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### Privileging asymmetric warfare (Part II) ? : the "proportionality" principle under international humanitarian law / Samuel Estreicher

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Abstract:	<p>The focus of this article is on the so-called principle of "proportionality," which regulates the conduct of warfare in an effort to limit harm to civilians during otherwise legitimate armed conflict. The author uses the qualifying adjective "so-called" because "proportionality" in this context is a misnomer. The actual obligation, as set forth in Articles 51(5)(b) and 57(2)(b) of AP I, speaks in terms of prohibiting (and deferring) attacks expected to cause incidental civilian losses "which would be excessive in relation to the concrete and direct military advantage anticipated." Neither the text nor the policy of IHL requires some form of "balancing" or use of a "sliding scale" to ensure that the military objective is "proportionate," in the sense of being commensurate with the extent of civilian losses? What is required is that the military use no more force than necessary to accomplish concrete, direct military objectives. The proposed "excessive loss" formulation is not only truer to the text of AP I but provides a sounder, more principled basis for judging violations, for insisting on military commander compliance - than the more elastic, manipulable "proportionality" formulation, which invites commentators and tribunals to second-guess military objectives and compare and weigh essentially non-comparable factors.</p>
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