

The Proportionality Balancing Test Revisited: How Counterinsurgency Changes “Military Advantage”

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*There is nothing collateral about collateral damage.*¹

I. Introduction

The United States’ position on the law of armed conflict principle of proportionality² is anchored in its collective response to Additional Protocol I to the Geneva Conventions.³ “The principle of proportionality requires the

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² The four universally-recognized principles governing the use of force in the law of armed conflict are military necessity, distinction (also known as discrimination), proportionality, and unnecessary suffering. “The principle of military necessity recognizes that force resulting in death and destruction will have to be applied to achieve military objectives, but its goal is to limit suffering and destruction to that which is necessary to achieve a valid military objective.” U.S. DEP’T OF NAVY, OFFICE OF THE CHIEF OF NAVAL OPERATIONS, HEADQUARTERS, U.S. MARINE CORPS, DEP’T OF HOMELAND SEC. AND U.S. COAST GUARD, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS [NWP 1-14M/MCWP 5-12.1/COMDTPUB P5800.7A], at 5-2 (2007) [hereinafter *COMMANDER’S HANDBOOK*]. “The principle of distinction is concerned with distinguishing combatants from civilians and military objects from civilian objects so as to minimize damage to civilians and civilian objects.” *Id.* at 5-3. “[The principle of] proportionality is concerned with weighing the military advantage one expects to gain against the unavoidable and incidental loss to civilians and civilian property that will result from [an] attack.” *Id.* Finally, “the law of armed conflict prohibits the use of arms, projectiles, or material calculated to cause unnecessary suffering to combatants.” *Id.* The *Commander’s Handbook* provides an excellent summary of the four principles, but it is not a source of legal authority.

³ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) annex I, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]. The United States is a signatory, but not a ratified party, to AP I. The portions of AP I regarding proportionality (Articles 51(5)(b) and 57(2)(a)(iii)) may be considered customary international law by U.S. authorities. See Michael Matheson, *Additional Protocol I as an Expression of Customary International Law*, 2 AM. U.J. INT’L L. & POL’Y 419 (1987). However, Matheson’s remarks may no longer be considered authoritative. See, e.g., Charles Garraway, Charles H. Stockton Professor of Int’l Law, U.S. Naval War Coll., Remarks at the U.S. Naval War College, Conference on the Law of War in the 21st Century: Weaponry and the Use of Force, available at <http://www.usnwc.edu/getattachment/e5e1e236-bda9-4ecf-8c03-e997c7efd9ef/2005-Conference-Brief> (last visited Aug. 12, 2010). Other U.S. authorities do not agree with Matheson’s assessment. See Memorandum for Mr. John H. McNeill, Assistant Gen. Counsel (Int’l), Office of the Sec’y of Def., subject: 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications (May 9,

commander to conduct a balancing test to determine if the incidental injury, including deaths to civilians and damage to civilian objects, is excessive in relation to the concrete and direct military advantage expected to be gained.”⁴ The assessment is prospective in nature, calling for an evaluation based on situational awareness prior to an attack.⁵ However, no further guidance, in the form of definitions or examples, is provided to commanders, who are left with only the plain meaning of the words. When the concrete and direct military advantage expected to be gained is anchored in a conventional operation’s goal of “partial or complete submission of the enemy,”⁶ the balancing test weighs

1986). The author adopts the proportionality test from AP I as an expression of customary international law.

⁴ AP I, *supra* note 3, arts. 51(5)(b), 57(2)(a)(iii). See also *COMMANDER’S HANDBOOK*, *supra* note 2, at 5-3; U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE paras. 39–41 (18 July 1956) (C1, 15 July 1976) [hereinafter FM 27-10]; U.S. DEP’T OF AIR FORCE, PAM. 14-210, USAF INTELLIGENCE TARGETING GUIDE 39, 52, 147–52 (1 Feb. 1998) [hereinafter AF PAM. 14-210]. The U.S. Air Force’s first publication on the law of armed conflict, Air Force Pamphlet 110-31, *International Law—The Conduct of Armed Conflict and Air Operations*, was released on 19 November 1976 but was later rescinded on 20 December 1995. Air Force E-Publishing—Obsolete Products, <http://www.e-publishing.af.mil/obsolete-products/index.asp?rdoFormPub=rdoPub&txtSearchWord=afp110-31> (last visited Aug. 12, 2010). The Air Force recently released, through its Judge Advocate General’s School, its new publication on the law of war. See AIR FORCE OPERATIONS & THE LAW—A GUIDE FOR AIR, SPACE & CYBER FORCES 19–21 (2009) [hereinafter AIR FORCE GUIDE].

