

Proportionality and the Laws of War

A Critical Analysis of the Principle of Proportion under Additional Protocol I, 1977

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*"Eye for eye, tooth for tooth, hand for hand,
foot for foot."*
(OT, Exodus 21:24)

Proportionality is an enduring remnant of chivalric code codified in Additional Protocol I to the Geneva Conventions, 1977.¹ The principle is a limitation on the method and means of warfare that requires parties to a conflict to exercise judgement as to whether the anticipated military advantage of a planned attack outweighs the expected degree of loss of life and damage to civilian property. Simply put, 'proportionality consists of a reasonable relation of means to ends'.² The tenor of the principle is thus creditable to the tenets of international humanitarian law but is lamentably ambiguous and difficult to apply.³ Practically, the principle demands relative values

to be assigned to unrelated factors: politico-military profit and the value of human life. The Principle of Proportion is a fundamental feature of the law of armed conflict; aimed at providing due protection to the civilian population from the unnecessary and worst effects of war.

During and post recent international conflicts, attended by heavy media dialogue,⁴ the legal principle of proportionality has been drawn on both to condemn and to justify whole and individual military actions. From the Coalition's destruction of the Iraqi electric power network in 1991 to the NATO attacks on the Belgrade television station in the Kosovo conflict, proportionality has been raised simultaneously as both a flag of integrity and an alarm of dereliction. Both those claiming and those disclaiming



Destroyed Iraqi Tu-22U aircraft

The rule of distinction is another deep-rooted principle of humanity requiring that such distinction be made between military objectives and civilian objects with a view to sparing the latter as much as possible

integrity appear to believe in the veracity of their statements. So, how can interpretation of this one principle translate into contradictory assertions?

Does this ambiguity and potential for discord render the principle unfeasible or is the law succinct enough to require adherence? In answering, I will examine the detail of the principle, focusing on Protocol I, and explore the continued validity of the principle of proportionality as a legal obligation by assessing it in relation to two factors: interpretation and application.

First I will examine how this principle is incorporated into military manuals and political rhetoric to understand how the principle is interpreted. I will show that, whilst interpretation is internationally uniform in its larger meaning, the detail is significantly vague. Then, in assessing the factors influencing the application of the principle during conflict, the disparity exposed in interpretation will be reinforced. I will conclude that although the principle has merit in warfare, its indistinct interpretation and application, together with the partialities of both parties to the conflict and observers, causes it to be inherently flawed.

Proportionality: Historical foundations

What is meant by the principle of proportionality and how does it contribute to the law of armed conflict? The principle extends from the just-war tradition established by Thomas Aquinas, who held that war was moral if it met the conditions of proper authority for its initiation, the cause was just, and if the state waging war had the right

intention.⁵ The just-war tradition was advanced by the work of two scholars, Francisco Vitoria (1480-1546) and Francisco Suarez (1548-1617) who contributed the concept of proportionality.⁶

However, it was not until the latter half of the 19th Century that the essential nature of the concept appeared in crude military doctrine and

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Collateral damage, Iraqi apartments belonging to civilians



international statute. Defining limitations on the methods and means of warfare, the Lieber Code of 1863 recognized that civilians⁷ and their assets⁸ should be protected in warfare and, further, that enemy combatants should not be afflicted by unnecessary suffering.⁹ The latter was codified by the St. Petersburg Declaration of 1868 in its prohibition of *maux superflus*,¹⁰ which was later to appear in the subsequent Hague treaties.¹¹ The fourth 1907 Hague Declaration states that [t]he right of belligerents to adopt means of injuring the enemy is not unlimited.¹² Such limitations include the use of weapons calculated to cause unnecessary suffering,¹³ or which are used against undefended towns, villages or buildings,¹⁴ or to destroy . . . the enemy's property, unless such destruction . . . be imperatively demanded by the necessities of war.¹⁵

Attempts at articulating proportionality can be detected here in the text of the Hague Declaration in demanding imperative military necessity for attacks on the civilian structure, summarized as only that amount of force should be used that is necessary to succeed in one's objective.¹⁶ Military requirement must not exceed the precepts of humanity. Humanity effectively places a restraint on military necessity to protect both combatants and non-combatants from the worst of war.

