

A Balancing Act: In Pursuit of Proportionality in Self-Defense for On-Scene Commanders

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*It is, of course, impossible to measure human lives against a military advantage to be gained. However, as long as wars are fought, and if there is to be compliance with the law of war, some such approximations must be made. Unfortunately, such an approximation must always be a subjective one and, unless it is completely unjustifiable, it would be not only impossible, but unjust, to judge an individual on any basis other than that of the total information available to him at the time*¹

I. Introduction

Over the past decade of counterinsurgency operations, U.S. commanders have come to recognize the negative strategic impact of decisions by their on-scene commanders to employ indirect fire (IDF) and close air support (CAS)² that result in incidental civilian injuries or property destruction. This recognition has led to the withdrawal of approval authorities for such missions to higher levels of command in deliberate offensive operations, and counterinsurgency policy-based tactical directives that restrict targeting authority even during some troops-in-contact (TIC)³ and self-defense scenarios.⁴ Despite this

recognition and emphasis, there exists a continued gap in training of, and application by, on-scene commanders of related obligations under international humanitarian law (IHL). Eliminating this training gap would support decentralized counterinsurgency operations.⁵ Part of the training gap may result from confusion among judge advocates about the applicability of the proportionality balancing test to defensive operations, whether deliberate or hasty.⁶

The principles of proportionality and minimization of collateral damage under Additional Protocol I to the Geneva Conventions (AP I),⁷ as applicable to U.S. forces under customary international law (CIL) and Department of Defense (DoD) policy,⁸ must be applied by on-scene commanders when coordinating uses of force in self-defense. “Proportionality” in duration and scope of force under the standing rules of engagement (SROE)⁹ must not be

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¹ 1 HOWARD S. LEVIE, THE CODE OF INTERNATIONAL ARMED CONFLICT 85 (1985).

² Indirect fire are “fire[s] delivered on a target that is not itself used as a point of aim for the weapons or the director, such as mortars, artillery” JOINT PUB. 3-09.3, CLOSE AIR SUPPORT, at III-25 (8 July 2009). Close air support (CAS) is “air action by fixed-wing (FW) and rotary-wing (RW) aircraft against hostile targets that are in close proximity to friendly forces” *Id.* at I-1.

³ A troops-in-contact (TIC) situation is a battlefield scenario in which “friendly ground forces [are] receiving effective fire.” *Id.* at V-19.

⁴ See, e.g., INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, LAW OF WAR DESKBOOK 155 (2011), available at http://www.loc.gov/rr/frd/Military_Law/pdf/LOW-Deskbook-2011.pdf (noting that “[r]ules of engagement may require elevating the decision to attack if collateral damage is anticipated to exceed thresholds established by higher-level commanders”); Press Release, Headquarters, Int’l Security Assistance Force, Tactical Directive (July 6, 2009) [hereinafter 2009 Tactical Directive], available at http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf (unclassified version of General Stanley McChrystal’s tactical directive referencing counterinsurgency principles in requiring responses like close air support potentially affecting civilian structures be a last resort in self-defense situations). See also Press Release, Headquarters, Int’l Security Assistance Force (SAF), General Petraeus Issues Updated Tactical Directive (Aug. 4, 2010), available at <http://smallwarsjournal.com/documents/isafnewsrelease2.pdf> (allowing indirect fire and CAS, apart from under two classified conditions, only where the approving commander can determine no civilians are present, or as a matter of self-defense where no other effective options are available); Memorandum from Commander, Int’l Security Assistance Force/U.S. Forces-Afghanistan, COMISAF’s Tactical Directive (30 Nov. 2011), available at <http://www.isaf.nato.int/images/docs/20111105%20nuc%20tactical%20directive%20revision%204%20%28releaseable%20version>

%29%20r.pdf (detailing releasable portions of the current tactical directive and expressing the commander’s intent to eliminate all ISAF-caused civilian casualties).

⁵ “Commanders ensure that their Soldiers and Marines are properly trained . . . in methods of shaping situations so that small-unit leaders have to make fewer split-second, life-or-death decisions.” U.S. DEP’T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY para. 1-142 (15 Dec. 2006). Among the manual’s “contemporary imperatives for counterinsurgency” is the need to “empower the lowest levels” of military leaders: “Higher commanders empower subordinates to make decisions within the commander’s intent. They leave details of execution to their subordinates and expect them to use initiative and judgment to accomplish the mission.” *Id.* para. 1-145.