⁵ For example, in the pre-planned strike on a fixed target, also known as a deliberate strike, the United States uses a formal process for collateral damage estimation (CDE), which takes into account the destructive capability of the potential weapons to be employed, the method of employment, the nature of the target (length, width, height, composition, etc.), the location of the target with respect to civilian property, and the presence of civilians (both within the target as well as in the vicinity of the target). See JOINT CHIEFS OF STAFF, JOINT MANUAL 3160.01, NO STRIKE AND THE COLLATERAL DAMAGE ESTIMATION METHODOLOGY (13 Feb. 2009) [hereinafter JCS JOINT MANUAL 3160.01]. The Collateral Damage Manual (CDM) “assists commanders in weighing risk against military necessity and in assessing proportionality within the framework of the military decision-making process. In short, the CDM is a means for a commander to adhere to the [law of war].” COMPENDIUM OF CURRENT CHAIRMAN, JOINT CHIEFS OF STAFF DIRECTIVES 65 (15 Jan. 2009), available at http://www.dtic.mil/cjcs_directives/support/cjcs/cjcsi_comp.pdf.

⁶ See Convention (IV) Respecting the Laws and Customs of War on Land arts. 22–28, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague IV]. See also Headquarters, U.S. War Dep’t, Gen. Orders No. 100 (Instructions for the Government of Armies of the United States in the Field) art. 15 (24 Apr. 1863) [hereinafter Lieber Code]. “Military necessity admits of all direct destruction of life or limb of ‘armed’ enemies, and of other persons whose destruction is incidentally ‘unavoidable’ in the armed contests of the war . . .” *Id.* While the Lieber Code is no longer itself a lawful general order binding on U.S. forces, it is generally considered to be the genesis of modern law of war and its tenants to be customary international law. See GARY D. SOLIS, THE LAW OF ARMED CONFLICT:

destruction of the enemy against collateral damage to civilians.⁷

However, counterinsurgency operations are inherently different,⁸ because the mission focuses not on destruction of the enemy but on providing for the safety and security of the local population, making safety and security the military advantage to be gained.⁹ Consequently, civilian casualties (both civilian deaths and civilian injuries) and civilian property damage in counterinsurgency operations necessarily detract from the military advantage to be gained and may result in mission failure.¹⁰ Recognizing this, the proportionality balancing test must be adjusted to weigh the goals of counterinsurgency (the safety and security of the local population) against civilian casualties and civilian property damage. Refocusing military operations from an enemy-centric to a population-centric center of gravity compels a re-balancing of the proportionality test in lethal targeting that has been used in the field by U.S. commanders for decades.¹¹

INTERNATIONAL HUMANITARIAN LAW IN WAR 38–46 (Cambridge Univ. Press 2010).

⁷ Civilians are unfortunately sometimes categorized as non-combatants, a usage which is technically inaccurate, because armed forces are divided into two groups, combatants and non-combatants. Non-combatant members of the armed forces, such as chaplains and certain medical personnel, are treated differently than combatant members of the armed forces. See Hague IV, *supra* note 6, art. 3. See also Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 15, August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

⁸ See DAVID GALULA, COUNTERINSURGENCY WARFARE: THEORY AND PRACTICE 4, 49–60, 81–86 (Praeger Security International 2006) (1964). “Thus the battle for the population is a major characteristic of the revolutionary war.” *Id.* at 4. See also U.S. DEP’T OF ARMY, FIELD MANUAL 3-24/U.S. MARINE CORPS WARFIGHTING PUBLICATION 3-33.5, COUNTERINSURGENCY 1-23, 1-24 (15 Dec. 2006) [hereinafter COUNTERINSURGENCY MANUAL].

⁹ GALULA, *supra* note 8, at 4, 49–60, 81–86. “The population, therefore, becomes the objective for the counterinsurgent as it was for his enemy. Its tacit support, its submission to law and order, its consensus . . . have been undermined by the insurgent’s activity.” *Id.* at 52.

¹⁰ *Id.* The author, David Galula, is widely regarded as the doctrinal father of counterinsurgency theory. However, even he upholds the need for application of conventional warfare proportionality at the initial stage of a counterinsurgency (“the first step”), which calls for the destruction or expulsion of insurgent forces. *Id.* at 76. “The operations during this step, being predominantly of a military nature, will inevitably cause some damage and destruction.” *Id.* After swift and short actions to eliminate the insurgents, the focus of attention shifts for the remainder of the counterinsurgency (“steps two through eight”). “[The insurgents] can be conclusively wiped out only with the active cooperation of the population . . . This is why the counterinsurgent forces must now switch their attention from the [insurgents] to the population.” *Id.* at 77. The proposed proportionality test for counterinsurgency operations described in this article should be implemented at the conclusion of “the first step” of combat operations, when the mission focus shifts from destroying the enemy to providing for the safety and security of the local population. See *infra* Part IV.

¹¹ The balancing test for proportionality dates back to 1956. Although articulated as a law of armed conflict principle in the Hague and Geneva Conventions traditions of international law, the balancing test incorporating proportionality was established as military doctrine in paragraph 41 of the 1956 edition of the U.S. Army Field Manual 27-10 (FM 27-10). The exact

II. Proportionality in Counterinsurgency Operations: Lessons of Farah, Afghanistan

The air strikes conducted by elements of the U.S. Navy and U.S. Air Force in Farah, Afghanistan, on 4 May 2009 demonstrate the need to reassess how the United States applies the proportionality balancing test in counterinsurgency operations.

