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Abstract

The laws of war are undergoing a fundamental transformation. The first step was the unmooring of the obligations of states and armies from the binds of reciprocity—the prospect that violations should be avoided because they will result in comparable reprisals from the other side—that began with the Geneva Conventions of 1949 and culminated in the 1977 Additional Protocols (AP I and II). The second major step—still an ongoing process—has been to substitute for the threat of reprisals the grounding of these obligations in enforceable, positive law. What started haltingly with the promulgation of several "grave" offenses in Geneva has—with the establishment of the International Criminal Court, international criminal tribunals for the former Yugoslavia and Rwanda, conventions against torture and other practices, and the sustained pressure of nongovernmental organizations—reshaped the international legal landscape.

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. I use the qualifying adjective "so-called" because "proportionality" in this context is a misnomer. The actual obligation, as set forth in AP I, speaks in terms of prohibiting (and deferring) attacks expected to cause incidental civilian losses "which would be excessive in

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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.

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I. THE CHANGING PARADIGM: FROM RECIPROCITY TO POSITIVE LAW

The law of armed conflict, also referred to as the laws of war or as international humanitarian law (IHL), has moved away from a contractual model to a largely regulatory model. The change started with the 1949 Geneva Conventions (Geneva I–IV) and culminated in the 1977 Additional Protocols to the Geneva Conventions. Additional Protocol I (AP I) deals with international armed conflict and Additional Protocol II (AP II) deals with non-international armed conflict.[1] With a few notable exceptions (US, India, Israel and Pakistan), AP I has garnered nearly universal ratification. Even non-ratifying countries,

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1 See generally Convention Relative to the Protection of Civilian Persons in Time of War ("Geneva IV"), 6 UST 3516, TIAS No 3365 (1949), reprinted in Gary D. Solis and Fred L. Borch, *Geneva Conventions* 183 (Kaplan 2010); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts ("AP I"), 1125 UN Treaty Ser 3 (1977); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts ("AP II"), 1125 UN Treaty Ser 609 (1978).

such as the US and Israel, purport to adhere to AP I to the extent it reflects customary international law (CIL). The International Committee of the Red Cross (ICRC), which sees itself as the guardian of the Geneva process, has over the years documented state practices in line with AP I prescriptions in order to lay the case for the essential equivalence between AP I and CIL.[2]

The Geneva process reflects a fundamental paradigm shift in the rules of warfare. In earlier times, wars consisted of clashes between standing armies of opposing states on a distinct "battlefield" at some remove from dense civilian settlements. The ground-rules for limiting "unnecessary" slaughter and the use of certain weapons likely to have enduring, devastating effects beyond cessation of the conflict were enforced by the rule of reciprocity—the prospect that non-compliance would incur retaliatory sanctions against the offending state. The horrific experience of World War II and its aftermath indicated the need for a broader, stronger regime than the historic laws of warfare enforced by the rule of reciprocity. IHL thus emerged from the 1949 Geneva Conventions—rules which provided greater protections for prisoners of war, further limits on the range of permissible targets, and most especially with regard to Geneva I–IV, an overarching concern with the protection of civilians under occupation and during armed conflicts. The rule of reciprocity—and the threat of reprisals that backed it up—was pushed aside. Henceforth, the obligations of the parties apply "in all circumstances"[3]—and cannot not be suspended, or violations excused, because the enemy has flouted the rules of proper warfare.

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2 See Jean-Marie Henckaerts and Louise Doswald-Beck, eds, 1 *Customary International Humanitarian Law: Rules* (Cambridge 2005); Jean-Marie Henckaerts and Louise Doswald-Beck, eds, 2 *Customary International Humanitarian Law: Practice* (Cambridge 2005); Jean-Marie Henckaerts, *Study on Customary International Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 Intl Rev Red Cross 175 (2005). For initial criticism of the ICRC study, see W. Hays Parks, *The ICRC Customary Law Study: A Preliminary Assessment*, 99 Am Socy Intl L Proc 208 (2005); Letter from John Bellinger III, Legal Adviser, US Dept of State, and William J. Haynes, General Counsel, US Dept of Defense, to Dr. Jakob Kellenberger, President, Intl Comm of the Red Cross, Regarding Customary International Law Study, 46 ILM 514 (2007).

