Proportionality in the Law of Armed Conflict: The Proper Unit of Analysis for Military Operations

Ryan Christian Else

Follow this and additional works at: http://ir.stthomas.edu/ustjlpp

Part of the International Law Commons, and the Military, War, and Peace Commons

Bluebook Citation

This Note is brought to you for free and open access by UST Research Online and the University of St. Thomas Journal of Law and Public Policy. For more information, please contact Editor-in-Chief Patrick O'Neill.
PROPORTIONALITY IN THE LAW OF ARMED CONFLICT

THE PROPER UNIT OF ANALYSIS FOR MILITARY OPERATIONS

RYAN CHRISTIAN ELSE

EXECUTIVE SUMMARY

Additional Protocol I to the Geneva Conventions states that an attack is disproportionate, thus illegal, if it “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.”1 This paper synthesizes rules usable to a commander to determine ex ante whether an attack meets this proportionality requirement.

Additionally, this paper draws from multiple sources of international law, the Protocol I signatories’ intent, and state practices in command responsibility to synthesize a proposed rule in determining whether incidental civilian losses are excessive relative to the military advantage gained by a specific tactical operation, a commander may aggregate specific tactical operations so long as:

(1) the military objective of the specific tactical operations is limited to a single enemy capability or stronghold, not the strategic value of the overall campaign;
(2) the military advantage of this objective is not dependent on the cumulative effect of many attacks, defined as related sets of specific tactical operations;
(3) the specific tactical operations are geographically and temporally close enough to allow the commander in immediate control of the operation to foresee civilian losses and concrete military advantages while being able to adjust the operations accordingly; and

(4) the target has some value to the overall strategy of the war, and the strategic objective cannot be met by some other specific tactical operation that would cause less incidental civilian loss. This rule seeks a balance between the legal requirement that our commanders exercise concern for civilians and the duties we impose on them to accomplish missions in areas of civilian concentration.

THE PRINCIPLE OF PROPORTIONALITY IN THE LAW OF ARMED CONFLICT

The *jus in belli*m principle of proportionality in the conduct of armed conflict can be traced to the seventeenth-century philosopher Hugo Grotius, who wrote, "[I]t is the bidding of mercy, if not of justice, that except for reasons that are weighty and will affect the safety of many, no action should be attempted whereby innocent persons may be threatened with destruction." However, throughout both the First and Second World Wars and most of the twentieth century, this principle was limited in application to distinguishing between indiscriminate attacks and legitimate military targets. The principle did not address legitimate military targets that would result in incidental civilian losses. In the early 1970s the International Committee of the Red Cross (ICRC) addressed this issue by holding two Conferences of Government Experts and drafting two Additional Protocols to the 1949 Geneva Convention. The final rule of proportionality in Additional Protocol I of the Geneva Convention is stated in terms of the ban on indiscriminate attacks. This reflects a historical struggle to conceptualize the difference between a military attack which does not distinguish between military and civilian targets, and a military attack which is against a legitimate military target but would create incidental civilian losses.

Additional Protocol I states the rule of proportionality of an attack in Article 51(5)(b) as follows:

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.

For an attack to be legitimate, the attacker must not only discriminate between military and civilian targets, but also enter into a calculation of what is an "excessive" loss of civilian life or objects relative to the "military advantage." These terms are left undefined and the language of "expected" civilian losses and "anticipated" military advantage indicate this is to be a

---

3. *Id.* at 90.
4. *Id.* at 90–91.
pre-attack calculation rather than a post-attack justification. When coupled
with the stress and speed of the modern battlefield, the ambiguity of what is
an “excessive” civilian loss relative to “military advantage” becomes a
problem for those planning an attack.

Article 51’s language also leaves much open to interpretation. What is
the effect of the “concrete and direct” requirement on military advantage
when the language for incidental loss of life is much more generalized?
Does this mean there is a presumption on the civilian side of the equation?
Even if a commander has the luxury of being able to assign clear values to a
certain military advantage via a certain civilian loss, the commander is left
with the problem of what constitutes an “attack” under Article 51(5). A
single shot from a rifleman would not constitute an attack for this analysis
since any civilian loss would be completely accidental because a soldier
could not legitimately target a civilian. Nor would the military advantage of
a six-month campaign justify a single attack that would otherwise incur
excessive civilian losses. Between these extremes the calculation becomes
much more difficult.