The rule of distinction is another deep-rooted principle of humanity requiring that such distinction be made between military objectives and civilian objects with a view to sparing the latter as much as possible. As recognition of its customary status,¹⁷ the principle was adopted in a resolution at a meeting in Edinburgh of the Institute of International Law in 1969¹⁸ and was later incorporated in Protocol I.¹⁹ The Protocol prohibits attacks where by its nature or application a weapon cannot be directed at or limited to the military objective.

Additional Protocol I

Although no reference is made to proportionality, its principle is composed in Art 51(5)(b) of Protocol I, stating that the following types of attack are to be considered indiscriminate:

*'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'*²⁰

Together, the principles of necessity and distinction under the mantle of humanity form the basic premise of the proportionality principle and the first part of the above text. These principles demand that the effects of military force be limited to the minimum needed to achieve military success whilst sparing the civilian population and its assets²¹ as far as possible. In saying that civilians must be spared *as far as possible* the law recognizes here that loss of life and injury to civilians is an inevitable consequence of war,²² though it is specific in stating that such consequences are to be the incidental effects²³ of a lawful attack²³ on a military objective and not the result of a direct, illegal attack on the civilian population. Incidental effects causing injury to civilians and damage to civilian property, commonly known as collateral damage,²⁴ can occur as a result of an attack for several reasons: weapon blast and fragmentation spreading beyond the perimeter of a military objective; errors in intelligence directing the weapon to the wrong target; misidentification of a target; or, weapon malfunction.

The balancing requirement for incidental effects, or collateral damage, is phrased in the latter half of the text of Art 51(5)(b), stating that an attack must be weighed against military advantage. In this sense, military advantage is the phased progress towards the realization of a clearly defined aim; the ultimate aim being to defeat the enemy's will or capability to wage war.²⁵ As a consequence each phase may be pictured benignly as a game of chess where the ultimate aim is to capture the opponent's king. Every move made and every piece played during the game follows a strategy formed in order to advance towards that goal. The progression of play is to create advantages over one's opponent that force him to play according to one's strategy, so making it easier to advance towards a position of check, or checkmate. This strategic advance of each chess piece can be equated to military advantage and the progressive

advance towards the ultimate submission or defeat of one's enemy.

The concept that the expectation of incidental damage, where innocent people are killed or maimed, should be balanced with the expected, and possibly esoteric, advancement towards the ultimate aim is, on the face of it, an uncomfortable premise. Yet, in accepting that innocents will suffer as a natural consequence of war, the fundamental nature of the principle is a necessary and important stricture to minimize suffering to non-combatants. The measure of whether the principle has proven effective in doing so is to establish how it is interpreted and applied as according to law.

Proportionality: A critical analysis

The following analysis will look at the problematic features of the principle of proportionality raised in Part I of this paper. Firstly, how the principle is interpreted and incorporated into military doctrine and government policy will be assessed and any nuances identified. Secondly, and as a result of its interpretation, I will determine how the principle is applied to identify whether doctrinal interpretations of the laws of war suffer in a practical sense.

Interpretation

In military manuals

The nature of the laws of armed conflict dictates their incorporation into military doctrine and manuals of warfare.²⁶ One can argue, therefore, that such handbooks offer an insight into how the obligation of proportionality is interpreted by states. For example, whilst the principle of proportionality is given due prominence in the manuals of both the UK and US,²⁷ the wording reflects a disparity of emphasis. In the UK's primary operational law doctrine, the advice is that

*'[M]ilitary objectives should not be attacked if the attack is likely to cause civilian casualties or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage which the attack is expected to produce.'*²⁸

Note that the operative term is *likely* to cause collateral damage balanced against the *expected*

advantage. The terminology would suggest one has to be more certain of the military gains of the attack than one has of the chances of injury to the civilian population. I would contend here a slight adjustment in emphasis of the proportionality text. Whereas Protocol I requires an expectation of collateral damage to be weighed against the expectation of military advantage, the UK implies that commanders have to take account of the *possibility* of excessive collateral damage. The balance is rightly phrased on the side of protecting the civilian population but it could be argued, not just in terms of semantics, that probability is easier to quantify in mechanical terms versus a possibility.