3 Common Article 1 of the Geneva Conventions states that "[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." Geneva IV, Art 1. Under Common Article 2, even if the conflict is with a non-party to the Convention, "the Powers that are Parties shall remain bound by it in their mutual relations" and shall "be bound by the Convention in relation to [the non-party], if the latter accepts and applies the provisions thereof." Id at Art 2. Moreover, even where the conflict is with a non-party that has not assumed the obligations of the Convention, if the conflict is otherwise within the scope of the Convention, obligations would still be owed to civilians and to civilian property protected by the Convention. In addition, important aspects of Geneva as well as the 1977 Additional Protocols are deemed binding on all parties to armed conflict as a matter of CIL. The extent to which the obligations of the Convention apply to non-signatory and non-state actors will be the subject of Part III in this series, *The Deliberate Killing of Civilians under International Humanitarian Law.* See note *.

The second step—still an ongoing process—has been to substitute for the threat of reprisals the grounding of these obligations in enforceable, positive law. What started haltingly with the promulgation of several "grave" offenses in Geneva has—with the establishment of the International Criminal Court (ICC), international criminal tribunals for the former Yugoslavia and Rwanda authorized by the UN Security Council, conventions against torture and other practices, and the sustained pressure of a proliferating number of nongovernmental organizations seeking to enforce human and IHL rights violations through international criminal and tort law—reshaped the international legal landscape.

These developments call for closer attention to AP I, the principal legal framework for regulating warfare that many writers on international law believe binds not only ratifying countries, but also all nations and their inhabitants as a matter of CIL. In an earlier article in this journal, I argued that the growth of "guerrilla" or irregular warfare—involving non-state armed groups locating themselves within dense civilian settlements in order to provoke a military response from occupying or NATO armies that would inevitably cause civilian casualties and generate additional recruits for the insurgent cause—requires a greater emphasis on broadly defining and strongly enforcing the duties of defenders to refrain from locating their military forces and assets among civilians.[4] The overarching objective of IHL is to reduce unnecessary harm to civilians in the armed conflicts that warfare causes. This risk of harm is a joint product of both defenders and attackers and has to be regulated as such.

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. I use 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."[5] As the discussion in Part III below shows, the "excessive loss" formulation is not only truer to the text of AP I but provides a sounder, more principled basis for judging violations than the more elastic, manipulable "proportionality" formulation.

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4 See Samuel Estreicher, *Privileging Asymmetric Warfare? Part I: Defender Duties under International Humanitarian Law*, 11 Chi J Intl L 425, 431–37 (2011).

5 Geneva IV, AP I, Art 51(5)(b), Art 57(2)(b).

II. RESORT TO WAR (*JUS AD BELLUM*) VS. CONDUCT OF WARFARE (*JUS IN BELLO*)

Before delving into the proper interpretation of Articles 51(5)(b) and 57(2)(b) of AP I, it is necessary to note the distinction between the rules governing resort to war (*jus ad bellum*) and the conduct of warfare (*jus in bello*). Geneva I–IV and AP I deal only with the latter; Geneva's rules, without passing on whether the resort to force is lawful, impose humanitarian restrictions on how the conflict may be conducted.[6]

Although the principle of proportionality enjoys a long history in philosophical and religious discourse on the "just war,"[7] its role in the customary law of *jus ad bellum* is part of the calculus for determining whether resort to force in a particular case is justified "self-defense." The classic formulation of the customary rule is found in Secretary of State Daniel Webster's 1841–42 correspondence with his British counterparts concerning an 1837 Canadian attack in US waters on the *Caroline*, a small steamer transporting men and munitions to join a group of insurgents occupying Navy Island, a British possession on the river boundary between Canada and the US. In April 1841, Webster wrote to British minister Henry S. Fox: "It will be for [the British] to show . . . that the local authorities of Canada,- even supposing the necessity of the moment . . . , did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it." [8] In July 1842, Britain's Lord Ashburton offered an apology