The scarce case law directly addressing this issue illustrates how
difficult this calculation is, especially considering the limited and
ambiguous proportionality principles available. One of the most on-point
modern cases, the Final Report to the Prosecutor by the Committee
Established to Review the NATO Bombing Campaign Against the Federal
Republic of Yugoslavia (“NATO Prosecutor’s Report”), states, “[T]he
proportionality or otherwise of an attack should not focus exclusively on a
specific incident.” However, the opinion uses an overly broad assessment
of a long-term strategy, “watered down into the context of the entire war
campaign against the C3 network,” to justify a series of American attacks
on a Yugoslavian television broadcast facility. Even more frustrating is that
little attention was given to explaining the analytical framework used to
assess the attacks, so it is very difficult to form practical rules to shape
future conduct rather than simply to legitimize past conduct.

After identifying the difficult issues presented in proportionality
analysis, such as what to include or exclude and determining standards of
measurement in time and space, the NATO Prosecutor’s Report states “the
answers to these questions are not simple” and should be “resolved on a
case-by-case basis, and the answers may differ depending on the

6. 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
Report”].
7. Paolo Benvenuti, The ICTY Prosecutor and the Review of the NATO Bombing Campaign
background and values of the decision maker."\(^8\) While it is true that proportionality analysis is not simple, Additional Protocol I did not intend a completely subjective standard based on the background and values of the individual commander. It also cannot be that lawyers are incapable of distilling concrete rules to guide commanders beyond this over-simplified case-by-case approach.

Case law provides a scant guide for commanders attempting to make real world decisions, leaving this difficult issue to academics and military lawyers. Unfortunately, proportionality calculations cannot be approached with a simple empirical method of \(X\) number of civilian lives must yield \(X\) number of enemy casualties. The weight of a military objective is inherently subjective and some lives and capabilities on the battlefield are worth more than others.\(^9\) It is essential that we address this difficult issue by guiding commanders in terms of who makes the decisions and what factors they must consider in making the decision to attack.

**HYPOTHETICAL AND ISSUES PRESENTED**

To flush out the difficulty of a military commander's determination of the proportionality of an attack, let's start with a hypothetical: A legally valid war has been initiated by the United Nations Security Council ("UNSC") in response to the attempted genocide of a particular ethnic group in Country A. Country A is threatening to use nuclear weapons to eradicate the group in neighboring Country B, as well as to attack Country C if Country C violates the territorial integrity of Country A. Country C's theater level commander, General X, has been assigned the problem of invading Country A without allowing Country A to make good on its threats of nuclear attack. General X decided on an air raid to begin the attack with the following goals: (1) to eliminate all of Country A's nuclear capabilities; (2) to eliminate Country A's air-defense, artillery, and communications to allow follow-on airborne operations; (3) to prevent Country A from moving its forces while conducting the genocide; and (4) to strike fear into Country A's senior political and military command by attacking high value targets with overwhelming displays of force.

Each of these goals has been divided into its own air campaign for command and control purposes. Four majors are assigned to supervise the planning and execution of these air campaigns, being told that they must follow the laws of war and have legal justification for all attacks before they are executed. These campaigns must be completed within one week of the start of the war. Finally, the majors assign captains to conduct the specific

---

\(^8\) NATO Prosecutor’s Report, *supra* note 6, at 1271.

tactical operations against each target, instructing the captains to act within the laws of war to provide legal justification for any civilian death that occurs before the attack.

One campaign, code-named X-Wing is led by Major Y who has planned a series of 70 attacks within the week in order to accomplish his campaign goals. Major Y’s greatest problem is that Country A’s National Guard has placed his most critical targets in civilian population centers in which he cannot avoid significant civilian casualties. To make things worse, these targets are absolutely essential to the success of his campaign; there is no way for this campaign to be deemed successful without hitting these targets that were carefully shielded by the unknowing population centers.

For these targets Major Y has assigned his best subordinate, Captain Z, to conduct the operations. Both Major Y and Captain Z consult military lawyers to discuss the legality of attacking these targets and are told that the civilian losses must be in proportion to the military advantage achieved by the attack. Captain Z takes this new knowledge and tells Major Y that he cannot conduct these attacks because the immediate military advantage of the individual attacks will not be proportional to the loss. Major Y responds that it is the military advantage of the campaign against the group of targets that must be considered, and the civilian losses in this instance are proportionate to the overall military advantage gained in the campaign.

However, Major Y goes to General X with one attack that is particularly troubling to him: a multi-day attack on the most high value targets in a civilian population outside Major Y’s usual geographic area of operations to be conducted the day after the other operations end. The targets are essential to the strategic goals listed above, and the follow-on missions will not succeed if these targets are not attacked. General X thus informs Major Y that the civilian losses will be proportional to the overall strategic military advantage of the invasion of Country A.