A. Factual Background

On 4 May 2009, elements of the Afghanistan National Security Forces¹² (ANSF) engaged Taliban insurgents outside Gerani Village, Bala Balouk District, Farah Province, Afghanistan, in a battle which lasted almost nine hours.¹³ Coalition allies, including U.S. Marine ground forces and U.S. Navy and U.S. Air Force airborne assets, eventually participated in the battle after the ANSF reported initial contact with the enemy.¹⁴ Navy F/A-18 strike fighters and Air Force B-1B bombers conducted several strikes during the battle while performing close air support (CAS) of friendly forces.¹⁵ The battle unfortunately resulted in civilian casualties and civilian property damage, which were initially examined by U.S. military authorities stationed inside Afghanistan and were later investigated by an independent team from outside Afghanistan appointed by the Commander, U.S. Central Command.¹⁶

B. Violations of the Law of Armed Conflict (Principle of Proportionality)

The target of the second B-1B airstrike was a building used by Taliban insurgents. A group of insurgents had been

test required that, in certain circumstances, “loss of life and damage to property must not be out of proportion to the military advantage to be gained.” See FM 27-10, *supra* note 4, at 19. In 1977, key terms were added. The current test states, “Particularly in the circumstances referred to in the preceding paragraph, loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained.” *Id.* at 5.

¹² The Afghanistan National Security Forces (ANSF) are comprised of two organizations, the Afghanistan National Army (ANA) and Afghanistan National Police (ANP). USCENTCOM’S UNCLASSIFIED EXECUTIVE SUMMARY—UNITED STATES CENTRAL COMMAND INVESTIGATION INTO CIVILIAN CASUALTIES IN FARAH PROVINCE, AFGHANISTAN ON 4 MAY 2009, at 2 (18 June 2009) [hereinafter FARAH REPORT].

¹³ *Id.* at 5–9. Fighting began at approximately 1230 and was substantially over by 2112 [local (Kabul) time]. *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 1–2. “U.S. military elements first returned to the village on May 7, 2009, as part of a joint visit with a delegation led by the Provincial Governor of Farah.” *Id.* “On May 8, 2009, the Commander of U.S. Central Command, General Petraeus, directed a U.S. Army brigadier general from outside Afghanistan to conduct a full investigation.” *Id.*

observed entering the building while en route to the battle,¹⁷ and although neither the ground commander nor the B-1B aircrew could confirm the presence, or absence, of civilians in the building, the ground commander ordered its destruction.¹⁸ The B-1B aircrew eventually dropped two 500-pound Global Positioning System (GPS)-guided¹⁹ Guided Bomb Units (GBU)²⁰ and two 2000-pound GPS-guided GBUs on the target.²¹ The CENTCOM investigation later concluded that this attack was one of the strikes that resulted in civilian casualties.²² Lack of knowledge regarding the presence, or absence, of civilians at the target, however, effectively precluded a proper collateral damage assessment; the commander could not perform a meaningful balancing test without information about the civilian situation.²³

In the third B-1B strike, neither the ground commander nor the B-1B air crew could confirm the presence, or absence, of civilians in a building which had been tentatively selected for engagement.²⁴ As in the second airstrike, the building was targeted because a group of Taliban insurgents had just entered it.²⁵ The ground commander eventually

ordered the B-1B air crew to drop one 2000-pound GPS-guided GBU on the target, which destroyed the building.²⁶ Once again, lack of knowledge regarding the presence, or absence, of civilians already in the building at the time of engagement made it impossible for the ground commander to complete the required proportionality assessment using the balancing test.²⁷ The CENTCOM investigation also noted this attack as a likely source of civilian casualties.²⁸

In the case of the second and third B-1B bomber strikes, the commander authorized of the use of deadly force without conducting the required balancing test. Consequently, both strikes resulted in violations of the law of armed conflict and long-standing U.S. policy regarding compliance with the law of armed conflict.²⁹

C. Effect of the Farah Air Strikes

The Farah air strikes had lasting effects. On 19 May 2009, the President of the Islamic Republic of Afghanistan, Hamid Karzai, and the U.S. Ambassador to Afghanistan, Karl Eikenberry, met with Afghan civilians in Farah to address concerns over the use of air strikes by coalition forces.³⁰ On 2 July 2009, shortly after the release of the investigation into the Farah air strikes, General Stanley McChrystal, Commander of NATO's International Security Assistance Force (ISAF) in Afghanistan, issued a tactical directive on the use of force.³¹ The unclassified portion of the directive is significant for three reasons. First, the Commander identified safeguarding the safety and security of the Afghan population as ISAF's mission.³² Second, the Commander linked collateral damage to mission failure.³³ Third, the Commander directed scrutiny of, and limits on,

¹⁷ *Id.* at 8. The B-1B air crew observed and tracked the group of Taliban insurgents and passed this information to the ground commander. *Id.*

¹⁸ *Id.* at 8–9.

¹⁹ The Global Positioning System (GPS) is a U.S. space-based radio navigation system that provides positioning, navigation, and timing services. Global Positioning System, <http://www.gps.gov> (last visited Feb. 25, 2010).

