

Some Reflections on the “Incidental Harm” Side of Proportionality Assessments

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I. INTRODUCTION

The prohibition of attacks expected to cause incidental loss of civilian life, injury to civilians, or damage to civilian objects that would be excessive in relation to the concrete and direct military advantage anticipated lies at the heart of the rules of international humanitarian law (IHL) regulating the conduct of hostilities. According to Article 51(5)(b) of the First Additional Protocol of 1977 to the Geneva Conventions of 1949 (AP I), a disproportionate attack is an attack that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof that would be excessive in relation to the concrete and direct military advantage anticipated.

Although first codified in Additional Protocol I, the prohibition was already considered a rule of customary law at the time,¹ and

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1. See, e.g., NEW RULES FOR VICTIMS OF ARMED CONFLICTS 317 (Michael Bothe, Karl Joseph Partsch & Waldemar A. Solf eds., 2d ed. 2013); INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 ¶¶ 1826, 1864 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977] (“In the Hague Conventions of 1899 and 1907, like the Geneva Conventions of 1929 and 1949,

there now appears to be general agreement that it constitutes a rule of customary law applicable in international and non-international armed conflicts.²

The rule on proportionality represents the most apparent manifestation of the balance between military necessity and considerations of humanity that underpins IHL. As military operations are taking place in densely populated areas with increasing frequency, the rule's significance for the protection of civilians has become even more key. It is of central relevance to the current discussions on the use of explosive weapons in populated areas.

Determining what falls into the two "sides" of the proportionality assessment as clearly as possible is essential to the proper application of the rule in practice. The expected "military advantage side" of the equation has received considerable attention; the "incidental harm side" less so—even though it is equally key in assessing the lawfulness of an attack. It raises a number of legal issues that need to be addressed by belligerents to ensure they are complying with the law. Proportionality is a challenging topic and is frequently misunderstood by nonexperts and the media, particularly while hostilities are unfolding. Addressing the incidental harm side of the assessment would also provide reassurance that this dimension is being given proper consideration.

This Article focuses on just some of the questions covered at the IDF panel, although there are many that warrant closer consideration.

II. APPLYING THE SAME YARDSTICK TO BOTH SIDES OF THE ASSESSMENT

First, as a preliminary point, the same interpretation of what constitutes an attack must be adopted for both "sides" of the proportionality assessment. Article 49(1) of AP I defines attacks as "acts of violence against the adversary, whether in offence or in defence."³ There has been considerable discussion of what constitutes an "attack" for determining the expected military advantage in

the rule of protection is deemed to be generally accepted as a rule of law, though at that time it was not considered necessary to formulate it word for word in the texts themselves.").

2. See, e.g., 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 46 (Cambridge Univ. Press 2005); NEW RULES FOR VICTIMS OF ARMED CONFLICTS, *supra* note 1 (stating that customary international law requires the parties engaged in armed conflict are "required to distinguish between military targets and civilians and civilian targets and to direct their military operations only against military objectives").

3. Protocols Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 49(1), June 30, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

proportionality assessments. There is agreement that it is neither, at one end of the spectrum, one single strike, nor, at the other, a military campaign as a whole.⁴ A number of states submitted statements at the time of ratification of AP I indicating their understanding that the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered *as a whole* and not only from isolated or particular parts thereof.⁵

In conducting proportionality assessments, the same interpretation of "attack" must also be adopted for assessing the expected incidental harm. The language of Article 51(5)(b) of AP I does not suggest otherwise, and taking a different approach would undermine the very purpose of the rule.

Thus, if in assessing the anticipated military advantage it is the "attack as a whole rather than isolated or particular parts of the attack" that must be considered, it is the expected incidental harm from the same attack "as a whole" that must be put on the other side of the scales. This means that it is the immediate incidental harm caused by different elements of the "attack" that must be considered, and that the same timeframe must be adopted for considering relevant harm as for the military advantage.