In comparison, the US military treat their introduction of proportionality somewhat differently. In the US Operational Law Handbook the paragraph addressing the principle²⁹ is transcribed more or less exactly from Protocol I (merely substituting 'expected' for the synonym probable) but is enveloped in advice that calls attention to mitigating circumstances of an otherwise disproportionate attack. The Handbook states in the succeeding paragraph that '[i]n judging a commander's actions one must look at the situation *as the commander saw it* in light of all circumstances'.³⁰ The law echoes this message of mitigation in Protocol I in that the commander 'should do everything feasible'³¹ to ensure an attack complies with the laws of war. However, the US manual seems to lessen the importance of the constraint when the mitigation is stressed immediately after it. The treatment of proportionality is given a different slant in the US' Air Force Intelligence Targeting Guide where it is given that '[i]f an attack is carried out efficiently, using the principle of economy of force, against a military installation, it would not be likely to violate this rule'.³² This assertion would seem to be true, as investigation of alleged disproportionate attacks involving the US, in NATO or *ad hoc* coalitions, have resulted in clearing them of any unlawful act. For instance, following the Kosovo conflict, the Final Report³³ determined that instances of collateral damage were either the result of mistakes or proportional to the military advantage earned.

By state organs

Military manuals are just one product evidencing state practice; statements of state organs serve the same purpose. Both the US and UK reiterated prior to and during the two conflicts in the Gulf that the requirements of proportionality were a significant factor of policy:³⁴ so too did most of the NATO states during the Kosovo campaign.³⁵ It is arguable, however, that such declarations of policy interpret

its commentary on Art 51, the International Committee of the Red Cross (ICRC) merely states that the preceding constraints on warfare in Protocol I succeed in tempering the permissible level of collateral damage, especially in the text of Art 48.³⁷ However, in discussing the provisions of Art 57(a)(iii) the ICRC provides us with some clarification. The commentary pronounces the interpretative statements as redundant in that



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the principle the same way, especially when addressing whether the principle applies to single or multiple attacks or to the campaign as a whole. The text of Art 51(5)(b) does not illuminate this issue and several countries inserted reservations on its meaning. For example, Italy submitted a Reservation to the purpose that in interpreting the article, the advantage anticipated from an attack refers to the attack 'as a whole and not only from isolated or particular parts of the attack'.³⁶

As a further seven countries, including the UK, submitted similar if not identical reservations, this interpretation attracts some weighty support but does not resolve the question. In

'it goes without saying that an attack carried out in a concerted manner in numerous places can only be judged in its entirety'.³⁸ The commentary goes on to state that this interpretation 'does not mean that during such an attack actions may be undertaken which would lead to severe' collateral damage.³⁹ This interpretation would accord with the views of the US and UK in a report published on the conduct of the Gulf War of 1991, where it was stated that proportionality should be, and was, assessed on a target-by-target basis as well as the campaign as a whole.⁴⁰ Furthermore, in several cases presented to the UN Security Council involving Israel, the judgements concur with this approach to

calculation.⁴¹ Thus, one could infer that the component parts of a concerted attack must comply with the proportionality principle as well as the concerted attack as a whole.

The attack on the Serbian communications network during the Kosovo conflict is one such case of an individual attack within a concerted offensive. NATO's rationale for including the Serbian television station in the attacks on the command and control structure was that it was an essential node in military radio relay and in the Milosevic propaganda machine.⁴² At the time of the attack the television station was occupied by civilian workers and resulted in 16 deaths.⁴³ Even leaving aside the question of the station's legitimacy as a military objective, because it was broadcasting again within three hours of the strike calls that the attack was disproportionate seem to be, *prima facie*, merited.⁴⁴ However, the Final Report to the Prosecutor reviewing the NATO bombing campaign accepted that the attack was proportionate on the grounds that the attack on the television station must be assessed within the confines of the concerted attack on the command and control system and that the sixteen deaths were in this way proportional to the advantage gained.⁴⁵

The report's conclusions⁴⁶ were based upon the judgement of the Court in the *Kupreskic* case,⁴⁷ which ruled that individual legal attacks, may, when viewed as a whole, 'not be in keeping with international law'.⁴⁸ There is some argument that the report's authors were guilty of misrepresenting the opinion of the Court in taking an opposite viewpoint,⁴⁹ yet I would suggest that in turning the question around the report in no way changes the answer.