There are two main issues, each with two sub-issues, in determining the proportionality of an attack:

1. How do we define an “attack”?
   A. Is it determined by the military advantage of the larger campaign or of a single incident; and
   B. If part of a larger campaign, does this logic extend to a theater-level, strategic command decision, or is it limited to an isolated group of engagements with the same tactical objective?

2. Once we have defined an “attack,” how do we calculate whether the incidental civilian losses are excessive to the military advantage gained?
   A. How does the type of military objective (i.e., preventing nuclear retaliation, protecting a threatened group, or preparing for follow-on operations) affect proportionality analysis when
the individual attack in question is essential to that military objective; and

B. How is this proportionality analysis affected by the temporal or geographic relation of the targets to other related targets?

These are real problems that arise as we demand more from the modern war-fighter. They are expected to reach every tactical and strategic objective to protect and promote our interests. But they cannot breach rules that are ambiguous even for public international law professionals. In essence, they must serve as the warrior-philosophers, not only experts of their technical craft, but also capable of justifying the terrible things they must do in our name. Any war-fighter who honestly exercises this level of care to prevent civilian losses while accomplishing their mission may not necessarily be focused on avoiding criminal penalty, since it is unlikely that a court would try to punish such a good-faith effort. It is more likely he/she is seeking legitimacy on the modern battlefield, which has become a top priority in recent counter-insurgency operations. This paper seeks to assist these brave war-fighters and those who advise them by determining the proper unit of analysis for calculating the proportionality of military advantage relative to civilian losses in individual attacks as part of broader campaigns.

DEFINING AN ATTACK IN PROPORTIONALITY CALCULATIONS

These problems are a direct result of imprecise textual language, making it difficult to define an “attack” within the meaning of Additional Protocol I. Article 49 defines “[a]ttacks” as “acts of violence against an adversary, whether in offence or in defence.” This broad definition of an attack indicates that analysis of proportionality would be limited to single acts because Article 51(5)(b) uses the singular “attack,” meaning any one act of violence against an adversary. However, the Reservations to Article 51 of Additional Protocol I show this interpretation was not the intent of many signatories and is inconsistent with much of the case law and academic interpretations.

For purposes of meaningful discussion, it is necessary to follow with some common definitions. Webster’s Dictionary (“Webster’s”) provides an overly broad definition of “attack,” so using the term “specific tactical operation” is more preferable in referring to the individual operation or smallest logical unit of analysis for proportionality purposes. This is not
limited to the individual rifleman, but includes a concise ground attack by a small unit or individual bombing by air, artillery or the like against a single target. Webster's defines a "campaign" as "military operations for a specific purpose." While broad, this definition can refer to a collection of specific tactical operations aimed at the same purpose, such as enemy capability, and will be a "tactical campaign." Unfortunately, Webster's definition could also encompass an entire war or pursuit of a strategic objective. This is the broadest alternative for analysis of an "attack," and will be considered a "strategic campaign."

The important difference between a tactical campaign and a strategic campaign is a tactical campaign interpretation is limited to a single and specific objective and cannot include long-term geo-political or strategic rationale to justify an attack. A tactical campaign consists of a more limited time frame and involves a more concise group of attackers, such as a sortie of air attacks against a specific enemy capability or an infantry assault to take an individual town. On the other hand, a strategic campaign interpretation allows aggregation of almost any amount of violence to justify incidental civilian losses. A strategic campaign is not limited to a single unit attacking or even a concise time frame since it is the overall strategic effect that is the focus of the analysis. Unfortunately, there is a gray area between each of these three terms. We must first look to case law to come to more useable concepts of what constitutes a proportional attack.

