I. Introduction

The United States’ position on the law of armed conflict principle of proportionality is anchored in its collective response to Additional Protocol I to the Geneva Conventions. “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.” The assessment is prospective in nature, calling for an evaluation based on situational awareness prior to an attack. 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,” the balancing test weighs 1986. The author adopts the proportionality test from AP I as an expression of customary international law.


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/cjcs_directives_65.pdf.

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.


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 underpins 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 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.

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...
observed entering the building while en route to the battle, 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. The B-1B aircrew eventually dropped two 500-pound Global Positioning System (GPS)-guided Guided Bomb Units (GBU) and two 2000-pound GPS-guided GBUs on the target. The CENTCOM investigation later concluded that this attack was one of the strikes that resulted in civilian casualties. 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.

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. As in the second airstrike, the building was targeted because a group of Taliban insurgents had just entered it. The ground commander eventually observed entering the building while en route to the battle, 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. The B-1B aircrew eventually dropped two 500-pound Global Positioning System (GPS)-guided Guided Bomb Units (GBU) and two 2000-pound GPS-guided GBUs on the target. The CENTCOM investigation later concluded that this attack was one of the strikes that resulted in civilian casualties. 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.

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. 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. 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. Second, the Commander linked collateral damage to mission failure. Third, the Commander directed scrutiny of, and limits on, ordered the B-1B air crew to drop one 2000-pound GPS-guided GBU on the target, which destroyed the building. 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. The CENTCOM investigation also noted this attack as a likely source of civilian casualties.

In the case of the second and third B-1B bomber strikes, the commander authorized 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.
the use of force, such as close air support (CAS), which might result in collateral damage.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{38} This definition is of doubtful 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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{42} “Advantage” is “superiority of position or condition; benefit, gain.”\textsuperscript{43} Taken

\textsuperscript{34} Id.

\textsuperscript{35} Hague IV, supra note 6, arts. 22–28. See also Lieber Code, supra note 6, art. 15.

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{38} COUNTERINSURGENCY MANUAL, supra note 8, at 7-6.

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{42} BLACK’S LAW DICTIONARY 992 (6th ed. 1990).

\textsuperscript{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. Both terms, taken together, stand for the proposition that 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 . . . .” “Direct” as a legal term is defined as “immediate; proximate.” 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.

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; it is quantitative in nature. In counterinsurgency operations, “concrete and direct” must be both quantitative and qualitative in nature. As a qualitative assessment, “concrete and direct” measures the real-time impact on the safety and security of the local population. As a quantitative measure, “concrete and direct” allows 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. 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.

3. “Unavoidable and Incidental”

“Unavoidable” as a legal term is defined as “incapable of being shunned or prevented, inevitable, and necessary.” “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.” 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.” 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. No civilian damage is ever collateral in counterinsurgency operations.

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

WEBSTER’S NEW COLLEGIATE DICTIONARY 234 (1977).


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)).

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.

Id.

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

Id.

Id.

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


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.

Id.

Id.; see also supra note 1.
4. “Excessive”

“Excessive” as a legal term is defined as “greater than what is usual or proper.”65 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.51 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.”66

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 shortcomings 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.”66

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

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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 warfare 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. 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? When the mission shifts, the proposed balancing test for counterinsurgency operations must displace the balancing test for conventional warfare to realign means and methods to support the counterinsurgency mission.

The proposed balancing test for proportionality in counterinsurgency operations is an improvement over the two current versions 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. This shift is necessary because counterinsurgencies redefine the mission to maximize benefit to civilians. In that regard, counterinsurgency is graduate level warfare. Commanders, by law and policy, are bound to uphold the law of armed conflict—including the principle of proportionality—and implementation of the re-balanced test, despite its difficulties, is a necessary step towards a successful counterinsurgency campaign.

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...
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.