Despite the ICRC and The Final Report, both regarding the problem of single or multiple attacks in similar ways, there remains some ambiguity. There is also some room for dispute in attempting to quantify the term excessive.⁵⁰ What level of collateral damage would be excessive exactly, and will excessiveness change with the tempo of the conflict or in the type of conflict? There is no answer in Protocol I and the ICRC's commentary relies on observance of distinction and military necessity to ensure collateral damage is not

excessive in proportional language. Despite the dissatisfaction on these points the principle is not 'a graveyard of good words',⁵¹ merely that whilst doubt exists, dispute will always follow where an attack causes collateral damage. Moreover, any difficulty or difference in interpretation of the proportionality principle will be compounded in its application. It is the application of the proportionality principle that I will next analyze.

Application

Guidance

The precautionary measures to be carried out by the commander in planning an attack are laid out in Art 57 of Protocol I. Sub-section 2(a)(iii) directs him to the measures to be undertaken to avoid excessive collateral damage in relation to the military advantage. How the commander applies the measures or assesses the probability in quantitative terms is not stated, although requiring the commander to 'take all feasible precautions'⁵² to avoid incidental damage suggests the use of intelligence and all other information to advise the assessment.⁵³ Although the governments of those states involved in the international conflicts of the last two decades have reiterated their intention to minimize collateral damage, both in component form and as a whole, they do not publish the means by which it is calculated.⁵⁴ It is a presumption then that an estimation of the number and degree of casualties is made using intelligent surveillance of the military objective and its environs, geo-populational data and the known effects of the weapon. The resulting information is weighed against the military advantage and whether this advantage is solely to be gained from the concerted attack or that of the campaign aim is, again, not provided for in law. In its Commentary the ICRC interprets the expression 'definite military advantage anticipated'⁵⁵ to mean "that the advantage concerned should be substantial and relatively close, and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded".⁵⁶ However, it is perhaps naive to think that the campaign's long-term aim will not be a dynamic in the equation. In point of fact, one could argue that the ICRC's interpretation forces a bit-by-bit



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approach to campaign planning rather than a focussed strategy, which could affect the direction and duration of the conflict.

The absence of explicit guidance is not an obstruction to the principle, as factors such as the size of the military objective, its location and the intensity of an operation will be conflict and objective specific. One cannot provide for a low-intensity conflict, such as Bosnia in 1995,⁵⁷ in the same way as for a high-intensity one such as the Gulf War of 1991. Similarly, the Protocol can offer no guidance on what would be termed excessive incidental damage for much the same reason.

Military strategy

There is a natural impulse on behalf of states to protect one's own forces from attack and they will use all means to facilitate a zero-casualty war.⁵⁸ Examples of how the protection can manifest itself can be seen in restrictions imposed on aircraft operating altitudes⁵⁹ or in mounting the operational tempo to bring the conflict to an early close. The former policy led to arguably the most memorable images of the Kosovo conflict — the attack on a convoy comprising mainly civilians and civilian vehicles near Djakovica. However, it is not the disproportionality of this shocking incident that is in question, rather the underlying principle that the routine nature of the policy of flying above 15,000 may have led to a greater degree of collateral damage in cumulative terms out of proportion to the military advantage gained. Of course, the military advantage is, as already stated above, just the politico-military gain achieved at the expense of the adversary. Those whose role it is to calculate the advantage and assess the probable effects on civilians are part of the same military machinery, so the question is: can one trust any assessment of proportionality to be equitable? Some scholars feel that the planners will by nature tend to exaggerate the military advantage in weighing the legitimacy of an attack.⁶⁰ It is difficult to assess this point, as any analysis of individual attacks will be unable to replicate the circumstances in which the decision was made and it is hard to be objective when benefiting from hindsight.

Additional problems are caused by the inherent secrecy of the military planning environment and the reluctance for the military to show its hand by explaining the strategy in the military advantages of an attack. The reliance is, and will undoubtedly remain, on the guidance laid out in Protocol I. Dependence will also remain on the responsibility for military planners to ensure that attack plans are assessed with the degree of impartiality necessary to protect civilians from the effects of war.