<table>
<thead>
<tr>
<th>Specific Tactical Operation</th>
<th>Tactical Campaign</th>
<th>Strategic Campaign</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Definitions</strong></td>
<td>Attack on single enemy position, such as a single missile/bomb strike</td>
<td>Collection of specific tactical operations aimed at single enemy capability or goal, such as an air sortie against enemy C3 in certain</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Hypothetical Illustration</th>
<th>Captain Z's individual missions against the individual targets assigned to him by Major Y</th>
<th>Campaign code-named X-wing with series of attacks aimed at Country A's Air Defense Capabilities</th>
<th>General X's four air campaigns, which only derive value in relation to the strategic objective of initiating the invasion</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unity of Time and Place of Parts of Operation</td>
<td>Limited to single place with limited time frame, such as a day (timing depends on type of target and asset used)</td>
<td>May be multiple locations, but within the same general geography or area of operations, and may take at least a week</td>
<td>No definite unity of place, targets can be spread over entire war zone, and time limitations imposed by strategic necessities</td>
</tr>
<tr>
<td>Amount of Force Deployed</td>
<td>Force is limited to that needed to destroy a single target, usually a single plane or missile, or an infantry platoon or company, usually led by Junior Officers</td>
<td>Uses multiple strike capabilities to address multiple targets, may be multiple, planes, working in concert with reasonable knowledge of each other's activities, usually lead by Field Grade Officers</td>
<td>Significant amount of force for diverse units and capabilities available to a General Officer</td>
</tr>
<tr>
<td>Foreseeable Lethality</td>
<td>Close connection between commanders and operation make lethality foreseeable and number of casualties of a relatively limited scope</td>
<td>Foreseeability of total lethality becomes tangential and number of casualties will be larger than any one of its constituent parts</td>
<td>Will be difficult to foresee and control casualties as General Officer is detached from operations, number of casualties will be large</td>
</tr>
</tbody>
</table>
Strategic Significance | Rarely will significance be such that abandoning the one operation will greatly affect the outcome of the war | May be significant enough to affect outcome of the war or require significant restructuring of war objectives | Is necessary to completing the war's political objectives and sought end-state

Note: This table seeks to distinguish the differences between the different available units of analysis in the proportionality calculation. There is certainly grey area between these options, but these coincide with the three grades of officers that will likely be making such decisions: Junior Grade, Field Grade, and General Officers.

One of the clearest, yet far from definitive, statements of the law as it stands today came from the NATO Prosecutor’s Report, “the proportionality or otherwise of an attack should not focus exclusively on a specific incident.” The specific incident in question was the NATO bombing of a Serbian TV and radio station that was also part of the Serbian command and control network. Ten to seventeen civilians were killed in this attack, but as the above quote indicates, the attack was analyzed as part of a larger coordinated attack on the Serbian command, control, and communications (C3) network because “on the same night, radio relay buildings and towers were hit along with electrical power transformer stations.” This sets the precedent that an individually disproportionate specific tactical operation, analyzed as a “specific incident,” may be proportionate in the context of coordinated attacks within the same day and with the same military advantage to be gained by the coordinated attacks. The military advantage of this overall operation is at least as significant as “disrupting and degrading the C3 . . . network,” since the C3 capabilities of an enemy is one of the highest value targets of any military campaign. The incidental civilian losses are measured relevant to the military advantage of a tactical campaign as defined above.

Unfortunately, this report gave little reasoning and based its decision primarily on the reasoning found in United Nations Prosecutor v. Kupreskić. Kupreskić applied the logic of collective military attacks to state that a group of attacks may be disproportionate even if their parts were proportionate if the sum total of civilian losses was excessive. The NATO Prosecutor’s Report concluded this logic must also work in the opposite direction: If the total military advantage of a group of attacks are

14. NATO Prosecutor’s Report, supra note 6, at 1279–1280.
15. Id. at 1277.
16. Id.
proportionate, a single disproportionate incident within the group may be justified. Yet, Kupreskić may not support this rationale. In the paragraph immediately preceding the one cited in the NATO Prosecutor’s Report, the Kupreskić court analyses of the Martens Clause,17 which was first set forth in the preamble of the 1899 Hague Convention of Law of War on Land, to dictate:

[T]he prescriptions of Articles 57 and 58 [of the Additional Protocol I to the Geneva Conventions] (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.18

According to this language, the NATO Prosecutor’s Report improperly uses the Martens Clause reasoning of Kupreskić to expand military discretion and decrease protection for civilians by permitting a commander to justify civilian losses in an individual attack via the military advantage of multiple attacks. Rather, Kupreskić’s reasoning would dictate that the smallest unit of analysis, the individual specific tactical operation, must be used independent of its larger context since this would give commanders the narrowest discretionary power to attack, and thus provides the most expanded protection of civilians. When applied to our hypothetical above, this rule would force Major Y to cancel, or Captain Z to refuse to conduct, all of the attacks against targets that would incidentally harm civilians since, when taken out of the context of collective mission, it would likely be difficult to say the civilian losses were worth, for example, one bridge. This reasoning seems to be an unworkable solution, which may explain the attempt of the NATO Prosecutor’s Report to bend this reasoning in another direction.

