

# PROPORTIONALITY, SELF-DEFENSE AND THE SOVEREIGN

Research Statement

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The use of proportionality as one of the criteria to justify the legality – or condemn the illegality – of a state’s claimed use of force in self-defensive, especially in situation where declaration of war against another state is not justified or possible, goes back at least to the 19<sup>th</sup> century *Caroline* incident.<sup>1</sup> It is an oft-used principle in international law, e.g., in the various statutes that prohibits “excessive” use of force, among many other cases.<sup>2</sup> But what is "proportionality" in self-defense, *ad bellum* or *in bello*? The literature, because of the complexity of the situation, had tended to divide itself into one of two different camps<sup>3</sup>, neither of which, we believe, satisfactorily grasps the nettle of the problem we wish to consider.

The first part of my work is descriptive. In both the *ad bellum* and *in bello* cases, I review the modern legal and jurisprudential practice about how the Geneva Convention, International Laws of War, and legal decisions of the ICJ, etc. tell us about when use of force *ad bellum* is proportionate, and how much collateral damage *in bello* is excessive in what situations.

The second part is normative. I consider various ethical theories, to determine what modern ethics tells us is the moral requirements on the sovereign and why. In particular, I shall consider the sovereign's changing role *vis-à-vis* the proportionality requirements. This requires considering not only modern thinkers, but also previous ones. For - in order for the discussion to be complete - it may well be necessary to consider not just modern ethicists, but their historical influence.<sup>4</sup> One may well

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<sup>1</sup> The *Caroline* incident occurred during the Canadian Rebellion of 1837, when the British were still controlling Canada. An insurgent group of about one thousand people took over Navy Island. The *Caroline* was a ship that on the day it was attacked, traveled Canadian waters and provided ammunition and personnel for the insurgency. The U.S. and Britain disagreed whether the actual targeting was proportional under the circumstances. For a more detailed account, see JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 217, 409-14 (1906); R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 82-92 (1938).

<sup>2</sup> KENNETH R. STEVENS, BORDER DIPLOMACY - THE CAROLINE AND MCLEOD AFFAIRS IN ANGLO-AMERICAN-CANADIAN RELATIONS, 1837-1842 (1989).

<sup>3</sup> See, e.g., NEWTON AND MAY, PROPORTIONALITY IN INTERNATIONAL LAW (2014), C.A.J COADY, MORALITY AND POLITICAL VIOLENCE (2008), and STEPHEN NATHANSON, TERRORISM AND THE ETHICS OF WAR (2010).

<sup>4</sup> Practically all thinkers on the subject refer extensively to WALZER’S JUST AND UNJUST WARS. Two recent works are STEPHEN NATHANSON, TERRORISM AND THE ETHICS OF WAR (2010), which applies Walzer’s (and others’) views to

have to consider 17<sup>th</sup> century thinkers who grounded the modern *Jus Bellum* concept in the rights and duties of the state; or the Enlightenment thinkers who wished to base political science, justice, and law on universal ethical principles.<sup>5</sup> My goal, after considering the ethics, is to strive towards the most legally consistent (and morally reasonable) view, *vis-à-vis* International Laws of Armed Conflict.

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distinguish terrorist acts from collateral damage, and C.A.J COADY, *MORALITY AND POLITICAL VIOLENCE* (2008) which employs his views when analyzing various ethical grounds for justifying collateral damage.

<sup>5</sup> Kant's *Critique of Practical Reason* (1788) and *Perpetual Peace* (1795), Bentham's *Principles of Morals and Legislation* (1789), etc. The utilitarian and deontological approaches are the most influential in modern writing to the ethics of war, being seen as easier to apply to justify (or forbid) actions in war. But serious attempt to modernize virtue ethics (e.g., ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY*, 1981) and other views (emotivism, etc.) and apply them to current ethics of war have also been made.