Further ambiguity within the guidance given in Protocol I is in the onus or division of responsibility for acting proportionally when not all relevant factors are under the control of the commander. Most causes of collateral damage, as I have shown, are in consequence to the actions of the attacking forces or their equipment. Nevertheless, actions not under the control of the attacking force can influence the normal course of an attack that apportions liability with the other party to the conflict. For example, military objectives might be deliberately sited or placed in close proximity to, or amongst, civilians and civilian infrastructure, or an adversary might go even further by employing human shields in order to protect his military assets.

Military objectives and human shields

The law of armed conflict prohibits the placing of military objectives in or near areas where there is a high concentration of civilians⁶¹ and the employment of civilians to shield targets from attack.⁶² That it nevertheless occurs as a matter of norm is not to say that the parties have acted illegally. Quite often the inter-relationship of military objective and civilian object is obscure and is becoming more so with the advances in technology. The technological and infrastructural features are usually the same: both use electrical power, telecommunications pathways and transportation. Economic factors, therefore, dictate that some degree of merging of military and civilian will occur — not in function necessarily but in the feed and use of joint primary resources. In cases like these, it is clear that the responsibility for minimizing incidental damage is that of the attacking force in the requirement to distinguish between civilian and military.

If, however, a party to the conflict was to deliberately locate a military objective in or near the civilian population the onus of responsibility appears, in the absence of Protocol I provisions to say otherwise, to remain with the attacking force; even though such an act is in categorical contravention of the rules of war. The wording of the applicable rules, Arts 51(5)(b) and 57(2)(a)(iii), neither implies joint responsibility, nor that prohibited positioning of military objectives or civilians somehow diminishes the responsibilities of the attacking commander. During the NATO campaign in and against Serbia, an attack on a command post in the village of Korisa caused extensive damage and the death of a great number of displaced Albanians.⁶³ NATO responded to criticism of the attack by insisting the command post was a legitimate military objective and that from intelligence it had been understood that the village had been evacuated of all civilians.⁶⁴ The Final Report to the Prosecutor on the NATO bombing campaign stated that reports suggested that the civilians had been moved into the village for the purpose of shielding the command post.⁶⁵ If true, in locating the command post in a village and employing human shields the Serbian military were in violation of the law of armed conflict. Whether they were also complicit in ensuring disproportionate results of the NATO attack appears to be of little consequence in comparison.

Less clear is the responsibility for the disproportionate deaths of a reported 300⁶⁶ civilians from the Coalition attack on the Al-Firdus Bunker during the 1991 Gulf War. The bunker had been built as a civilian air-raid shelter during the Iran-Iraq War but the Coalition believed, a decade later, that it was being used as a command and control bunker. Coalition intelligence identified the presence of camouflage and barbed wire around the entrances, and armed guards posted at control of entry points. In briefings during and after the war, the Coalition said that they believed that the Iraqi authorities had allowed the families of officer personnel working in the bunker to use the upper floors above the command and control facility to shelter from aerial attack.⁶⁷ According to international humanitarian law, a civilian object loses its protection from attack once its purpose

changes from that of a civilian nature to a military one.⁶⁸ In this sense the Coalition calculated the probability of civilian casualties taking into consideration their understanding of the revised purpose of the bunker, and not taking into account the (unknown) presence of civilians on the night of the attack. One can carefully state that the renewed status of the bunker and the attack upon it was consequently proportionate. This stance was put forward by the Coalition in placing responsibility for the resultant deaths at the door of Saddam Hussein and his regime for failing to 'honor his own law of war obligations'.⁶⁹

Hindsight renders the attack, like that of Korisa, wholly disproportionate yet one has to take into consideration that hindsight is a wonderful but future-dependent thing and only those circumstances ruling at the time can dictate the course of events.

Conclusion

The lack of precision found in the principle as it stands in the codified light of Protocol I would seem to operate in the interests of the military.⁷⁰ The Protocol delegates to the commander the responsibility to ensure the tenets of proportionality are met, yet offers minimal guidance on how he is to execute this responsibility. It is perhaps, then, not surprising that this delegation encounters divergent opinions of the proportionality of attacks during conflict.