However, the Kupreskić analysis is in conflict with other sources of the law of proportionality in the law of armed conflict, primarily the apparent intent of the signatories to Protocol I to the Geneva Conventions. Ten of the signatories—Australia, Belgium, Canada, France, Germany, Italy, Netherlands, New Zealand, Spain, and the United Kingdom—made reservations to Articles 51 and 57 very similar to that of the United Kingdom. The reservation states, “[T]he military advantage anticipated from an attack is intended to refer to the advantage anticipated from the

17. The Martens Clause states, “Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.” Fyodor Fyodorovich Martens, Russian Delegate, Convention with Respect to the Laws and Customs of War on Land (Hague II), 1899.

Proportionality in the Law of Armed Conflict

attack considered as a whole and not only from isolated or particular parts of the attack. The issue is framed in the same light in the military manuals of most Western Countries as well. For example, the United Kingdom’s Manual of the Law of Armed Conflict states, “[I]t is generally accepted that the use of force must be proportionate to its overall objective.”

The ICRC’s survey of military manuals shows that the Australian Defence Force Manual, the Belgian Law of War Manual, the Canadian Law of Armed Conflict Manual, the German Military Manual, the Nigerian Military Manual, the Spanish LOAC Manual, and the United States Naval Handbook all frame proportionality analysis in terms of an attack “as a whole,” and not from isolated parts of an operation. Furthermore, the ICRC commentary to Article 57 of Protocol I states,

It goes without saying that an attack carried out in a concerted manner in numerous places can only be judged in its entirety. However, this does not mean that during such an attack actions may be undertaken which would lead to severe losses among the civilian population or to extensive destruction of civilian objects. Nor does it mean that several clearly distinct military objectives within an urban area may be considered as a single objective. This would be contrary to Article 51.

This leads to the reasonable inference that the signatories intended that, when deciding if the military advantage of an attack is proportionate to the civilian losses, the proper unit of analysis is not a single incidence of violence on the battlefield. This interpretation of the rule is strengthened by the Rome Statute of the International Criminal Court (Rome Statute), which makes it a war crime to:

intentionally [launch] 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.

Beyond this, the language of an “attack considered as a whole” and “overall military advantage” does not provide useful guidance as to what limits there are to aggregating these incidences. In the hypothetical, this rule would only

22. International Committee of the Red Cross [“ICRC”] Commentary, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), ¶ 2218 (1977) [hereinafter “ICRC Commentary”].
inform our commanders that they do not have to limit their analysis to the instant military advantage of the particular attack in question, so the Major was correct in his orders to the Captain. While helpful, this does not inform the Major whether all the attacks in question can be aggregated into the one-week tactical campaign or if the aggregation is limited to a grouping connected by time, space, or mission type. It also fails to inform the General the degree to which the type of military objective, as well as its importance in the overall strategy of the war effort, fits into his analysis.

Whether the proportionality of an attack should be determined by the military advantage of the larger campaign, of which the attack is a part, or of the attack as a single incident, it seems apparent that the rule allows for the use of military advantage gained to extend beyond a single occasion to justify an incidental civilian loss. Beyond this point, courts have relied upon a “totality of the circumstances” approach in the few cases that address this issue. For example, in Prosecutor v. Stanislav Galic, the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) stated, “in determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.”

Since case law is relatively thin on the proper extent of aggregating military advantage, scholarly work and state practice must guide further analysis around three issues: the extent of proper aggregation of incidents of violence in determining military advantage and civilian losses; whether the nature of the military objective to be achieved effects this analysis; and how geographically and temporally related targets must be in order to be properly aggregated.

**LIMITS ON AGGREGATING MILITARY OBJECTIVES**

The rule of proportionality was not commonly distinguished from the rule of discrimination prior to 1977 when the Additional Protocols to the Geneva Conventions were enacted. Since that time, major conflicts have yielded some information as to the practice of states in calculating the proportionality of an attack, in particular the 1991 Gulf War and the 1999 Kosovo Bombings because these wars were fought with a conscious effort to minimize and justify civilian losses.