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6 See AP I, preamble (stating that its provisions apply to all persons "without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict"). The ICRC Commentary on Article 51 notes that the Diplomatic Conference declined to adopt a distinction between the jus in bello rules applicable to an aggressor and those applicable to the victim of the aggression. Instead, the preamble "confirmed the equality of the Parties to the conflict with regard to the obligations laid down by humanitarian law. This is wholly reasonable, as the distinction between jus ad bellum and jus in bello is fundamental and should always be respected." ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* 616–17 (Martinus Nijhoff 1987) (Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann, eds) (italics omitted).

7 See US Conference of Catholic Bishops, *The Challenge of Peace: God's Promise and Our Response* in Jean Behke Elhstain, ed, *Just War Theory* 101 NYU 1992, ¶ 99 ("[T]he damage to be inflicted and the costs incurred by war must be proportionate to the good expected by taking up arms."); Joseph C. McKenna, *Ethics and War: A Catholic View*, 54 Am Pol Sci Rev 647, 651 (1960) ("[T]he seriousness of the injury must be proportioned to the damages that the war will cause."). See generally Thomas Hurka, *Proportionality in the Morality of War*, 33 Philo & Pub Aff 34 (2005); Michael Walzer, *Just and Unjust Wars* (Basic Books 2d ed 1992).

8 R.Y. Jennings, *The* Caroline *and* McLeod *Cases*, 32 Am J Intl L 82, 89 (1938), quoting Letter from Daniel Webster, Secretary of State to Minister Henry S. Fox, April 24, 1841, 30 Brit Foreign & St Papers 1129. See also Jennings, 32 Am J Intl L at 82 ("It was in the *Caroline case* that self-defence was changed from a political excuse to legal doctrine.").

while repeating the plea of self-defense.[9] Webster responded: "Undoubtedly it is just, that while it is admitted that exceptions growing out of the great law of self-defence do exist, those exceptions should be confined to cases in which the necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[10]

Webster's correspondence respecting the *Caroline* incident does not refer to "proportionality" as such, but to the self-defense justification for resort to force, which limits the scope of the force used to the necessity of its use. Webster is insisting that "action justified by the necessity of self-defence must be kept within that necessity helped to produce the modern doctrine that the use of force in self-defence must not exceed what is necessary and proportionate. . . ."[11]

In a number of cases, the International Court of Justice (ICJ) has reaffirmed the elements of necessity and proportionality in the *jus ad bellum* law of self-defense. For the most part, these cases involved relatively confined incidents and the ICJ was readily able to find the military response not justified by self-defense. Thus, in the *Oil Platforms* case, where, in response to a mine damaging a US Navy frigate in the Persian Gulf, the US launched "Operation Praying Mantis," shelling two Iranian oil platforms allegedly used as radar stations and several Iranian ships and aircraft. The ICJ stated:

> [T]he Court cannot assess in isolation the proportionality of the action to the attack to which it was said to be a response; it cannot close its eyes to the scale of the whole operation, which involved, inter alia, the destruction of two Iranian frigates and a number of other naval vessels and aircraft. As a response to the mining, by an unidentified agency, of a single United States warship, which was severely damaged but not sunk, and without loss of life, neither "Operation Praying Mantis" as a whole, nor even the part of it that destroyed . . . the platforms, can be regarded, in the circumstances of this case, as a proportionate use of force in self-defence.[12]

To similar effect is *Nicaragua v United States*, which dealt with US assistance to the "contras," a group opposing the Sandinista government of Nicaragua.[13] The US defended its support of the contras as a means of helping El Salvador

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9 See Letter from Lord Ashburton to Mr. Webster, July 28, 1842, 30 Brit & Foreign St Papers 195, quoted in Jennings, 32 Am J Intl L at 89–91 (cited in note 8).