To compound the probability of misunderstanding, the nature of secrecy in military planning dictates that the military planners are most able to verify that the obligation of proportionality was met subsequent to their attack. They and they alone knew the military advantage sought, what was the acceptable level of collateral damage balanced against that advantage, and the intelligence that informed the assessment. Without making observers and the other parties to the conflict privy to the set values or to the desired advantage, it seems that this situation will not change. Similarly, in the reliance of those circumstances ruling at the time and the impossibility of retrospective assessment, it is difficult to imagine that any

international tribunal could successfully prosecute disproportionate acts.⁷¹

However, rewording the proportionality articles in Protocol I to add more detailed guidance for its application would be unachievable. The task of importing text that could contend with the multi-faceted conflicts of, say, Kosovo while retaining enough flexibility for the new hybrid of internationalized internal conflict would be overwhelming. Less evasiveness on the part of the states' militaries to reveal their techniques of calculating collateral damage would go some way in assuring a degree of adjudication after the fact, as well as substantiating their observance of the law.

The one area in which the articles would benefit from further study would be in the manner of clarification. Statements of clarification on what constitutes a calculable attack, multiple and single, and the associated proximity, duration and extent of military advantage would certainly fortify the principle. That the principle remains a viable if frail rule of international law would seem, in lieu of the inadequacies raised in this essay, to ignore its manifest iniquities. But if the principle were to be declared obsolete, the consequences for those civilians caught up in warfare would indeed be dire.

ANNEX A British Defence Doctrine Joint Warfare Publication 0-01 — Extract JWP 0-01

The Selection and Maintenance of the Aim
In the conduct of war as a whole, and in every operation within it, it is essential to select and clearly define the aim. The ultimate aim in war is to break the enemy's will to fight. Each phase of the war and each separate operation is directed towards this supreme aim, but will have a more limited aim, which must be clearly defined, simple and direct. Once the aim is decided, all efforts are directed to its attainment until a changed situation calls for re-appreciation and probably a new aim. Every plan or action must

be tested by its bearing on the chosen aim. The selection and maintenance of the aim is regarded as the 'Master Principle'. It has therefore been placed first in the list. The remaining principles are not given in any particular order since their relative importance varies according to the nature of the operation.

Maintenance of Morale

Success in war often depends more on moral than on physical qualities. Numbers, armament and resources cannot compensate for lack of courage, energy, determination, skill and the bold offensive spirit that springs from a national determination to succeed. The development and subsequent maintenance of the qualities of morale are, therefore, essential to success in war.

Offensive Action

Offensive action is the necessary forerunner of success; it may be delayed, but until the initiative is seized and the offensive taken, success is unlikely.

Security

A sufficient degree of security is essential in order to obtain freedom of action to launch a bold offensive in pursuit of the selected aim. This entails adequate defence of high value assets and information that are vital to the nation or the armed forces. Security does not, however, imply undue caution and avoidance of all risks, for bold action is essential to success in war. On the contrary, with security provided for, unexpected developments are unlikely to interfere seriously with the pursuit of a vigorous offensive.

Surprise

Surprise is a most effective and powerful influence in war and its moral effect is very great. Every endeavour is made to surprise the enemy and to guard against being surprised. By the use of surprise, results out of all proportion to the efforts expended can be obtained and, in some operations, when other factors are unfavourable, surprise may be essential to success. Surprise can be achieved strategically, operationally . . .

[3-2 2nd Edition]

ANNEX B UK Doctrine for Joint and Multinational Operations (Joint Warfare publication 0-10) — Extracts JWP 0-10

ANNEX 6A — LAW OF ARMED CONFLICT

6A1. Those involved in joint operations should first be aware of the distinction between the law which governs the right of States to resort to armed force and the rules in the Law of Armed Conflict (LOAC) which have to be observed by the combatants in the prosecution of the conflict.

6A2. **Limits on the Use of Force.** Until the early twentieth century, international law imposed no real limitation on the right of states to go to war to resolve their differences. However, following the First World War, the major world powers, through the Covenant of the League of Nations in 1919, agreed to restrictions on the recourse to war. Later, in the Pact of Paris of 1928, those same powers agreed to renounce the use of war as an instrument of policy. The United Nations (UN) Charter took this process further by requiring states to '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 UN'. So the UN Charter requires that international disputes be settled by peaceful means. Armed force may only be permitted in the following circumstances:

- a. When mandated by resolution of the Security Council (to restore international peace and security).
- b. When used for the purposes of the individual or collective self defence (under Article 51 UN Charter). This includes defending one's own state against an armed attack and coming to the aid of other Allied nations (NATO Treaty Article 5), but might also encompass intervention in another state to protect or rescue one's own nationals.