²⁰ The Guided Bomb Unit (GBU) is a standard acronym for air-delivered ordnance. FARAH REPORT, *supra* note 12, at 2.

²¹ *Id.*

²² *Id.* at 9. “While this investigation assesses approximately 26 civilian casualties based on the information from various sources and on new graves in the Gerani area in early May, no one will ever be able conclusively to determine the number of civilian casualties that occurred on May 4, 2009.” *Id.* at 11. The Afghan Independent Human Rights Commission report, favorably received by the U.S. investigation team, cited as many as eighty-six civilian casualties from the incident. *Id.*

²³ It was impossible for the commander to properly weigh—using the balancing test—what he and the air crew did not know. The occurrence of collateral damage, however regrettable, is not a per se violation of the law of armed conflict. See AP I, *supra* note 3, arts. 51(5)(b), 57(2)(a)(iii). The failure to affirmatively weigh collateral damage prior to a strike, however, is a violation of the law of armed conflict. *Id.* The failure to affirmatively weigh collateral damage prior to a strike is also a violation of U.S. policy with regard to compliance with the law of armed conflict. See U.S. DEP’T OF DEF., DIR. 2311.01E, DoD LAW OF WAR PROGRAM 2 (9 May 2006) [hereinafter DODD 2311.01E]. “It is DoD policy that . . . [m]embers of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.” *Id.* at 2. Of note to Navy judge advocates, principles of international law trump Navy Regulations. “At all times, commanders shall observe, and require their commands to observe, the principles of international law. Where necessary to fulfill this responsibility, a departure from other provisions of Navy Regulations is authorized.” U.S. DEP’T OF NAVY, REG. 0705, OBSERVANCE OF INTERNATIONAL LAW (14 Sept. 1990).

²⁴ FARAH REPORT, *supra* note 12, at 9.

²⁵ *Id.* This group of Taliban insurgents was actually moving northward, away from friendly forces, at the time of engagement. *Id.*

²⁶ *Id.*

²⁷ The failure to affirmatively weigh collateral damage prior to a strike is a violation of the law of armed conflict. See AP I, *supra* note 3, arts. 51(5)(b), 57(2)(a)(iii). Additionally, the failure to affirmatively weigh collateral damage prior to a strike is a violation of U.S. policy with regard to compliance with the law of armed conflict. See DODD 2311.01E, *supra* note 23, at 2. Therefore, the third B-1B strike, like the second B-1B strike, violated the law of armed conflict, as well as U.S. policy regarding compliance with the law of armed conflict.

²⁸ FARAH REPORT, *supra* note 12, at 9.

²⁹ AP I, *supra* note 3, arts. 51(5)(b), 57(2)(a)(iii). See also DODD 2311.01E, *supra* note 23, at 2.

³⁰ Carlotta Gall, *A Vow to Cut Afghan Civilian Deaths*, N.Y. TIMES, May 19, 2009, at A12, available at http://www.nytimes.com/2009/05/20/world/asia/20Afghan.html?_r=2&ref=world.

³¹ Press Release, Headquarters, International Security Assistance Force, Tactical Directive (July 6, 2009), available at http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf [hereinafter Press Release, Tactical Directive] (on file with author). The press release contained the two-page unclassified version of the Tactical Directive for publication. The Tactical Directive is a classified document.

³² *Id.*

³³ *Id.*

the use of force, such as close air support (CAS), which might result in collateral damage.³⁴

The tactical directive set the stage for discussion over the need to adjust the application of the balancing test during counterinsurgency operations. Before exploring that discussion, however, the Farah air strikes should be examined from a counterinsurgency perspective.

D. Farah Air Strikes as Mission Failure in Counterinsurgency

The Farah air strikes were mission failures in the broader counterinsurgency effort. Even if the commander at Farah had had the information necessary to comply with the principle of proportionality—and had completed the balancing test—the test itself must be adjusted for counterinsurgency operations.

The mission of conventional warfare is defeat of the enemy.³⁵ In that context, the balancing test for proportionality weighs the number of enemy killed and enemy equipment destroyed (military advantage to be gained) against civilian casualties and civilian property damage as an unintended (collateral) consequence.³⁶ In contrast, the mission of counterinsurgency operations is the provision of safety and security to local populations, making such safety and security the military advantage to be gained.³⁷

Commanders currently have little effective guidance on how to properly weigh collateral damage directly against the safety and security of the local population—that is, the military advantage to be gained during counterinsurgency. The Army and Marine Corps’s joint manual on counterinsurgency only briefly notes the difference in weighing proportionality during counterinsurgency operations: “But in [counterinsurgency] operations, advantage is best calculated not in terms of how many insurgents are killed or detained, but rather which enemies are killed or detained.”³⁸ This definition is of doubtful

³⁴ *Id.*

³⁵ Hague IV, *supra* note 6, arts. 22–28. See also Lieber Code, *supra* note 6, art. 15.