⁶ Law of war (LOW) training, including requirements which overlap rules of engagement, is a judge advocate responsibility, overseen by the General Counsel of the Department of Defense (DoD), and in coordination with supported commanders. See U.S. DEP’T OF DEF., DIR. 2311.01E, DOD LAW OF WAR PROGRAM para. 5.1.5 (22 Feb. 2011) [hereinafter DODD 2311.01E].

⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

⁸ Although Additional Protocol I (AP I) is specifically applicable to international armed conflicts, DoD policy requires that servicemembers “comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.” DODD 2311.01E, *supra* note 6, para. 4.1. The United States has not ratified AP I; however, the portions of AP I applicable to this article are viewed as expressions of customary international law (CIL). See *infra* Part II.A.1–2 and notes 11 and 14.

⁹ CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES (13 June 2005) [hereinafter SROE] (unclassified portions).

confused with the IHL obligation to apply a military advantage versus incidental loss to civilians balancing test in any “attack,” whether offensive or defensive in nature.

This article first examines the general requirements under IHL for commanders to balance military advantage against expected incidental loss to civilians and to take precautions to minimize that expected loss. It then distinguishes the *jus ad bellum* concept of “proportionality” identified as a self-defense principle under the SROE and demonstrate why its wording may lead to confusion over the applicability of the *jus in bello* proportionality balancing test in defensive operations.¹⁰ Next, the article identifies when and why the proportionality balancing test is applicable under IHL to on-scene commanders during defensive and unplanned TIC situations. Finally, having identified its scope of applicability within these situations, the article discusses the practical application by on-scene commanders of the proportionality balancing test and duty to minimize collateral damage.

II. Proportionality Requirements Under International Humanitarian Law

Proportionality is one of the four principles governing the use of force in IHL. Its requirements are stated within Articles 51 and 57 of AP I, most of which the United States follows as the embodiment of CIL.¹¹ The principle of proportionality is a precautionary measure against indiscriminate attacks that affect the civilian population. Proportionality balancing is a subset of the broad IHL requirement that, “[i]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians, and civilian objects.”¹²

The unclassified portions of the SROE are provided in Appendix A to chapter 5 of the *Operational Law Handbook*. INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK (2012), available at http://www.loc.gov/rr/frd/Military_Law/operational-law-handbooks.html [hereinafter OPERATIONAL LAW HANDBOOK].

¹⁰ *Jus ad bellum* is the body of international law that governs the conditions under which a state resorts to an armed conflict. *Jus in bello*, or International Humanitarian Law (IHL), is the body of international law governing the actions of a state during an armed conflict, once it has started. See, e.g., *IHL and Other Legal Regimes—Jus ad Bellum and Jus in Bello*, INT’L. COMM. OF THE RED CROSS (Oct. 29, 2010), <http://www.icrc.org/eng/war-and-law/ihl-other-legal-regimes/jus-in-bello-jus-ad-bellum/overview-jus-ad-bellum-jus-in-bello.htm>.

¹¹ See Michael Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U.J. INT’L L. & POL’Y 419 (1987) (presented while Matheson served as Deputy Legal Advisor, U.S. Department of State).

¹² AP I, *supra* note 7, art. 57(1).

A. Proportionality Balancing Test

Under AP I, the principle of proportionality prohibits attacks “expected to cause incidental . . . injury to civilians [or] damage to civilian objects, . . . which would be excessive in relation to the concrete and direct military advantage anticipated.”¹³ The United States follows this prohibition as CIL, and requires commanders to adhere to it by weighing “the anticipated loss of civilian life and damage to civilian property reasonably expected to result from military operations [against] the advantages expected to be gained.”¹⁴ At a minimum, the United States views CIL as prohibiting attacks “that would *clearly result* in collateral civilian casualties disproportionate to the expected military advantage.”¹⁵ In discussing this formulation of the proportionality balancing test, it is helpful to review some key definitions.