During the first Gulf War, at the individual attack level, operational commanders showed a fair degree of restraint when they had doubts about their abilities to avoid civilian casualties. Aircraft commanders were

---


instructed to return to base without attacking if they could not hit a designated target safely. On at least two occasions the Royal Air Force refused to bomb targets due to the incidental civilian loss anticipated. At the higher levels of command, however, less discipline may have been exercised in giving an honest assessment of proportionality. Judith Gardam uses the Annual Defense Report to Congress’ article, *The Conduct of the Persian Gulf War*, to reach the conclusion that “it was the military advantage of the destruction of the overall target that was included in the proportionality equation and not that of each strike against each component of the target” in the first Gulf War. Gardam provides a rare glimpse into the war-fighter’s perception of proportionality when she quotes the Defense Report as saying that the targets that were canceled due to anticipated civilian losses “were not fundamental to the timely achievement of the victory. Had that been the case, irrespective of collateral damage that might have resulted, one would have to have been responsible for accepting those targets and for going against them.” Such reasoning, which allowed for the aggregate military advantage to outweigh and justify the civilian losses, may be a valid method of analysis only if applied equally to aggregate the civilian losses, as well. However, in this same war “the combined effects of the attacks on [infrastructure targets leading to great civilian losses] is also not factored into the determination of what is likely to constitute ‘excessive’ collateral injury to civilians. The destruction of each target is assessed individually rather than as a part of the broader picture.” Whatever the proper unit of analysis may be, this inconsistent application of the rule of proportionality does not align with either the letter or the spirit of the rule and must be avoided. Such inconsistencies in proportionality analysis by commanders on the ground is not surprising, given the little guidance the Military Manuals on the law of war provide them and their legal advisors. As cited above, the United States Naval Handbook gives no guidance beyond analyzing an attack “taken as a whole,” and the Law of War Handbook published by the United States Judge Advocate General’s School quotes Article 51(5)(b) of General Protocol I and provides an example for commanders which addresses individual targets, but does not provide any further guidance on how a commander considers a target in relation to other targets or campaign objectives.

Both Judith Gardam and A.P.V. Rogers analyze the Kosovo bombing

26. *Id.*
27. *GARDAM, supra* note 2, at 114.
28. *Id.* at 118.
29. *Id.* at 119.
30. *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, supra* note 21, at 329.
campaign on a strategic level, noting that with between 10,000 and 14,000 strike sorties there were only about 500 civilian deaths. These statistics seem to show that immense care was given by the NATO commanders in avoiding civilian casualties, but it reveals little as to how the proportionality of an attack was accounted for by these commanders. The bombing of the Serbian television station cited above shows that the commanders used aggregated missions within the same day and with the same overall mission objective, a view validated by the NATO Prosecutor’s Report. This is a more disciplined approach than the strategic level aggregation of military advantage and the disaggregation of civilian losses shown in the First Gulf War less than a decade earlier. Additionally, this shows a small trend toward limiting the aggregation of military advantage and civilian losses that are reasonably related in time and military objective, but more research and case studies are necessary to establish any sort of state practice resulting in a customary norm.

GEOGRAPHIC AND TEMPORAL RELATION OF MILITARY OBJECTIVES—FORESEEABILITY STANDARD

Since it seems clear that at least some aggregation of single military operations is appropriate when determining the military advantage relative to civilian losses, it seems logical that such operations would have to be somewhat related in time and space. Without some relation, a commander would be free to say that if the war itself were just, and the overall civilian losses were not excessive to the aims of the entire war, then the attacks are proportional. This seems outside of the jus in bellum rule of proportionality since it would rely almost completely on the jus ad bellum legality of the war.

Despite the centrality of the relationship to determining the proportionality of an “attack,” the necessary temporal and geographic relation of military operations and targets is not well established. As shown above in the NATO bombing of the Serbian television station, the one-day collective attack on an enemy’s C3 capabilities may be evaluated as a single “attack.” However, there was no indication of a spatial limitation or whether a day was a lower or upper limit on such an aggregation of targets. The ICRC Commentary to Article 57 of Protocol I to the Geneva Convention indicates that there should be a close relation between targets in a proportionality calculation, “The expression ‘concrete and direct’ was intended to show 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.”

32. NATO Prosecutor’s Report, supra note 6, at 1279–80.
33. ICRC Commentary, supra note 22, at § 2209.
clear if this comment refers to the physical characteristics such as time and space or to the strategic value of the targets relative to one another. Judith Gardam concluded it is the latter, stating that this was meant to "ensure that the assessment of military advantage is in the relatively short term rather than to allow for the inclusion of the long-term cumulative impact of attacks."34 This shows that the military advantage must be narrowly construed relative to the civilian losses, and does not speak directly to the issue of time and space. Thus the ICRC commentary leaves little substantive guidance on the necessary spatial or temporal relation of attacks.