10 John Basset Moore, 2 *A Digest of International Law* § 217, at 409, 412 (1906), quoting *Letter from Daniel Webster, Secretary of State, to Lord Ashburton, Aug. 6, 1842*, (internal quotation marks omitted),

11 See Christopher Greenwood, *The Caroline* (Max Planck Encyc of Pub Intl L, Apr 2009) online at www.mpepil.com/sample_article?id=epil/entries/law-9780199231690-e261&recno (visited Apr 25, 2011).

12 *Case Concerning Oil Platforms (Iran v. US)*, 42 ILM 1334 ¶ 77 (Nov 6, 2003).

13 *Military and Paramilitary Activities In and Against Nicaragua (Nicar v US)*, 1986 ICJ 14, 25 ILM 1023 ¶¶ 20–21 (June 27, 1986).

defend itself against Sandinista-supported rebels in El Salvador.[14] The Court rejected the US claim of necessity because the US measures against Nicaragua "were only taken, and began to produce their effects, several months after the major offensive of the armed opposition against the Government of El Salvador had been completely repulsed . . . , and the actions of the opposition considerably reduced in consequence."[15] As for the US claim of proportionality in self-defense:

> Whether or not the assistance to the contras might meet the criterion of proportionality, the Court cannot regard the United States activities . . relating to the mining of Nicaraguan ports and the attacks on ports, oil installations, etc., as satisfying that criterion. Whatever uncertainty may exist as to the exact scale of the aid received by the Salvadorian armed opposition from Nicaragua, it is clear that these . . . United States activities . . . could not have been proportionate to that aid. . . . [T]he Court must also observe that the reaction of the United States in the context of what it regarded as self-defence was continued long after the period in which any presumed armed attack by Nicaragua could reasonably be contemplated.[16]

Both the necessity and proportionality elements of *jus ad bellum* analysis implement a background legal rule barring UN member states from using any armed force against each other except in self-defense. Article 2, paragraph 4 of the UN Charter states "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."[17] Absent an exercise of collective security by the UN Security Council, the only exception is Article 51's recognition of "the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security."[18]

The necessity and proportionality inquiry is directed to setting a limit on the self-defense exception. Necessity requires that there be an armed attack, presumably an imminent attack ("instant, overwhelming, and leaving no choice of means, and no moment for deliberation").[19] Proportionality requires, as Webster put, that the defender "did nothing unreasonable or excessive."[20] The only permitted occasion for the use of force is self-defense and the use of force

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14 Id at ¶ 19.

15. Id at ¶ 237.

16 Id.

17 UN Charter, Art 2, ¶ 4.

18 Id at Art 51.

19 Jennings, 32 Am J Intl L at 89, quoting Letter from Daniel Webster, Secretary of State to Minister Henry S. Fox, April 24, 1841 (cited in note 8).

20 Id.

"must be limited by that necessity and kept clearly within it."[21] For small-scale, relatively isolated and long-past disturbances like the *Caroline* incident, proportionality limits the ability of the defender to use a minor incursion as an occasion for an all-out war.[22] It is a forward-looking concept: "proportionality in self-defence looks forward. The test is whether the force used is proportionate to the threat it is designed to meet, not to the events of the past."[23] Those events are "relevant as an aid to determining the scale of the future threat, not as its own yardstick for measuring proportionality."[24]

III. THE "PROPORTIONALITY" PRINCIPLE IN THE CONDUCT OF WAR

A. "Disproportionate" or "Excessive" Loss

Jus in bello, the IHL governing the actual conduct of warfare, "is entirely independent of the requirements of self-defence."[25] It assumes, for purposes of its application, that the resort to armed force is justified by self-defense but imposes a number of constraints on the warring parties largely for the protection of civilians. The "proportionality" or "excessive loss" principle is one of these limits.

The "proportionality" or "excessive loss" principle first appears as a codified rule of IHL in Articles 51(5) and 57(2) of AP I:

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21 Id.

22 See Yoram Dinstein, *War, Aggression and Self-Defence* 208–09 (Cambridge 2d ed 1994); David Kaye, *Adjudicating Self-Defense: Discretion, Perception, and the Resort to Force in International Law*, 44 Colum J Transnatl L 134 (2005).