1. Definitions

Some of the terms of art in this proportionality test requirement are not explicitly defined in U.S. military doctrinal publications. However, “military advantage” can be defined simply as “a more favorable position pertaining to war.”¹⁶ The key is that “an identifiable military benefit . . . should derive from the degradation, neutralization, destruction, capture, or disruption of the object.”¹⁷ The term “concrete and direct” is a qualitative concept measured by “enemy forces killed or captured and the amount of enemy equipment destroyed or damaged.”¹⁸ Defined in the negative, “[a] remote advantage to be gained at some unknown time in the future” would weigh too lightly against

¹³ *Id.* art. 51(5)(b). This prohibition is restated as a requirement to refrain from planning and deciding to launching such an attack under Article 57, Precautions in Attack. *Id.* art. 57(2)(a)(iii).

¹⁴ JOINT CHIEFS OF STAFF, JOINT PUB. 3-60, JOINT TARGETING app. E, para. E.2.d. (13 Apr. 2007) [hereinafter JOINT PUB. 3-60]. See U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE paras. 39–41 (18 July 1956) [hereinafter FM 27-10]; U.S. DEP’T OF NAVY, OFFICE OF THE CHIEF OF NAVAL OPERATIONS, HEADQUARTERS, U.S. MARINE CORPS, DEP’T OF HOMELAND SECURITY 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); AIR FORCE OPERATIONS & THE LAW—A GUIDE FOR AIR, SPACE & CYBER FORCES 19 (2009) [hereinafter AIR FORCE OPERATIONS].

¹⁵ Matheson, *supra* note 11, at 426 (emphasis added). But see JOINT PUB. 3-60, *supra* note 14, at E-1 (using the broader “may be expected to cause” language of AP I, article 51); FM 27-10, *supra* note 14, para. 41 (using a middle ground of “probable losses”).

¹⁶ Commander Matthew L. Beran, *The Proportionality Balancing Test Revisited: How Counterinsurgency Changes “Military Advantage,”* ARMY LAW., Aug. 2010, at 8. The scope of the military advantage that U.S. military doctrine attaches to the military advantage side of the balancing test is discussed *infra* in Part IIA.1–2 and note 26.

¹⁷ U.S. DEP’T OF AIR FORCE, PAM. 14-210, USAF INTELLIGENCE TARGETING GUIDE 12 (1 Feb. 1998).

¹⁸ Beran, *supra* note 16, at 8.

civilian losses.¹⁹ The term “incidental” should not be read to mean “incurred casually,” but rather to mean “likely to happen in . . . subordinate conjunction” with the attack, and “unavoidable and unintentional.”²⁰ Finally, “excessive” is a term not specifically defined in U.S. military doctrine in this context.²¹ As a general legal term, it means “greater than what is usual or proper.”²² In this context, “excessive” is commonly used interchangeably with “disproportionate.”²³ “Excessive” is a forgiving standard and difficult to pinpoint outside the context of the full facts of a specific situation, but one that must be consciously applied by a commander.²⁴ As with most major military decisions, what is “excessive” rests on the subjective judgment of a commander, based on the “weighing of factors which cannot be quantified. The best that can be expected of the decision-maker is that he act honestly and competently.”²⁵

¹⁹ MICHAEL BOTHE, KARL JOSEF PARTSCH & WALDEMAR A. SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949*, at 365 (1982). The authors were members of the Germany and United States delegations to the diplomatic conference in Geneva from 1974 to 1977. Their commentary is a guide to the Protocols, referencing “the drafting history as the authors experienced it.” *Id.* at v.

²⁰ WEBSTER’S UNABRIDGED DICTIONARY 966 (1998); INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 12 (2011) [hereinafter OPERATIONAL LAW HANDBOOK]. The International Committee of the Red Cross (ICRC) Commentary to AP I does purport to place a broad quantification on the meaning of “incidental,” stating that “[t]he Protocol does not provide any justification for attacks which cause extensive civilian losses and damages. Incidental losses and damages should never be extensive.” COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 626 (1987) [hereinafter ICRC COMMENTARY]. However, this statement does not define “extensive,” a concept difficult to define without examining the magnitude of the counterbalancing military advantage. In a case of potential “extensive” civilian casualties, the broader IHL prohibition against indiscriminate attacks would usually be a more appropriate lens, with the attack potentially violating the “directed at a specific military objective” requirement or the means not being capable of being “directed at a specific military objective.” AP I, *supra* note 6, art. 51(4)(a) and (b).