In addition, international law appears to recognise a further category of intervention. Although the

principle of state sovereignty is paramount in the UN Charter, the international community appears to have accepted the principle of humanitarian intervention in another state's affairs in breach of its territorial integrity and sovereignty where extreme humanitarian need exists (eg. No Fly Zones in North and South Iraq).

6A3. Proportionality and the Law. In the event that force is used in these circumstances, it should be only that necessary and proportionate to meet the threat or restore peace and security; this has significant implications for commanders at the operational and tactical levels in planning and conduct of operations in terms of geographical area of operations, size of forces and type and nature of targets and weaponry which can legally be brought to bear. In all cases, members of the Armed Forces, irrespective of their rank or command responsibility, are obliged to act within the law. [6A-1 2nd Edition]

JWP 0-10

c. **Distinction.** Attacks should be limited to military objectives only and the civilian population and civilian 'objects' shall not be made the object of attack. Specifically a military objective is an object which by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralisation in the circumstances ruling at the time offers a definite military advantage. The civilian population as such and individual civilians shall not be the objects of attack. (Civilians lose such protection if they take direct part in hostilities and civilian objects may become legitimate military objectives if they contain military personnel or equipment or supplies or are otherwise associated with combat activity incompatible with their civilian status).

d. **Proportionality.** Military objectives shall not be attacked if the attack is likely to cause civilian casualties or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage which the attack is expected to produce.

6A8. The Application of Law of Armed Conflict in Joint Operations. The increased destructiveness

of modern weapons has led to much greater emphasis on the importance of targeting. As well as restating the principles set out in paragraphs 6A2-6A5 above, Protocol I to the Geneva Conventions clarified a number of other rules on targeting as well as introducing a number of additional rules. These include the following:

- a. Attacks which are indiscriminate are forbidden. Methods or means of warfare which would cause unnecessary suffering are prohibited.
- b. Attacks against the civilian population are prohibited.
- c. Acts of hostility against cultural objects or places of worship, which are not military objectives, are prohibited.
- d. It is normally prohibited to destroy remove or render useless objects indispensable to the survival of the civilian population.
- e. Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be attacked unless those objects are being used other than for their normal function and are providing regular, significant and direct support to military operations and such attack is the only feasible way to terminate such support.

However, the mere presence of civilians in a zone or armed conflict does not necessarily prevent military action, and the risk that civilians will be killed or injured as a result of an attack on a military objective does not render that attack unlawful, provided that the proportionality rule is satisfied. [6A-3 2nd Edition]

Notes

1 Hereafter Protocol I.

2 Schachter cited in Arend & Beck, 1993: 166.

3 See the Final Report to the Prosecutor on the conduct of the NATO Bombing Campaign in Kosovo (hereafter Final Report) (2000) at para. 19. In addition, see inter alia, Dinstein, 2001: 184; Fischer, 1999: 88; Gardam, 1993:405; Gasser, 1995: 221 at 509(3); Nardin, 1993: 291; Robertson, 2002: 179. For an assessment of the principles application in the wars of the future, see Gilbert, 2003: 77, 125-26.