By way of example, in the 2006 discussions on explosive remnants of war, it was noted that the use of cluster munitions could lead to a military advantage that materialised in the longer term. Unexploded submunitions could prevent enemy combatants from accessing particular areas in the mid-to-long term. The same timeframe must be the basis for assessing expected civilian harm.⁶

4. See PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH AT HARVARD UNIV., MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE 11–13 (2013).

5. See, e.g., *UK Reservation upon Ratification*, INT'L COMM. OF THE RED CROSS, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=OpenDocument&documentId=0A9E03F0F2EE757CC1256402003FB6D2> (last visited Feb. 21, 2018) [<https://perma.cc/WW9H-3XQS>] (archived Feb. 18, 2018). Similar declarations were also made by Australia, Belgium, Canada, France, Germany, Italy, the Netherlands, New Zealand and Spain. *Geneva Conventions of 1949 and Additional Protocols, and their Commentaries*, INT'L COMM. OF THE RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470 (last visited Feb. 21, 2018) [<https://perma.cc/Q5KV-CQRZ>] (archived Feb. 13, 2018).

6. Third Review Conference of the States Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, *Expected Civilian Damage and the Proportionality Equation—To What Extent Should the Mid to Longer Term Consequences of Explosive Remnants of War Be Taken into Consideration in the Proportionality Assessment*, ¶¶ 31–33, U.N. Doc. CCW/CONF.III/WP.9 (Nov. 15, 2006) [hereinafter Third Review Conference].

III. THE TYPES OF HARM OR DAMAGE THAT FALL WITHIN THE PROPORTIONALITY ASSESSMENT

The second set of comments relates to the types of incidental harm to be considered in proportionality assessments. The formulation of proportionality in Additional Protocol I mentions three types of harm or damage: loss of civilian life, injury to civilians, and damage to civilian objects.

First, when considering the death or injury to civilians, *whose* civilians should be considered? Usually it is the civilians under the control of the enemy who are considered, on the assumption that a state would not conduct attacks that could put “its” civilians at risk. However, the way hostilities have recently been conducted in a number of contexts, including most notably the use of human shields and the intentional placement of military objectives in civilian infrastructure, indicates this is not necessarily the case.

The majority of the rules of the 1949 Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV)⁷ only apply to “protected persons” within the meaning of the Convention: persons who find themselves, in case of a conflict or occupation, in the hands of a party to the conflict or occupying power of which they are not nationals.⁸ In contrast, the rules on the conduct of hostilities codified in Additional Protocol I—including the prohibition on attacking civilians and the prohibition on disproportionate attacks—extend to *all* civilians, not just those in the hands of a party of which they are not nationals.⁹

Consequently, it appears uncontroversial that it is the expected harm to all civilians—those under the effective control of the enemy and those under the effective control of the attacker, including its own nationals—that must be considered in a proportionality assessment.¹⁰

7. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 13–26, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

8. *Id.* art. 4.

9. As pointed out in the ICRC Commentary to Additional Protocol I, “[i]n protecting civilians against the dangers of war, the important aspect is not so much their nationality as the inoffensive character of the persons to be spared.” COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977, *supra* note 1, ¶ 1909.

10. See YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 120 (2016) (noting that it is the duty of all parties to remove civilians under their control from the vicinity of military objectives); IAN HENDERSON, THE CONTEMPORARY LAW OF TARGETING 227–29 (2009) (“[A] very important point is that nationality of the civilians is an irrelevant consideration. A State’s own civilians are immune from consequences of an attack just as much as are the enemy’s civilians.”)