²¹ See, e.g., OPERATIONAL LAW HANDBOOK, *supra* note 20, at 12 (defining incidental damage and military advantage, but not discussing the meaning of “excessive”).

²² BLACK’S LAW DICTIONARY 561 (6th ed. 1990).

²³ See, e.g., Matheson, *supra* note 11, at 426.

²⁴ See W. Hays Parks, *Air War and the Law of War*, 32 A.F.L. REV. 1, 201 (1990). An extreme example of injury and damage to civilians which today would be considered excessive in violation AP I, article 51(5)(b) is the Allied bombing of Dresden in 1945. Dresden’s sole military facilities were a rail yard and communication lines, while the city housed thousands of civilian refugees. During the repeated bombing, it is estimated that 35,000 people died—most of whom were civilians. ALEXANDER MCKEE, *DRESDEN 1945: THE DEVIL’S TINDERBOX* 109, 274 (1984). “What is ‘usual and proper’ cannot be fixed by definitions within the balancing test. The balancing test must set forth the process and means of proportionality assessments, but not mathematical formulas or precise metrics, because such numerical standards will change with each military operation.” Beran, *supra* note 16, at 9.

²⁵ BOTHE, PARTSCH & SOLF, *supra* note 19, at 310.

2. Scope of the Military Advantage to Be Considered

The general definition of military advantage is straightforward, as shown above; but the scope of that advantage as used in proportionality balancing is up for debate in the international legal community. To illustrate, the U.S. position and that of some other states and commentators is that the military advantage to be weighed is generally “not restricted to tactical gains, but is linked to the full context of a strategy.”²⁶ The U.S. position differs from that of the International Committee of the Red Cross (ICRC), which advocates a narrow tactical view of military advantage.²⁷ Although under the U.S. view the military advantage to be weighed does not have to be limited to tactical gains, U.S. military doctrine recognizes that either approach is a legitimate choice for a commander to employ in the balancing calculus.²⁸

B. Requirement to Avoid or Minimize Incidental Civilian Loss

Interrelated with the proportionality balancing test are several precautions required by IHL, specifically by Article 57 of AP I. These precautions are inextricably linked to the test, since the calculus will change as precautions are adopted or rejected. First among these precautions are the duties of commanders to verify that the objects of their attacks are not civilians or civilian objects and then to take precautions to avoid or at least minimize incidental injury of civilians or damage to civilian property.²⁹ AP I ratifiers, including frequent U.S. coalition partners, are required to “do everything feasible” to verify the objective is not civilian, and “take all feasible precautions” in their choice of means and method—a high standard.³⁰ The United States

²⁶ JOINT PUB. 3-60, *supra* note 14, at E-1. “The military advantage anticipated is intended to refer to the advantage anticipated from [the commander’s] actions [in an operation] considered as a whole, and not only from isolated or particular parts thereof.” *Id.* This formulation of the scope of military advantage for purpose of proportionality is similar to the declaration of the United Kingdom regarding Article 51 when it ratified AP I, referring to “an attack considered as a whole and not from isolated or particular parts of the attack.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), United Kingdom Ratification with Declarations and Reservations, Jan. 28, 1998, 2020 U.N.T.S. 77 [hereinafter United Kingdom Declarations].

²⁷ ICRC COMMENTARY, *supra* note 20, at 683–84 (stating that the military advantage must be “relatively close,” and related to a “specific tactical operation”).

²⁸ OPERATIONAL LAW HANDBOOK, *supra* note 20, at 12 (military advantage may be examined “on a target-by-target basis, but also may be done in an overall sense [related to] campaign objectives”). As discussed below in Part VI.A, the target-specific military advantage will usually be a more workable standard in the context of balancing by an on-scene commander, but he is not precluded from taking the broader mission into the calculus.

²⁹ AP I, *supra* note 7, art. 57(2)(a)(i) and (ii). The third precaution is a restatement of the Article 51 proportionality balancing test. *Id.* art. 57(2)(a)(iii).

