposed to law. Nevertheless, there is much common ground, so discussions of law are sometimes enlightening.

<sup>14</sup> Geoffrey Best, *Humanity in Warfare* (New York: Columbia University Press, 1980), 8.

<sup>15</sup> William V. O'Brien, *The Conduct of Just and Limited War* (New York: Praeger, 1981), 16. According to the UN Charter, "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations." UN Charter, Art. 2(4), Ian Brownlie, ed., *Basic Documents in International Law*, 3d Ed. (Oxford: Clarendon Press, 1983).

<sup>16</sup> Francisco Suarez, *De Triplici Virtute Theologica, Fide, Spe, et Charitate* (1621) reprinted in James Brown Scott, ed., *Classics of International Law*, vol. 2 (Oxford: Clarendon Press, 1944), 816.

<sup>17</sup> The Romans, for instance, required that a special class of priests (fetials) declare a cause just before going to war. After reaching the appropriate conclusion, the priests would throw open the doors to the temple of Mars. A delegation sent for the purpose then hurled a spear with a fire-hardened tip into enemy territory to declare war officially. Doyne Dawson, *The Origins of Western Warfare* (Boulder: Westview, 1996), 114; Martin van Creveld, *The Transformation of War* (New York: The Free Press, 1991), 129.

<sup>18</sup> Myres S. McDougal and Florentino P. Feliciano, *The International Law of War* (New Haven: New Haven Press, 1994), 134.

<sup>19</sup> Robert L. Holmes, *On War and Morality* (Princeton: Princeton University Press, 1989), 163.

<sup>20</sup> Best, 1945, 235.

<sup>21</sup> Holmes, 180.

<sup>22</sup> O'Brien, 28.

<sup>23</sup> Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* (New York: Oceana, 1964), 572; O'Brien, 28.

<sup>24</sup> Richard J. Regan, *Just War* (Washington: The Catholic University of America Press, 1996), 63.

<sup>25</sup> A.J. Coates, *The Ethics of War*, (Manchester: Manchester University Press, 1997), 176.

<sup>26</sup> Max Hastings and Simon Jenkins, *The Battle for the Falklands* (New York: Norton, 1983). This formulation considers the total good and evil of a conflict, so the division of casualties between the nations is irrelevant.

<sup>27</sup> Coates, 175.

<sup>28</sup> O'Brien, 27.

<sup>29</sup> A cease-fire is merely an agreement to end active hostilities; it does not terminate a state of war.

<sup>30</sup> Steven Lee Myers, "Bomb. Missile. Bomb. Hey, It Looks Like a War," *New York Times*, Feb. 21, 1999, 4.

<sup>31</sup> According to a UN Food and Agriculture Organization sponsored study *quoted in* Nigel Hawkes, "UN Sanctions Blamed for Children's Deaths," *Times*, Dec. 1, 1995. Although

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economic sanctions are not armed warfare, they have been such an integral part of the US strategy against Iraq from the beginning, they merit a brief mention.

<sup>32</sup> Regan, 66.

<sup>33</sup> Best, *Humanity*, 8.

<sup>34</sup> General Orders No. 100, Art. 15, quoted in Richard S. Hartigan, *Lieber's Code and the Law of War* (Chicago: Precedent, 1983), 48.

<sup>35</sup> Judith Gail Gardam, "Proportionality and Force in International Law," *The American Journal of International Law*, vol. 87, 1993, 396.

<sup>36</sup> Best 1945, 20.

<sup>37</sup> Best 1945, 21. Further to that concept, the essence of the UN Charter is to maintain peace and ensure that war is waged in only the most just and extraordinary circumstances, when other means have failed.

<sup>38</sup> Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977), 251-263. Walzer argues that a horrifying, imminent danger might justify the soon-to-be victim's violation of moral constraints. He offers the example of Britain's decision to bomb German cities in 1940.

<sup>39</sup> John C. Ford, "The Morality of Obliteration Bombing," in *War and Morality*, ed. R. Wasserstrom (Belmont, California: Wadsworth Publishing Co., Inc., 1970), 26.