This was the position recently adopted by the Syria Commission of Inquiry, which, in assessing whether a government airstrike that damaged a water spring was disproportionate, considered its adverse impact on civilians in opposition and government-held territory.¹¹

Second, attacks against military objectives frequently have numerous serious adverse consequences on civilians in addition to death, injury, and damage to property. This is particularly the case for attacks conducted in populated areas. The damage and destruction caused by the attacks, as well as the risks posed by unexploded remnants of war, frequently lead to displacement, impede access by humanitarian organisations to people in need, prevent children from attending school, impair livelihood activities, and delay post-conflict reconstruction.¹²

Belligerents should take these consequences into account as part of their obligation to spare the civilian population.¹³ While some of this harm is not specifically mentioned in the formulation of proportionality in Additional Protocol I, consideration could be given to it by granting extra “weight” to the damage to certain objects. By way of example, Article 51(5)(b) of AP I does not mention displacement of civilians among the types of expected incidental harm to be considered. However, the fact that displacement is likely to occur as a result of an attack expected to destroy civilian homes could affect the weight to be given to that destruction in the proportionality calculation. Greater weight should be given to their destruction than to that of deserted homes or business premises.¹⁴

IV. “REVERBERATING” OR “KNOCK-ON” EFFECTS

The final point to touch upon is whether incidental harm arising from what are often referred to as the “reverberating” or “knock-on” effects of an attack should be included in proportionality assessments.

This type of incidental harm can occur in a number of different ways. These include, first, situations where the harm does not occur immediately, like when a civilian is injured by unexploded cluster

11. U.N. High Comm’r for Human Rights, *Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya: Detailed Findings*, ¶¶ 32–37, U.N. Doc A/HRC/34/CRP.3 (Mar. 10, 2017).

12. See, e.g., SIMON BAGSHAW, U.N. OFFICE FOR THE COORDINATION OF HUMANITARIAN AFF., COMPILATION OF MILITARY POLICY AND PRACTICE: REDUCING THE HUMANITARIAN IMPACT OF THE USE OF EXPLOSIVE WEAPONS IN POPULATED AREAS 9–11 (2017), <https://www.unocha.org/sites/unocha/files/OCHA%20Compilation%20of%20Military%20Policy%20and%20Practice%202017.pdf> [https://perma.cc/5HDE-CLRR] (archived Feb. 13, 2018).

13. Protocol I, *supra* note 3, art. 57(1).

14. See Laurent Gisel, *Relevant Incidental Harm for the Proportionality Principle*, 46 COLLEGIUM 118, 120 (2015).

submunitions months after they were employed in an attack. This could be referred to as “delayed effect.” Second is harm that, even though it occurs immediately after an attack, continues for a prolonged period of time, as is the case, for example, with diseases caused by the use of “toxic” weapons. This could be referred to as “long term harm.” Third is harm that is not caused by the attack itself but occurs because of damage to another object that, in turn, leads to incidental harm. An example could be death and disease resulting from damage to civilian objects that provide vital services to the civilian population, such as hospitals. These are referred to as “knock-on effects.” A more elaborate version occurs when an attack damages one object and, as a consequence of this, a different civilian object cannot function, leading to civilian casualties. An example would be an attack that damages the electricity-generating and distribution systems, which means that the water purification systems cannot operate, leading to an outbreak of waterborne diseases. Essentially, there appear to be two principal forms of this type incidental harm: harm that does not manifest itself immediately upon the attack and harm that occurs as a result of a knock-on effect.

IHL treaties provide limited guidance on whether, and if so, to what extent, this type of damage should be included in proportionality assessments. Article 51(5)(b) of AP I refers to “anticipated” military advantage and “expected” incidental harm.¹⁵ It is probably safe to assume that for present purposes the terms “anticipated” and “expected” are synonymous. These are understood as meaning that it is only incidental harm that is *foreseeable* that should be taken into account.

However, while there are adjectives that set parameters for the military advantage side of the equation—“concrete and direct”—there are none for the incidental harm side. Does this mean that all incidental harm that is reasonably foreseeable must be factored into a proportionality assessment? Or is there a point when harm, even though foreseeable, is too remote? There appears to be no basis for claiming that remoteness in space or over time should automatically put incidental harm outside the scope of a proportionality assessment. More relevant is the fact that with the passage of time or with a longer “chain of causation” the possibility for intervening acts to occur is greater, which makes it more difficult to foresee the occurrence of the harm.