³⁶ AP I, *supra* note 3, arts. 51(5)(b), 57(2)(a)(iii). See also COMMANDER’S HANDBOOK, *supra* note 2, at 5-3; FM 27-10, *supra* note 4, paras. 39–41; AF PAM. 14-210, *supra* note 4, at 39, 52, 147–52; AIR FORCE GUIDE, *supra* note 4, at 19–21.

³⁷ GALULA, *supra* note 8, at 4, 83. “[V]ictory is not the destruction in a given area of the insurgent’s forces and his political organization.” *Id.* at 54. It is something more (difficult). “[V]ictory is that plus the permanent isolation of the insurgent from the population, isolation not enforced upon the population but [rather] maintained by and with the population.” *Id.*

³⁸ COUNTERINSURGENCY MANUAL, *supra* note 8, at 7-6.

utility because it presumes commanders know exactly which enemies to engage, which places an even higher burden on commanders than simple knowledge of the presence, or absence, of civilians in a potential strike situation.³⁹ Providing commanders with useful definitions for terms, as well as guidance for completing the balancing test in a counterinsurgency, is absolutely essential to avoiding future incidents such as the 4 May 2009 air strikes in Farah.

III. Guidance to Commanders

A. Proposed Definitions

The balancing test for proportionality is articulated in two ways. The first suggests that “proportionality is concerned with weighing the military advantage one expects to gain against the unavoidable and incidental loss to civilians and civilian property that will result from the attack.”⁴⁰ The second states that “the principle of proportionality requires the commander to conduct a balancing test to determine if the incidental injury, including death to civilians and damage to civilian objects, is excessive in relation to the concrete and direct military advantage expected to be gained.”⁴¹ These descriptions include terms that must be defined.

1. “Military Advantage”

“Military” as a legal term means “pertaining to war or to the army; concerned with war.”⁴² “Advantage” is “superiority of position or condition; benefit, gain.”⁴³ Taken

³⁹ *Id.* “In COIN environments, the number of civilian lives lost and property destroyed needs to be measured against how much harm the targeted insurgent could do if allowed to escape.” *Id.* This test is highly speculative in nature and demands a level of knowledge plus immediate ability for assessment and decision-making in order to be useful. However, the Counterinsurgency Manual embraces sensitivity to the impact of military operations on the local population. “If the target in question is relatively inconsequential, then proportionality requires combatants to forego severe action, or seek noncombative means of engagement.” *Id.*

⁴⁰ AP I, *supra* note 3, arts. 51(5)(b), 57(2)(a)(iii). Additional Protocol I articulates the principle of proportionality under the law of armed conflict. The balancing test for proportionality is stated in two separate but nearly identical ways. The first statement of the test—the language quoted above—is found in the *Commander’s Handbook*. COMMANDER’S HANDBOOK, *supra* note 2, at 5-2. See also AIR FORCE GUIDE, *supra* note 4, at 19. The U.S. Army does not address this statement of the test. See FM 27-10, *supra* note 4, paras. 39–41.

⁴¹ AP I, *supra* note 3, arts. 51(5)(b), 57(2)(a)(iii). Additional Protocol I articulates the principle of proportionality under the law of armed conflict. The balancing test for proportionality is stated in two separate but nearly identical ways. The second statement of the test—the language quoted above—is found in the *Commander’s Handbook*. COMMANDER’S HANDBOOK, *supra* note 2, at 5-2. See also FM 27-10, *supra* note 4, para. 41; AIR FORCE GUIDE, *supra* note 4, at 19.

⁴² BLACK’S LAW DICTIONARY 992 (6th ed. 1990).

⁴³ WEBSTER’S NEW COLLEGIATE DICTIONARY 17 (1977).

together, “military advantage,” as a combined term, should be defined as “a more favorable position pertaining to war.”

Reviewing these definitions is not a pedantic exercise; it is quite useful to re-emphasize that proportionality assessments must be evaluated in martial terms. Conventional warfare operations focus on the enemy, which naturally reinforces the military character of proportionality assessments. In contrast, because counterinsurgency operations focus on the local population, extraneous factors—such as political, diplomatic, or even economic considerations—can cloud what must be pragmatic, mission-based assessments of safety and security of the local population.⁴⁴ The key questions when evaluating military advantage in a counterinsurgency, therefore, are the following: Does the proposed military action result in a more favorable position for the local population? And does the proposed military action benefit the people?