23 Christopher Greenwood, *International Law and the 'War Against Terrorism'*, 78 Intl Affairs 301, 314 (2002).

24 Id. While the *Oil Platforms* and *Nicaragua* rulings could be read to limit proportionality in the *jus ad bellum* context to an "eye for an eye" or "tit-for-tat" responses that only meet but do not go beyond the level of force used, that view is difficult to reconcile with the opinion of ICJ majority in *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*. 35 ILM 809 (July 8, 1996). In that case, without requiring that the use of nuclear force be in response to a prior nuclear attack, the majority was willing to countenance the possibility of a nuclear strike in self-defense: "The proportionality principle may thus not in itself exclude the use of nuclear weapons in self-defence in all circumstances." Id ¶ 42. See also id ¶105(E) ("[I]n view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake. . . ."). See generally Frederic L. Kirgis, *Some Proportionality Issues Raised by Israel's Use of Armed Force in Lebanon*, 10 ASIL Insights 1, 10 (Aug 17, 2006), online at http://www.asil.org/insights060817.cfm (visited Apr 25, 2011).

25 Greenwood, *International Law* at 314 (cited in note 23).

- AP I, Art 51: Protection of the civilian population . . . 5. Among others, the following types of attacks are to be considered as indiscriminate: . . . (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.
- AP I, Art 57: Precautions in attack . . . 1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects. . . . 2. With respect to attacks, the following precautions shall be taken: (a) those who plan or decide upon an attack shall: (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects . . . ; (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects; (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated; (b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated; (c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

In addition, violations of some aspects of the "proportionality" or "excessive loss" principle are treated in Article 85(3)(a)–(c) as "grave breaches" of the Protocol:

- AP I, Art 85(3): [T]he following acts shall be regarded as grave breaches of this Protocol, when committed willfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health: (a) making the civilian population or individual civilians the object of attack; (b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2(a)(iii); (c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause extensive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2(a)(iii). . . .

The relevant provisions in all three Articles do not use the term "proportionality" or any of its variants. Rather, all three Articles are aimed at different types of "indiscriminate" attacks, one of which is defined in Article 51(5) as an attack that is likely to cause incidental loss of civilian life or limb or

damage to civilian objects "which would be *excessive* in relation to the concrete and direct military advantage anticipated . . . "[26] The use of the "excessive loss" formulation was not accidental. The ICRC's initial draft of Article 46, the precursor of Article 51 of AP I, spoke in terms of "disproportionate" loss:

> The employment of means of combat, and any methods which strike or affect indiscriminately the civilian population and combatants, or civilian objectives and military objectives, are prohibited. In particular, it is forbidden: . . . (b) to launch attacks which may be expected to entail incidental losses among the civilian populations and cause the destruction of civilian objects to an extent disproportionate to the direct and substantial military advantage anticipated.[27]

Romania, several Eastern bloc nations and Syria opposed use of the term "disproportionate", fearing it required comparison of dissimilar things and would be too easy to manipulate.[28] In response, the drafters inserted "excessive" for "disproportionate" in all three relevant Articles.[29]

While the negotiating history is not conclusive, the change in language from "disproportionate" to "excessive" should have legal consequences. It is after all the language nations have agreed to by their ratification.

At the least, the requirement of showing "excessive" civilian losses relative to the military objective cuts against the tendency of some commentators to distort the concept of "proportionality" as it should apply in the *jus in bello*

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26 Geneva IV, AP I, Art 51(5) (emphasis added).

27 3 *Protection of War Victims: Protocol I to the Geneva Conventions* 123 (Howard S. Levie, ed, 1980), quoted in William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 Mil L Rev 91, 103 (1982). The ICRC's AP Commentary, published in 1987, states "[t[he formula that was adopted [by the Diplomatic Conference] is very similar to that proposed by the ICRC." ICRC, *Commentary* at 625 (cited in note 6). No attempt is made to explain the change in wording from "disproportionate" to "excessive" in Geneva IV, AP I, Art 52(5). ICRC, *Commentary* at 625 & n 31 (cited in note 6).