³⁰ *Id.*

views the substance of these obligations as CIL, applicable in the “conduct of military operations,” but substitutes a practicability test in place of feasibility.³¹ Joint U.S. doctrine specifically places a requirement on planners to ensure that civilian objects are not targeted.³²

This requirement to verify that objectives are not civilian objects could be read as resting within the doctrinal plans cell at higher levels of command; but the requirement is, in fact, applicable at any level where a plan or decision is made to attack a target. Such broad applicability is clear from AP I’s inclusion of “those who plan *or decide*” and the U.S. position that Article 57-related CIL applies “in the conduct of military operations” in general.³³ United States doctrine requires commanders to minimize or avoid incidental civilian loss by examining the type of military target, terrain, weapon choice, weather, and civilian proximity in order to minimize or avoid incidental civilian loss.³⁴ These factors are also useful in a balancing test analysis of any residual expected incidental civilian loss, since the data also facilitates a reasoned estimation of the magnitude of the incidental civilian loss that must be balanced.³⁵

C. Requirement to Cancel or Suspend Attacks Where No Longer Proportionate

The next precaution in attack required by Article 57 is canceling or suspending an attack “if it becomes apparent that . . . the attack may be expected to cause incidental [civilian loss] . . . which would be excessive”³⁶ Unlike the first three precautionary requirements, which apply specifically to “those who plan or decide upon an attack,” this obligation is of general application and intuitively applicable at least down to the on-scene commander level.³⁷

³¹ Matheson, *supra* note 11, at 426–27.

³² JOINT PUB. 3-60, *supra* note 14, at E-4.

³³ AP I, *supra* note 7, art. 57(2)(a) (emphasis added); Matheson, *supra* note 11, at 426–27.

³⁴ JOINT PUB. 3-60, *supra* note 14, at E-3.

³⁵ “Minimization of Civilian Casualties. Attacks are not prohibited against military targets even if they cause incidental injury or damage to civilians or civilian objects. In spite of precautions, such incidental casualties are inevitable during armed conflict.” *Id.* at E-4.

³⁶ AP I, *supra* note 7, art. 57(b).

³⁷ BOTHE, PARTSCH & SOLF, *supra* note 19, at 366 (emphasis added). Bothe asserts that

[a]s originally proposed . . . this provision was addressed to “those who launch an attack” . . . “if possible.” The Committee [did not adopt this language] so that it would apply to *all commanders* who have the authority to cancel or suspend attacks . . . [including] the commander of military organizations actually engaged in combat.

Id. (emphasis added).

As joint U.S. military doctrine explains, “[t]arget intelligence may be found to be faulty before an attack is . . . completed. If it becomes apparent that a target is no longer a lawful military objective, the attack must be cancelled or suspended.”³⁸

D. Requirement to Give Advance Warning When Circumstances Permit

The final required precaution in attack from Article 57, which is applicable to the United States as an expression of CIL, is an obligation to give “effective advance warning . . . of attacks which may affect the civilian population, unless circumstances do not permit.”³⁹ Joint U.S. military doctrine reverses the default starting point for this decision, requiring warnings “when circumstances permit.”⁴⁰ Circumstances permit when “any degradation in attack effectiveness is outweighed by the reduction in collateral damage” due to civilians being able to leave the objective.⁴¹ As with the rule for canceling or suspending an attack, the responsibility for this required warning is not limited to “those who plan or decide upon an attack.”⁴² With the general requirements regarding the proportionality balancing test and related precautions in attack laid out, the issue is the applicability of these rules to on-scene commanders in TIC scenarios and in the exercise of self-defense authorities.

III. SROE Self-Defense Principle of “Proportionality” Distinguished

Rules of engagement (ROE) constrain commanders’ actions, as does IHL. Although ROE will usually impose policy-based obligations more restrictive than those required by law, they can never serve to relieve commanders of basic underlying IHL obligations.⁴³ Thus, the SROE must be interpreted consistently with commanders’ IHL obligations

³⁸ JOINT PUB. 3-60, *supra* note 14, at E-4.