2. “Concrete and Direct”

“Concrete” as a common term is defined as “characterized by or belonging to immediate experience of actual things or events; real, tangible”⁴⁵ “Direct” as a legal term is defined as “immediate; proximate.”⁴⁶ Both terms, taken together, stand for the proposition that military advantage must be measured at the point of engagement using information readily available to the commander conducting the balancing test.⁴⁷

In conventional warfare operations, “concrete and direct” can be measured by the number of enemy forces killed or captured and the amount of enemy equipment destroyed or damaged;⁴⁸ it is quantitative in nature.⁴⁹ In

counterinsurgency operations, “concrete and direct” must be both quantitative and qualitative in nature.⁵⁰ As a qualitative assessment, “concrete and direct” measures the real-time impact on the safety and security of the local population.⁵¹ As a quantitative measure, “concrete and direct” allows not only for an assessment of the number of enemy killed or captured and the amount of enemy equipment destroyed or damaged—which parallels the conventional warfare model—but also the number of civilian casualties and amount of civilian property damage.⁵² Finally, it is important to also allow an assessment of the number of civilian casualties and amount of civilian property damage that will not occur if the proposed military action is not pursued.⁵³

3. “Unavoidable and Incidental”

“Unavoidable” as a legal term is defined as “incapable of being shunned or prevented, inevitable, and necessary.”⁵⁴ “Incidental” as a common term is defined as “occurring merely by chance or without intention or calculation; being likely to ensue as a chance or minor consequence; accidental.”⁵⁵ Both terms, taken together, purport to modify the clause “loss to civilians and civilian property that will result from the attack.” However, this grammatical construction is fundamentally inconsistent with the nature of counterinsurgency operations, because causing civilian casualties and civilian property damage is neither “by chance” nor “minor.”⁵⁶ Counterinsurgency operations turn this fundamental assumption of conventional warfare on its head and demand in its place a commitment to avoiding collateral damage to achieve the desired objective of safeguarding and securing the local population.⁵⁷ No civilian damage is ever collateral in counterinsurgency operations.⁵⁸

⁴⁴ GALULA, *supra* note 8, at 4, 49–60, 81–86; COUNTERINSURGENCY MANUAL, *supra* note 8, at 1-23, 1-24.

⁴⁵ WEBSTER’S NEW COLLEGIATE DICTIONARY 234 (1977).

⁴⁶ BLACK’S LAW DICTIONARY 459 (6th ed. 1990).

⁴⁷ The Rendulic Rule demands examination of a particular situation as it appeared to the commander at the time of the decision. In *United States v. List* (“Hostages Trial”), General Lothar Rendulic was charged with war crimes for his “scorched earth” tactics while in command of German troops in Scandinavia. General Rendulic defended his actions as necessary in light of his belief that Russian forces were in the immediate vicinity and in hot pursuit of his forces. The Court acquitted him of the charge. “But we are obliged to judge the situation as it appeared to the defendant at the time. . . . [T]he defendant may have erred . . . but he was guilty of no criminal act.” *United States v. Wilhelm List, XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10*, at 1296–97 (1947–48). Neither the *Commander’s Handbook* nor the *Land Warfare Manual* specifically addresses this temporal requirement. However, the *Air Force Guide* does. “Commanders must determine if use of force is proportional based on all information reasonably available at the time.” AIR FORCE GUIDE, *supra* note 4, at 20 (quoting the rescinded CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3121.01A, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES GL-17 (15 Jan. 2000)).

⁴⁸ Hague IV, *supra* note 6, arts. 22–28. See also Lieber Code, *supra* note 6, art. 15; COMMANDER’S HANDBOOK, *supra* note 2, at 5-2, 5-3; FM 27-10,

supra note 4, paras. 39–41; AF PAM. 14-210, *supra* note 4, at 39, 52, 147–52; AIR FORCE GUIDE, *supra* note 4, at 13–21.

⁴⁹ *Id.*

⁵⁰ GALULA, *supra* note 8, at 4, 83. See also COUNTERINSURGENCY MANUAL, *supra* note 8, at 1-2, 1-22, 1-28.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* See also Press Release, Tactical Directive, *supra* note 31, at 1–2.

⁵⁴ BLACK’S LAW DICTIONARY 1523 (6th ed. 1990).

⁵⁵ WEBSTER’S NEW COLLEGIATE DICTIONARY 580 (1977).

⁵⁶ GALULA, *supra* note 8, at 4, 81–83. See also COUNTERINSURGENCY MANUAL, *supra* note 8, at 1-22, 1-28; Press Release, Tactical Directive, *supra* note 31, at 1–2.

⁵⁷ *Id.*

⁵⁸ *Id.*; see also *supra* note 1.

4. “Excessive”

“Excessive” as a legal term is defined as “greater than what is usual or proper.”⁵⁹ Determining what is usual or proper will inherently involve a fact-specific inquiry, which makes operational guidance on “excessive” of critical importance to commanders.⁶⁰ Conventional operations, which focus on the subjugation of an enemy, are more forgiving of civilian casualties and civilian property damage.⁶¹ Counterinsurgency operations, on the other hand, compel a double assessment of civilian casualties and civilian property damage, first, for their impact on the counterinsurgency mission, and second, as an independent but necessary factor for subjective evaluation of “properness.”⁶²

IV. Reconsidering the Balancing Test for Counterinsurgency Operations

Defining the terms of the proportionality balancing test to conform to both conventional and counterinsurgency operations is unworkable. In short, the test must be reconsidered, and, for clarity, one clear description of the test for counterinsurgency operations is needed. The definitions discussed above reveal the differences between conventional warfare operations and counterinsurgency operations, including the goal of military operations and the fundamental rejection of “collateral damage” in counterinsurgency operations. Significantly, counterinsurgency operations demand a double assessment of civilian casualties and civilian property damage because of the focus on provision of safety and security to the local

population and because the “properness” of military action must be evaluated differently.