28 Neither Romania, Syria, nor Hungary could accept the use of the word proportionality:

> Romania submitted an amendment deleting Article 51(3)(b) of the ICRC draft in order to remove any reference to proportionality from the Protocol. Several delegations spoke in support of the Romanian amendment. Syria could 'not accept the theory of some kind of 'proportionality' between military advantages and losses and destruction of the civilian population and civilian objects, or that the attacking force should pronounce on the matter. Hungary could not accept the ICRC draft, based on the rule of proportionality 'which called for a comparison between things that were not comparable, and thus precluded objective judgment'. . . .

Fenrick, 98 Mil L Rev at 103 (cited in note 27).

29 One commentator argues that the negotiating history sheds little light: "In summary, the negotiating history indicates that the term 'disproportionate' was proposed initially but, as it was strongly challenged by several countries because of its subjectivity, 'disproportionate' was replaced by the term 'excessive'. The record does not indicate the reason for the change but it is probable that it was a face-saving device for Romania and her supporters." Id at 106.

context. Because the concept of "proportionality," standing alone, suggests the "just deserts" premise of criminal law, some have argued for an "eye for an eye" or "tit-for-tat" reading. Such a reading would limit the use of force so that it would not exceed the extent of casualties and other damage inflicted by the enemy's assault. This, as we have seen, is not the rule in *jus ad bello*. And in any event, this reading cannot be squared with the forward-looking language of the AP I provisions referring to an attack "expected to cause" civilian loss "which would be excessive" relative to the "military advantage anticipated."

The rejection of language of "proportionality" also cuts against the effort to equate "excessive" losses with "extensive" losses, as was attempted by the ICRC in commentary written ten years after the Additional Protocols were signed:

> The idea has . . . been put forward that even if they are very high, civilian losses and damages may be justified if the military advantage at stake is of great importance. This idea is contrary to the fundamental rules of the Protocol; in particular it conflicts with Article 48 (*Basic rule*) and with paragraphs 1 and 2 of the present Article 51. The Protocol does not provide any justification for attacks which cause extensive civilian losses and damages. Incidental losses and damages should never be extensive.[30]

There is no textual basis for this claimed per se prohibition of "extensive" civilian losses: the references to Articles 48 and 51 do not support the proposition.[31] This purported prohibition is also at odds with the ICJ's refusal to rule out resort to devastating nuclear weapons as a matter of *jus ad bellum*. Of course, targeting civilians and attacks without a "specific military objective" are independently unlawful under the first four subsections of Article 51. Military commanders, moreover, have the obligation to ensure they can achieve their

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30 ICRC, *Commentary* at 626 (cited in note 6). Some commentators have been unduly swayed by this overbroad statement. See, for example, Paul Reynolds, *Q&A: Mid-East War Crimes?* BBC News (July 21, 2006), online at http://news.bbc.co.uk/2/hi/middle_east/5198342.stm (visited Apr 25, 2011) , quoting former UN High Commissioner for Human Rights Louise Arbour:

> The scale of killings . . . , and their predictability, could engage the personal criminal responsibility of those involved, particularly those in a position of command and control. . . . [T]he bombardment of sites with alleged military significance, but resulting invariably in the killing of innocent civilians, is unjustifiable.

31 Article 48 of AP I sets forth the basic "rule of distinction"—"the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives." Geneva IV, AP I, Art 48 . Similarly, paragraphs 1 and 2 of Article 51 state that civilians "shall enjoy general protection against dangers arising from military operations"; and that civilians "shall not be the object of attack." Id at Art 51, ¶¶ 1, 2. But the issue in the present context assumes a military objective and that the AP has not been otherwise violated, and asks whether the presence of "extensive" civilian losses, standing alone, violates the "proportionality" or "excess loss" rule.

military objectives with the minimum possible civilian losses. But whether due to defenders co-locating military personnel and assets within dense civilian populations, civilians failing to heed the warnings required by Article 57(2)(c) and continuing to remain inside known military objectives, or otherwise, such losses can still occur without being "excessive in relation to the concrete and direct military advantage."