This appears to be the concern underlying some experts’ reservations. For example, in relation to the question of whether the possible harm from unexploded cluster submunitions should be taken into account in proportionality assessments, it was noted that this

15. Protocol I, *supra* note 3, art. 51(5)(b).

risk would be affected by a number of factors, including when civilians are likely to be allowed to return; which steps parties in control of the area are likely to take to mark or clear contaminated areas; and whether civilians are likely to heed prohibitions.¹⁶ While it is true that these variables will affect the foreseeability of the harm, this does not mean the harm should be excluded.

Other areas of public international law may offer guidance on this aspect of proportionality assessment. For example, remoteness is mentioned in the International Law Commission's (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts, but for a different purpose: determining the extent of the obligation to make full reparation for injury caused by an internationally wrongful act. It is nonetheless interesting to see that even in that context the ILC excluded "damage which is too indirect, remote or uncertain to be appraised."¹⁷ The ILC then noted that:

causality in fact is a necessary but not a sufficient condition for reparation. There is a further element, associated with the exclusion of injury that is too 'remote' or 'consequential' to be the subject of reparation. In some cases, the criterion of 'directness' may be used, in others 'foreseeability' or 'proximity'. But other factors may also be relevant: for example, whether State organs deliberately caused the harm in question, or whether the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule. In other words, the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation.¹⁸

Consideration should also be given to whether particular areas of domestic law, such as torts, could provide guidance on this question. When drawing analogies, it should be borne in mind that the policy considerations underlying the prohibition on disproportionate attacks in IHL—balancing the expected military advantage of an attack with expected incidental harm—may be very different from those underlying domestic rules on liability for torts or breaches of contract.

V. NEXT STEPS

In recognition of the centrality of the prohibition of disproportionate attacks to the rules regulating conduct of hostilities in modern warfare, it is the topic of a number of expert consultations—some recently concluded and others still ongoing, including the work of the International Law Association on the

16. Third Review Conference, *supra* note 6, ¶ 19.

17. Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 227 (2001).

18. *Id.* at 227–28.

conduct of hostilities;¹⁹ an expert workshop convened by the International Committee of the Red Cross and the Université de Laval in June 2016; and a Harvard Programme on International Law and Armed Conflict project.²⁰

The panel on proportionality at the IDF Conference was the genesis of a Chatham House project that aims to contribute to the debate by continuing the reflection on the incidental harm side of proportionality assessments.²¹ Beginning in the autumn of 2017, Chatham House will convene a number of expert consultations to inform the elaboration of a report analyzing the constituent elements of incidental harm and their interplay with the expected military advantage side of the assessment. To the extent possible, the report will also identify parameters to provide guidance in applying the rule. While the focus of the project is the law, careful consideration will also be given to the practicalities of applying different aspects of the rule in practice. The report aims to provide guidance to those conducting military operations, and to the wide range of stakeholders that play a role in promoting compliance with IHL, including government officials, legal practitioners, humanitarian organizations, advocacy groups, and the media.

19. Int'l Law Assoc. Study Grp. on the Conduct of Hostilities in the 21st Century, *The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare*, 93 INT'L L. STUD. 322 (2017).

20. The Programme on International Law and Armed Conflict's (PILAC) project focuses on what commanders should know before launching an attack against a military objective. *Commanding Knowledge: The Line of Fire in the IHL Principle of Proportionality*, HARV. LAW SCH. PILAC, <https://pilac.law.harvard.edu/commanding-knowledge-the-line-of-fire-in-the-ihl-principle-of-proportionality> (last visited Feb. 21, 2018) [<https://perma.cc/J8SK-BQAM>] (archived Feb. 13, 2018).

21. *The Limits on War and Preserving Peace*, CHATHAM HOUSE, <https://www.chathamhouse.org/about/structure/international-law-programme/limits-on-war-and-preserving-peace-project> (last visited Feb. 21, 2018) [<https://perma.cc/2BQQ-JX2X>] (archived Feb. 13, 2018).