A. The Balancing Test for Counterinsurgency Operations—A Proposal

I propose the following revised balancing test to address the shortfalls of the current test when applied to counterinsurgency operations. “In counterinsurgency operations, the principle of proportionality requires commanders to confirm that a proposed action will likely result in a concrete and direct military advantage without excessive loss of civilians and civilian property.”⁶³

The second part of the counterinsurgency balancing test’s double assessment of civilian casualties and civilian property damage requires a subjective evaluation of what is “excessive.” This evaluation is best left to operational commanders to define, shape, or at least discuss in orders to subordinate commanders, generally in the form of commander’s intentions or concept of operations during a military campaign.⁶⁴ What is “usual or proper” cannot be fixed by definitions within the balancing test. The balancing test must set forth the process and means for proportionality assessments, but not mathematical formulas or precise metrics, because such numerical standards will change with each military operation.

B. The Balancing Test for Counterinsurgency Operations—The Argument Against Change

Some may argue that the balancing test for proportionality, which has been used for decades,⁶⁵ needs no adjustment. Arguably, adjusting the focus and definitions of the test could limit the discretion and latitude it affords to commanders, who are used to, and comfortable with, the current test, including its vague terms and lack of specific additional guidance. However, counterinsurgency

⁵⁹ BLACK’S LAW DICTIONARY 561 (6th ed. 1990).

⁶⁰ Press Release, Tactical Directive, *supra* note 31, at 1–2. “We must avoid the trap of winning tactical victories—but suffering strategic defeats—by causing civilian casualties or excessive damage and thus alienating the people.” *Id.* at 1.

⁶¹ W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 149–202 (1990). For example, the Battle of Britain resulted in 23,002 civilian deaths over the seven-month period between June and December 1940. The eight-day bombing campaign over Hamburg (24–30 July 1943) resulted in 42,600 civilian deaths. The two-day bombing campaign over Dresden (14–15 February 1945) caused an estimated 25,000 civilian deaths. Finally, the two-day bombing campaign over Tokyo (9–10 March 1945) resulted in 83,793 civilian deaths. *Id.* at 154. These staggering figures reflect the total war mentality of the conflict, and two underlying notions prevailing at the time regarding collateral damage—first, that such damage was simply the price for waging war (“the cost of doing business”) and second, that the responsibility for minimization of collateral damage rested with the nation in control of the civilian population and individual civilians themselves. *Id.* at 149–50. Neither notion is consistent with counterinsurgency theory. First, “the business” in counterinsurgency operations is providing for the safety and security of the local population. See GALULA, *supra* note 8, at 4. Second, U.S. forces, by law and policy, are responsible for minimizing collateral damage in all operations. See AP I, *supra* note 3, arts. 51(5)(b), 57(2)(a)(iii); DODD, 2311.01E, *supra* note 23, at 2.

⁶² GALULA, *supra* note 8, at 4, 81–83. See also COUNTERINSURGENCY MANUAL, *supra* note 8, at 1-2, 1-22, 1-28; Parks, *supra* note 61, at 149–50.

⁶³ The second of the two ways the current balancing test is stated is, “The principle of proportionality requires the commander to conduct a balancing test to determine if the incidental injury, including deaths to civilians and damage to civilian objects, is excessive in relation to the concrete and direct military advantage expected to be gained.” See COMMANDER’S HANDBOOK, *supra* note 2, at 5-2. See *supra* notes 40–41 and accompanying text. The major changes are removal of the term “incidental” and emphasis on the term “excessive.” See *infra* Part IV.B.

⁶⁴ General McChrystal’s Tactical Directive of 2 July 2009 is an example. In it, he sets forth the mission for all U.S. forces operating under the control of U.S. Forces–Afghanistan (USFOR-A) and his intentions for employment of force. “Like any insurgency, there is a struggle for the support and will of the population. Gaining and maintaining that support must be our overriding operational imperative—and the ultimate objective of every action we take.” See Press Release, Tactical Directive, *supra* note 31, at 1.

⁶⁵ The balancing test for proportionality dates back to 1956. The original test was modified in 1977 to its current form. See FM 27-10, *supra* note 4, at 5, 19. See *supra* note 11 and accompanying text.

operations are a radical revolution in warfare⁶⁶ that compels an equally radical re-examination of conventional warfare, including how proportionality is assessed in armed conflict. Additionally, re-assessment of the balancing test does not restrict a commander's discretion; it simply better informs the decision-making process by aligning the means and methods employed with the mission objective.

The current balancing test should not be rescinded; in fact, it must remain in place because it properly assesses proportionality in conventional warfare operations, as well as at the very beginning of counterinsurgency operations.⁶⁷ The critical question left to the commander is, When does the mission shift from a focus on destruction of the enemy to a focus on providing for the safety and security of the local population?⁶⁸ When the mission shifts, the proposed balancing test for counterinsurgency operations must displace the balancing test for conventional warfare to re-align means and methods to support the counterinsurgency mission.