B. "In Relation to the Concrete and Direct Military Advantage Anticipated"

This brings us to the major interpretive issue concerning the "proportionality" or "excessive loss" principle: "disproportionate" or "excessive" loss in relation to what? The text answers: "the concrete and direct military advantage anticipated."[32] There is no question that the modifiers "concrete" and "direct" require a real, nontrivial military objective. It is also correct that the anticipated military advantage is not limited to the immediate battle that causes the civilian loss at issue but relates to the attack as whole. The text speaks in terms of "military advantage anticipated" but does not limit that advantage to the particular battle, which would make little military sense. Not surprisingly, the Rome Statute's criminal provision in this context refers to "overall military advantage."[33]

But does the text require 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? For example, W.J. Fenrick, a senior legal advisor for the Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia, writes: "Strictly speaking, resolution of the proportionality equation requires a determination of

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32 Geneva IV, AP I, Art 51(5)(b), Art 57(2)(b).

33 Article 8(2)(b)(iv) of the Rome Statute makes the following an international crime, cognizable by the ICC:

> (iv) 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. . . .

Id. This was also the position taken by the UK and several other countries when ratifying AP I. See Adam Roberts and Richard Guelff, eds, *Documents on the Laws of War* 511 (Oxford 3d ed 2000) (including the ratification statement issued by the UK regarding Article 51 and Article 57, "the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole. . . ."). "The ICRC stated at the Rome Conference on the Statute of the International Criminal Court that the addition of the word 'overall' . . . could not be interpreted as changing existing law." Henckaerts and Doswald-Beck, 1 *Customary International Humanitarian Law* at 50 (cited in note 2).

the relative worth of military advantage gained by one side and the civilian casualties or damage to civilian objectives incurred in areas in the hands of the other side."[34]

This type of calculus, however, is not what IHL requires.[35] This formulation invites the second-guessing of military objectives in an ex post setting when the Protocol's regulatory aim is, as Article 57(2) makes clear, to influence targeting and other military decisions before they are implemented.[36] Moreover, other than insisting on "concrete" and "direct" advantage, neither Article 52 nor Article 57 authorize discounting "the military advantage anticipated" by some factor based on civilian casualties or civilian property damage.

Although the Protocol does not directly define "military advantage" or "military objective," Article 52(2) offers a partial definition in connection with "objects":

> 2. Attacks should be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

We are thus told that while civilians as such "shall not be the object of attack" under Article 51(2), all "objects which . . . make an effective contribution to military action and whose . . . destruction . . . offers a definite military advantages" are subject to attack. But we are not given an easy means of mediating between these two rules.[37]

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34 W.J. Fenrick, *Targeting and Proportionality during the NATO Bombing Campaign Against Yugoslavia*, 12 Eur J Intl L 489, 501 (2001).

35 See Michael N. Schmitt, *Fault Lines in the Law of Attack*, in Susan C. Breau and Agnieszka Jachec-Neale, eds, *Testing the Boundaries of International Humanitarian Law*_277, 293 (Brit Inst of Intl and Comp L 2006):

> Complicating matters is pervasive confusion over how to conduct the proportionality 'test.' Many wrongfully characterize it as balancing, ie, does the concrete and direct military advantage 'outweigh' resulting collateral damage and incidental injury? If so, attack is permitted; if not, it is forbidden. The test is often portrayed as a scale, with the slightest difference tipping the balance.
>
> In fact, the test is one of 'excessiveness.' The rule only bans attacks in which there is no proportionality at all between the ends sought and the expected harm to civilians and civilian objects.