4 See, inter alia, BBC News Online (1998); BBC News 24 (2003a);

- BBC News 24 (2003b); Macwhirter, 2001; Radio Netherlands (2004); Rosenblatt, L. (1998); Sky News (2003); Weigel, G. (2002).
- 5 Arend, 1993: 14.
- 6 Ibid.
- 7 Art 44.
- 8 Arts 34 and 35.
- 9 Art 13.
- 10 Oeter, 1995: 115.
- 11 See The Hague Declaration (1899); The Hague Convention IV (1907) Art 23(e); and, further, Protocol I Art 35(2).
- 12 Art 22.
- 13 Art 23(e).
- 14 Art 25.
- 15 Art 23(g).
- 16 See inter alia, Greenwood, 1995: 30; Lacey & Bill, 2001: 8-9; JWP 0-10, 2002: 6A-1.
- 17 Nicaragua Case (Merits), at 176; The Caroline Case xxx. 193.
- 18 Schindler & Toman, cited in Green, 200: 47. Green reproduces the Resolution at ibid 48-9.
- 19 Art 48, and further Art 51(4) & (5) and 57(2)(a)(iii).
- 20 Roberts & Guelff, 2000: 449. Emphasis added.
- 21 Protocol I Art 57.
- 22 Fischer, 1999: 88.
- 23 Protocol I Arts 51(5)(b) and 57.
- 24 The San Remo Manual Art 13(c) defines collateral casualties or collateral damage as "the loss of life of, or injury to civilians or other protected persons, and damage to or destruction of . . . objects that are not in themselves military objectives".
- 25 JWP 0-01, 2001: 3-2.
- 26 Indeed, this is an obligation built into most international humanitarian law. See Protocol I, Art 83(1).
- 27 Although not parties to Protocol I the US have affirmed the principle of proportionality to be declaratory of customary international law. Lacey & Bill, 2001: 8.
- 28 JWP 0-10, 2002: 6A-3.
- 29 Lacey & Bill, 2001: 9.
- 30 Ibid, emphasis in the original.
- 31 Art 57(2)(a)(i) and (ii). Italy inserted a statement of understanding that 'the word feasible means that which is practicable or practically possible, taking into account all circumstances ruling at the time' (at B). Several states inserted the same or similar statements.
- 32 USAF 14-210, 1998: 149 at A4.3.1.2.
- 33 2000: passim.
- 34 E.g. BBC News 24, 2003b; Sky News, 2003; US DoD, 1992: 99-100.
- 35 Clark, 2001: 218, 221, 226-27.
- 36 See Italy's Reservation (E).
- 37 ICRC: 625-26.
- 38 Ibid: 685 at 2218.
- 39 Ibid.
- 40 US DoD, 1992: 611.
- 41 UNSCR 262 (1968): 12; UNSCR 573 (1985): 23.
- 42 The Final Report, 2000: at 74.
- 43 Amnesty International, 2000:64.
- 44 Ibid.
- 45 2000: at 78.
- 46 Ibid.
- 47 No IT-95-16-T, 207 at 526, 14 Jan 2000.
- 48 Ibid at 526.
- 49 Ronzitti, 2000: 7; Lausen, 2000: 792.
- 50 Art 51(5)(b).
- 51 Robertson, 2002: 179. See, inter alia, Gray, 2000: 106-07; Dinstein, 2001: 197-98; US DoD, 1992: 611.
- 52 Art 57(2)(a)(ii).
- 53 See the Reservations inserted by Italy (at D) and the UK (at c).
- 54 The Daily Telegraph reported Prime Minister Tony Blair's speech to the House of Commons on 20 March 2003 when he said that the 'British forces will do everything' to ensure the minimization of civilian casualties (Jones, 2003). Following a more than usually candid press briefing by senior military officers and legal advisers, The Daily Telegraph set out the nation's policy on the political and legal clearance of targets for the war in Iraq. The briefing, however, fell short of revealing the process of calculation and the threshold of acceptable collateral damage (Tweedie, 2003).
- 55 Art 51(5)(b).
- 56 ICRC: 684 at 2209.
- 57 NATO conducted air strikes on two ammunition storage bunkers in response to Serbia's breach of the cease-fire.
- 58 The term is used by Rogers, 2000.
- 59 NATO's aircraft adopted a height limitation during the Kosovo conflict in 1999. The aircrew routinely operated at a height of 15,000 feet, placing them above the range of Serbia's anti-aircraft fire but well within the range of criticism as being unable to effectively distinguish their targets. See Amnesty International, 2000: 60; The Final Report, 2000 at 69; Rogers, 2000.
- 60 Gardam, 1993: 407; Rowe, 2000.
- 61 Art 48, comprising the Basic Rule of the protection of civilians, and specifically Arts 56(5) and 58(b).
- 62 Ibid and also Arts 12(4), 51(7) and 58(a).
- 63 Amnesty International, 2000: 71-72. Serbia put the death toll at 87, and a further 78 people wounded (ibid).
- 64 Final Report, 2000: 88
- 65 Ibid: 88-89.
- 66 Smyth, 1999: 164.
- 67 US DoD, 1992: 615.
- 68 Art 52.
- 69 US DoD, 1992: 615.
- 70 Gardam, 1993: 407.
- 71 Gilbert, 2003: 125-26.

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