The proposed balancing test for proportionality in counterinsurgency operations is an improvement over the two current versions⁶⁹ in at least one critical aspect—the term “incidental” is no longer used. Removing “incidental” is key to the understanding that civilian casualties and civilian property damage are never collateral in military operations that support a counterinsurgency effort. The proposed test re-focuses attention on the nature of “excessive,” which reinforces the weight civilian casualties and civilian property damage should be given on both sides of the balance, as well as how they can offset military advantage and act as an independent factor for “properness.” The current balancing test for proportionality, with its use of the term “incidental,” perpetuates the conventional warfare focus on the enemy—a focus that is incongruous with the

nature of counterinsurgency operations. By dropping “incidental” from the test, the proposed test embraces a focus on the population while maintaining a means to assess the appropriateness of proposed military actions.

C. The Balancing Test for Counterinsurgency—Increase in Risk

Re-considering, or re-balancing, the proportionality test for counterinsurgency operations is novel—and has risks. By shifting emphasis away from destruction of the enemy to providing for the safety and security of the local population, the equation favors the safety and security of civilians over the safety of coalition forces.⁷⁰ This shift is necessary because counterinsurgencies re-define the mission to maximize benefit to civilians.⁷¹ In that regard, counterinsurgency is graduate level warfare.⁷² Commanders, by law and policy, are bound to uphold the law of armed conflict⁷³—including the principle of proportionality—and implementation of the re-balanced test, despite its difficulties, is a necessary step towards a successful counterinsurgency campaign.⁷⁴

V. Conclusion

The balancing test for proportionality is derived from a conventional warfare model of military operations, which views collateral damage as an unfortunate but necessary outcome of missions focused on the destruction of an enemy. In stark contrast, counterinsurgency operations radically redefine the mission to one of providing for the safety and security of the local population, compelling a fundamental re-assessment of proportionality. Civilian casualties and civilian property damage are never collateral considerations in counterinsurgency operations, and the balancing test for proportionality must embrace this

⁶⁶ GALULA, *supra* note 8, at xi–xiv.

⁶⁷ See Hague IV, *supra* note 6, arts. 22–28; GALULA, *supra* note 8, at 4, 49–60, 81–86; *supra* note 10 and accompanying text.

⁶⁸ GALULA, *supra* note 8, at 75–77. “The goal is reached when static units left to garrison the area can safely deploy to the extent necessary.” *Id.* at 75. It is clear that the timeframe for conventional warfare operations is short. “The first step in the counterinsurgent’s operations should not be allowed to drag on for the sake of achieving better military results.” *Id.* at 76.

⁶⁹ AP I, *supra* note 3, arts. 51(5)(b), 57(2)(a)(iii). Additional Protocol I articulates the principle of proportionality under the law of armed conflict. The balancing test for proportionality is stated in two separate but nearly identical ways. The first statement of the test is found in the *Commander’s Handbook*. COMMANDER’S HANDBOOK, *supra* note 2, at 5-2. See also AIR FORCE GUIDE, *supra* note 4, at 19. The U.S. Army does not address this statement of the test. See FM 27-10, *supra* note 4, paras. 39–41. The second statement of the test is found in the COMMANDER’S HANDBOOK, *supra* note 2, at 5-2. See also FM 27-10, *supra* note 4, para. 41; AIR FORCE GUIDE, *supra* note 4, at 19.

⁷⁰ Press Release, Tactical Directive, *supra* note 31, at 1–2. “I recognize that the carefully controlled and disciplined employment of force entails risks to our troops—and we must work to mitigate that risk wherever possible.” *Id.* at 1.

⁷¹ GALULA, *supra* note 8, at 83.

⁷² COUNTERINSURGENCY MANUAL, *supra* note 8, at 1-1.

⁷³ DoDD 2311.01E, *supra* note 23, at 2.

⁷⁴ Initial assessments suggest that the Tactical Directive is having a positive impact in reducing collateral damage caused by coalition forces. “Civilian deaths caused by U.S. and allied forces dropped by nearly a third . . . indicating that coalition efforts to cut down on civilian casualties are having an impact on the battlefield.” Anand Gopal, *Taliban Drive Up Afghan Civilian Toll: U.N. Says Insurgent Attacks Led to 14% Jump in Fatalities in 2009; Western Effort to Reduce Deaths Shows Results*, WALL ST. J., Jan. 14, 2010, available at <http://online.wsj.com/article/SB1000142405274870436200457500083380271148.html>. “The number of civilians killed by the Taliban and their allies rose sharply, by about 40%.” *Id.* “The drops in deaths resulting from allied action and the corresponding increase in deaths attributed to insurgents could help Western forces win support from wary Afghans.” *Id.*

fundamental difference between conventional warfare operations and counterinsurgency operations.

The proffered proportionality test, which addresses the change in how “military advantage” should be defined, re-balances the test for counterinsurgency operations. The

proposed definitions and guidance of the revised test should better equip commanders for operations in this complex and demanding arena of warfare.