

LETTER TO THE EDITOR

RE: Hensey Fenton III, *Proportionality and Its Applicability in the Realm of Cyber-Attacks*, 29 DUKE J. COMP. & INT'L L. 335 (2019)

To The Editor,

Hensey Fenton III,¹ wrote a very well-researched, very well-argued, very well-organized and a very well-documented journal essay for the *Duke Journal of Comparative and International Law*, entitled, “Proportionality and Its Applicability in the Realm of Cyber-Attacks.” Its main focus is on the relationship between the practice of proportionality in war and cyber warfare. The article is rich in its discussion and surveys so many premises. It brings to the fore a discourse on the definition of cyber war, its differences from kinetic warfare, *jus in bello*, *jus ad bellum*, knock-on effects, dual-use systems, the role of experts in cyber war and other topics. The seriousness with which Mr. Fenton treats cyber war is very much applauded. The author tackles conceptually the syndrome of proportionality and its applicability in cyber war. One can detect from his writing the crude nature of cyber warfare and that it exceeds the legal and political boundaries of just war theory, the traditions of military balance and even the rules of nuclear deterrence. He warns that the lack of proportionality in cyber-attacks can make that type of war unlimited, writing that “unnecessary ambiguities within the cyberwar context,” is attributable to the absence of a precise definition of proportionality.²

The writer provides a definition of cyber war as “any action taken, whether offensive or defensive, that is reasonably expected to cause injury or death to persons, or damage or destruction to objects, through the undermining of the functions of a computer network, for a political or national security purpose.”³ In critiquing this definition, one can modify it to add that “it is an attack to subvert the computational capability of any entity in a manner that establishes a political/military crisis that can escalate or deescalate depending on the diplomatic-strategic effort exerted by many

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1. Hensey Fenton III is currently an Associate at Covington & Burling LLP.

2. Hensey Fenton III, *Proportionality and Its Applicability in the Realm of Cyber-Attacks*, 29 DUKE J. COMP. & INT'L L. 335, 342–43 (2019).

3. *Id.* at 343.

actors to contain it or defuse it.”

Fenton’s analysis has significance. His advocacy of a comprehensive cyber warfare treaty to harness the still ungovernable perimeters of cyber war can give the sense that bilateral and regional conventions among nations on that subject can be pursued. This is what he supports passionately. One can get and compare from the impulse of his journal article that if world diplomacy and the thrust of U.S. foreign policy were able to produce the Non-Proliferation Treaty (NPT) decades ago, there is the possibility to sign a similar collective-responsibility convention modeled after it on cyber war. Mr. Fenton’s article makes the reader think seriously about the legal and political challenges associated with cyber-attacks and their ramifications.

Nabil Mikhail*

* Nabil Mikhail has a PhD in Foreign Affairs from the University of Virginia and has taught political science, international relations, and security politics at the George Washington University. Nabil Mikhail is currently finishing a book on the Arab-Israeli conflict.