A.P.V. Rogers provides a reasonable approach to these issues, "[T]he answer probably is that it does not matter so long as the same timescale is applied to both [the humanitarian and military] limbs."35 This seems like a workable rule for both temporal and geographic analysis as long as it is kept within reason, since consistency would allow for accountability of decision makers either way. For example, in our hypothetical all the initial operations were within one week of each other and all within Country A, except for the attack on which the Major challenged the General. As long as both the civilian losses (humanitarian limb) and the military advantages (military limb) were kept within this week of operations it would seem reasonable for a commander to analyze them as a whole, at least in terms of their relation in time and space, since that individual commander would be accountable for a discrete number of civilian losses relative to what is still a narrowly identifiable military advantage.

Compare this to the unreasonable use of an entire war in the Kosovo example discussed above where as many as 14,000 sorties flown in the four month bombing campaign have been used to show proportionality. In this case, both the humanitarian and military limbs are evaluated on an equal timescale and within the same geographic boundaries of the conflict. It seems less reasonable, though, because it is less likely that a commander in the planning stage could have foreseen a discrete number of civilian casualties relative to a narrowly identifiable military advantage in a way that would keep individual commanders accountable for the decision to go forward with an individual attack despite incidental civilian losses.

It seems that temporal and geographic relationship is only important if it becomes of such a broad scope that a reasonable commander can no longer foresee the incidental civilian costs relative to the military advantage that the commander perceives in a relatively narrow sense. If multiple attacks are so separated in either time or space to not allow the commander in immediate control of the operation to foresee the civilian losses and the

34. GARDAM, supra note 2, at 103.
35. ROGERS, supra note 25, at 22.
concrete military advantages during the planning of an operation, then these attacks must not be aggregated for proportionality purposes. This would also imply that if attacks are not planned, then at the same time they cannot be aggregated, since the commander could not foresee them as a whole. Applied to the hypothetical, this would still allow the Major to justify the attacks to the Captain since the Captain would be able to see the concrete terms in which the decision was being made, i.e. the civilian losses relative to the short-term goal of destroying Country A’s air-defenses.

Such a foreseeability test also indicates a problem of whose perspective is relevant to this analysis since, “it is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to non-combatants.” It is just as unlikely that they would have the same ability to foresee the results of an attack. For this legal standard to be applicable it must be the judgment and capabilities of a reasonable military commander in the same position, since it will be military commanders and not human rights lawyers making these decisions when it matters the most. This foreseeability test also makes sense for applying the rule to the practical circumstances of war since an infantry commander in an urban firefight will have a much more narrow view of his mission’s relation to others both geographically and temporally than an Air Force commander in charge of a large-scale bombing campaign.

THE TACTICAL AND STRATEGIC RELATION OF MILITARY OPERATIONS

The relatively loose foreseeability standard of time and space needed in order to be aggregated as an “attack” means that the substantive relationship must be more significant if we are to limit a commander’s ability to justify an incidental civilian loss within a reasonable standard. The ICRC commentary to Article 57 of Protocol I speaks directly to the limits on the analysis of proportionality of an attack, saying “this article, like Article 51 (Protection of the civilian population),’ is not concerned with strategic objectives but with the means to be used in a specific tactical operation.” This means that an individual military operation cannot be justified by its role in the “big-picture” strategic goals of the war, such as the overall attempt at regime change in the 2003 invasion of Iraq. Rather, this language indicates that it would, at most, be appropriate to consider missions aimed at a single enemy capability or stronghold (such as air-defense) during a certain period (i.e., not attacks on air defense capabilities at separate periods in the war) as a single attack since these would be the upper limits of what could be considered a “specific tactical operation.” For the

37. ICRC Commentary, supra note 22, at ¶ 2207.
hypothetical, this would mean Major Y could justify the civilian losses of an individual bombing within the week-long air-raid via the military advantage of, for example, eliminating Country A’s C3 capabilities within that one week of attacks since these missions have a singular tactical goal and are part of a continuous-reasonable period within the war. The reasonableness of this relationship is best determined by the foreseeability test discussed above. However, Major Y could not use the justification that these acts were essential to the overall war efforts or to the capitulation of Country A’s political leadership.

So, the costs and benefits of individual military missions may be aggregated up to a point, and that point may not go beyond a singular tactical objective or the discreet results which are foreseeable to the commander at the time of planning. While this may seem clear, some commanders may argue that tactical objectives overlap or can only be realized on a cumulative basis, such as the defoliation of South Vietnam by the US in the 1960s. In this case, a mission would consist of multiple sortie strikes with chemical agents that would destroy leaves in the forests used as cover by the Vietcong, and it would cause severe civilian loss, both in lives and objects. It would be improper to analyze the proportionality of the defoliation campaign as a whole in terms of the military advantage gained from the cumulative effects of the many defoliation missions run during the war. Rather, the military advantage would have to be calculated by the anticipated foreseeable military advantage of the defoliation achieved in a certain area subject to one tactical mission, which may consist of multiple sorties. In more precise terms, the military advantage must be immediately foreseeable from the mission as the commander plans the individual operation, and not justified in terms of what will happen in multiple missions of the same sort that are continually run throughout the war.