36 See Geneva IV, AP I, Art 57(2)..

37 In addition, Article 57(3) of AP I states: "When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects." Geneva IV, AP I, Art 57. We are still left with the question as to what the military commander is

What, then, is the test for determining whether the civilian loss likely to be caused by an attack "would be excessive in relation to the concrete and direct military advantage"?[38] Particularly against the background provided by the "proportionality" principle's role in the customary law of *jus ad bellum*, the proper test is one of "necessity". Thus, so long as a matter of fact the attack has a concrete and direct military objective, the determinative question is whether the commander has used the "least deleterious" (in terms of civilian loss) means of achieving that objective.[39] This is the "proportionality" and "necessity" test applicable to choice of weapons or methods of warfare generally. As Professor (now ICJ Judge) Christopher Greenwood has observed, "the crucial question is whether other weapons or methods of warfare available at the time would have achieved the same military goal as effectively while causing less suffering or injury."[40]

The Additional Protocol, which is after all a *jus in bello* document, does not regulate what military objectives commanders or their superiors can or should have.[41] It provides that certain weapons cannot be used, that certain objectives are off limits, and that certain precautions must be taken.[42] It provides no warrant, however, for rating military objectives.

The requirement is not that the military inflict as few civilian losses as possible in some abstract sense, but that the military inflict as few civilian losses as possible given "the concrete and direct military advantage anticipated."[43] This formulation also has the virtue of avoiding the "apples and oranges" comparisons inherent in more aggressive conceptions of "proportionality" review.[44] No complex, metaphysical "exchange value," no "comparison between

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to do if there is only one military objective that can obtain the desired military advantage and it likely entails some civilian losses.

38 Geneva IV, AP I, Art 51(5)(b), Art 57(2)(b).

39 From my late, great colleague, Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 Am J Intl L 715, 728 (2008).

40 Id, quoting Christopher Greenwood, *Command and the Laws of Armed Conflict* *24 (Strategic Combat Studies Occasional Paper No 4 1993).

41 But compare note 25.

42 See generally Geneva IV, AP I, Art 36, Arts 51–58.

43 Id at Art 51(5)(b), Art 57(2)(b).

44 See, for example, International Criminal Tribunal for the Former Yugoslavia (ICTY), *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* (June 8, 2000), 39 ILM 1257, 1271 (2000) ("It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective.").

things that [are] not comparable"[45] is required. The military sets the concrete and direct military objective: the commander's duty under AP I is to reasonably minimize civilian losses in pursuit of that objective.[46]

* * *

This is not to gainsay that difficult choices will have to be made at the margins, but the undertaking for the commander—and hence the inquiry for the prosecutor, court or tribunal that may be considering criminal or civil penalties—is not metaphysically daunting. It is relatively manageable, and it, if the duty is violated, can be a basis for possible culpability.

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45 See note 28.

46 Some writers take the view that some same-side losses are required by the proportionate use of force. This is usually a bald assertion, backed with citations to other commentators who also offer no basis in the text of AP I or other governing legal instruments for their position. See, for example, Richard D. Rosen, *Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity*, 42 Vand J Transnatl L 683, 691 n 39, 747–48 (2009). Whether this claim is grounded in "just war" theory or make good military or political sense in a particular situation, it does not reflect a requirement of CIL, as embodied in AP I. But compare the confusing discussion in Rebecca J. Barber, *The Proportionality Equation: Balancing Military Objectives with Civilian Lives in Armed Conflict in Afghanistan*, 15 J Conflict & Security L 467, 481 (2010) ("The risk of incurring 'own-side casualties' is not part of the proportionality equation as described in Protocol I. Nevertheless, it is well recognized that military commanders are entitled to take some measures to minimize the risk to their own soldiers."), with Barber, 15 J Conflict & Security L at 482 ("It is generally agreed that complying with the proportionality equation requires a willingness to accept *some* own-side casualties. . . ."). Moreover, the view that proportionality requires sustaining some same-side losses cannot explain the unwillingness of the ICTY prosecutor to indict NATO commanders for NATO's zero same-side-casualty motivated bombing campaign over Belgrade in 1999. See generally *Final Report to the Prosecutor*, 39 ILM 1257 (cited in note 44). On June 2, 2000, the prosecutor announced her decision not to refer the issue to the UN Security Council. UN Security Council, 4150th mtg, 1st Sess, 1st series, UN Doc S/PV.4150 3 (2000).