<sup>40</sup> L.C. Green, *The Contemporary Law of Armed Conflict* (Manchester: Manchester University Press, 1993), 67.

<sup>41</sup> Paul Christopher, "Unjust War and Moral Obligation: What Should Officers Do?", *Parameters*, Autumn 1995, 8.

<sup>42</sup> In cases I can imagine, such as orders to kill civilians or others *hors de combat*, such orders would be immoral as well as illegal.

<sup>43</sup> Christopher Greenwood, "The Relationship between *ius ad bellum* and *ius in bello*," *Review of International Studies*, 1983, 231.

<sup>44</sup> *Nuernberg Charter*, London Agreement, 82 U.N.T.S. 280, Art. 6(a) (August 8, 1945).

<sup>45</sup> Grotius, 575. "[T]he king who undertakes a war for trivial reasons ... is responsible to his subjects for making good the losses which arise therefrom. For he perpetrates a crime, if not against the foe, yet against his own people." *Ibid.*

<sup>46</sup> This discussion is taken from Theodor Meron, *Henry's Wars and Shakespeare's Laws* (Oxford: Clarendon Press, 1993), 73.

<sup>47</sup> Franciscus de Victoria, *De Indis et de Ivre Belli Relectiones* (1696), reprinted in Scott, James Brown, ed., *Classics of International Law*, (Oxford: Clarendon Press, 1917), 173.

<sup>48</sup> *Trials of the Major War Criminals before the International Military Tribunal*, vol. 5 (Nuernberg: International Military Tribunal, 1947), 387.

<sup>49</sup> US v. List, et al., *Trials of War Criminals before the Nuernberg Military Tribunals*, vol. 11, (Washington: Government Printing Office, 1950), 1230, 1247.

<sup>50</sup> *Ibid.*

<sup>51</sup> Air Force Pamphlet (AFP) 110-34, *Commander's Handbook on the Law of Armed Conflict*, Jul. 25, 1980, para. 3-8.

<sup>52</sup> De Victoria, 179.

<sup>53</sup> Tim Barela, "To Win a War," *Airman*, Sept. 1999, 3, quoting Lt. Gen. Michael Short, USAF.

<sup>54</sup> Coates, 221.

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<sup>55</sup> James Turner Johnson, *Just War Tradition and the Restraint of War* (Princeton: Princeton University Press, 1981), 198.

<sup>56</sup> The *Belgrano* was, until she was sold to Argentina in 1952, the *USS Phoenix*, a light cruiser that earned nine battle stars in WWII. Arthur Gavshon and Desmond Rice, *The Sinking of the Belgrano* (London: Secker and Warburg, 1984).

<sup>57</sup> Lawrence Freedman and Virginia Gamba-Stonehouse, *Signals of War* (Princeton: Princeton University Press, 1991), 247-271.

<sup>58</sup> Hastings, 143-163.

<sup>59</sup> McKee, 109, 112.

<sup>60</sup> McKee, 321. In addition to the rail and communication lines argument, the bombing of Dresden may have been calculated to impress the advancing Red Army with the power of US and British airpower -- still a poor way to spend 35,000 lives.

<sup>61</sup> One could merely consider the possibility of escalation to be one more factor in the proportionality equation, but it is clearer to examine it separately. Besides, there are other, subtler political considerations that still would require this category.

<sup>62</sup> Coates, 223.

<sup>63</sup> *Supra* at p. 9.

<sup>64</sup> Steven Lee Myers, "U.S. Presses Air Attacks on Iraq in a Low-Level War of Attrition," *New York Times*, Feb. 3, 1999.

<sup>65</sup> R.E. Lee, quoted in Trevor Royle, ed., *A Dictionary of Military Quotations* (London: Routledge, 1990). I do not mean to assert that Lee was in favor of unlimited warfare, but this is my favorite quote from the "war is Hell" genre; e.g., Sherman and Patton.

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