**STRATEGIC VALUE OF A MILITARY OBJECTIVE**

So far we can infer the rule that, in determining whether incidental civilian losses are excessive relative to the military advantage gained by an attack, a commander may aggregate individual military operations so long as (1) the military objective of the missions is limited to a single enemy capability or stronghold; (2) the military advantage of this objective is not dependent on the cumulative effect of many attacks, defined as related sets of missions; and (3) the attacks are geographically and temporally close enough to allow the commander in immediate control of the operation to foresee the civilian losses and the concrete military advantages and be able

38. GARDAM, supra note 2, at 101.
39. Id.
to adjust the operations accordingly. These can be summarized, respectively, as principles of discreteness of substantive relationship, immediacy, and foreseeability. The final factor which must be accounted for is primacy, the strategic value of the military objective as determined through aggregation of the three principles of analysis.

At first glance the requirement that the analysis be focused solely on the "specific tactical operation" seems to eliminate the need for determining primacy, but a specific tactical operation which contributes little to the overall war effort while causing incidental civilian losses may not be logically or reasonably justified if the operation has no long term value even if it has immediate value. In the hypothetical above, one objective was to prevent Country A from moving its forces while conducting the genocide. Even if the operations to complete this objective met the requirements of the substantive relationship, immediacy, and foreseeability tests, it would make little sense to say that this objective could involve very much incidental loss of life because the ethnic group's protection is the goal of both missions and the overall war.

The same logic does not apply to the other missions since a short-term, incidental loss of life may save more lives if Country A's genocide is stopped. If the military objective is a final target in a long war, such as opposing commands' last communication link to its forces, incidental civilian losses may be more acceptable than when that target was just one of many such targets. The strategic value of a military objective cannot be completely irrelevant.

There is only one way to make this observation compatible with the rule that strategic attacks must be justified as specific tactical operations absent a cumulative effect: a target must have some value to the overall strategy of the war, and this particular strategic goal cannot be met by another specific tactical operation that would cause less incidental civilian loss, respectively the principles of primacy and necessity. This does not allow a commander to justify incidental civilian losses with a military advantage, but forms a negative duty to not conduct operations that would cause incidental civilian losses if those operations do not meet the needs of the overall war effort. Examples of such operations would include missions aimed at the protection of a group of people that would be harmed by the missions themselves or distraction missions that serve little purpose in the overall war effort. The specific tactical operation must exhibit primacy and necessity in addition to a discrete substantive relationship, immediacy, and foreseeability.

40. ICRC Commentary, supra note 22, at ¶ 2207.
CONCLUSION: INFERENCES ABOUT THE RULE OF PROPORTIONALITY

The rule of proportionality, while ambiguous in its codified terms, can be summarized as follows: in determining whether incidental civilian losses are excessive relative to the military advantage gained by a specific tactical operation, a commander may aggregate individual military operations so long as:

1. the military objective of the specific tactical operations is limited to a single enemy capability or stronghold, not the strategic value of the overall campaign;
2. the military advantage of this objective is not dependent on the cumulative effect of many attacks, defined as related sets of specific tactical operations;
3. the attacks are geographically and temporally close enough to allow the commander in immediate control of the operation to foresee civilian losses and concrete military advantages and be able to adjust the operations accordingly;
4. the target has some value to the overall strategy of the war and the strategic objective cannot be met by some other specific tactical operation that would cause less incidental civilian loss.

Finally, when a commander provides an aggregate justification for an attack, a subordinate may only refuse to conduct the specific tactical operation if any of these factors are clearly absent. This interpretation of the rule of proportionality balances protecting civilians on the battlefield, as required by international regimes such as the Rome Statute and Additional Protocol I to the Geneva Conventions, and the military necessity for a commander to strike essential targets that are located near civilian populations. Any commander who calculates the proportionality of an attack has evidenced a good faith effort to practice the duty to spare civilians and civilian objects in the conduct of military operations as much as possible, and should be commended, not punished.

---

41. Rome Statute, supra note 23.
42. Protocol Additional to the Geneva Conventions of 12 August 1949, supra note 1.
43. ICRC Commentary, supra note 22, at ¶ 2215.