³⁹ AP I, *supra* note 7, art. 57(2)(c); Matheson, *supra* note 11, at 426–27. *See also* Convention (IV) Respecting the Laws and Customs of War on Land, art. 26, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague IV]. Article 57(2)(c) can be viewed as an authoritative interpretation of requirements to warn under Hague IV, rather than maintaining the “bombardment” versus “assault” distinction. BOTHE *supra*, note 19, at 368. An additional provision applicable to ratifiers of AP I requires that when a choice between multiple military objectives with similar military advantage is possible, the one expected to cause the least civilian loss must be selected. AP I, *supra* note 7, art. 57(3). Neither U.S. treatment of AP I requirements, nor U.S. military doctrine express this as applicable to U.S. commanders.

⁴⁰ JOINT PUB. 3-60, *supra* note 14, at E-4.

⁴¹ *Id.*

⁴² AP I, *supra* note 7, art. 57(2)(a) and (c).

⁴³ *See* OPERATIONAL LAW HANDBOOK, *supra* note 20, at 74.

to conduct proportionality balancing and take precautions in attack to spare the civilian population.⁴⁴

A. The *Jus ad Bellum* Nature of SROE “Proportionality”

In its discussion of self-defense procedures, the SROE enumerates de-escalation, necessity, and proportionality as the “principles of self-defense.”⁴⁵ As the SROE define proportionality for purposes of self-defense, they essentially require the responsible leader to make a *jus ad bellum* determination regarding what level of force is sufficient to respond decisively to a threat.⁴⁶ This determination must incorporate the principle of giving the force opportunity to cease threatening actions or withdraw. Further, the principle of necessity is satisfied only for so long as the force continues to commit hostile acts or demonstrate hostile intent. The SROE self-defense proportionality principle is clearly designed to aid a commander in a lawful resort to armed conflict (*jus ad bellum*) on a localized, specific incident scale.

This *jus ad bellum* focus in the SROE regarding IHL principles related to self-defense does not obviate the need to apply *jus in bello* IHL principles, including military necessity, distinction, and humanity, once a self-defense engagement is initiated. Although these *jus in bello* principles are not enumerated in the SROE, they are taught by judge advocates and commanders during law of war (LoW) and ROE briefings, and are routinely included on mission- or theater-specific ROE cards.⁴⁷ The SROE also alludes generally to these rules in its declaration that “all appropriate actions may be used in self defense.”⁴⁸

⁴⁴ The SROE “establish fundamental policies and procedures governing the actions to be taken by U.S. commanders and their forces during all military operations . . . occurring outside U.S. territory,” with an emphasis in the unclassified portions on rules regarding self-defense. SROE, *supra* note 9, § 1a. Although a mission will almost always be conducted under theater- or operation-specific ROE, those ROE are implemented as supplemental measures to the SROE, situating the SROE and its definitions as fundamental to all extra-territorial U.S. military operations. *Id.* at 2.

⁴⁵ *Id.* at A-3.

⁴⁶ “Proportionality. The use of force in self-defense should be sufficient to respond decisively to hostile acts or demonstrations of hostile intent. Such use of force may exceed the means and intensity of the hostile act or hostile intent, but the nature, duration, and scope of force used should not exceed what is required.” *Id.*

⁴⁷ See, e.g., PowerPoint Presentation, Training Devs. Dir., The Judge Advocate Gen.’s Legal Ctr. & Sch., U.S. Army, The Law of War: The Rules that Govern the Conduct of Soldiers in Military Operations (1 Oct. 2011) [hereinafter LoW Standard Training Package], available at <https://jag.ellc.learn.army.mil/bbcdwebdav/institution/JAG%20Institution/Library/Main%20Page/STPs/OpLaw/Law%20of%20War.ppt> (JAG University account required); U.S. FORCES—IRAQ ROE CARD, in HEADQUARTERS HEADQUARTERS, U.S. FORCES—IRAQ OPERATION ORDER 11-01, annex C, app. 8, tab B (6 Jan. 2011) (requiring servicemembers to “[m]inimize incidental injury, loss of life, and collateral damage”).

⁴⁸ SROE, *supra* note 9, § 4.a. (emphasis added).

B. Confusing SROE Language Regarding *Jus ad Bellum* Proportionality

Since proportionality balancing is one of the core *jus in bello* principles that determines whether a self-defense action is “appropriate,” commanders and inexperienced operational law practitioners may be confused by SROE language appearing to except the requirement. In the 2005 revision to the SROE, the following language was added to the self-defense principle of proportionality: “The concept of proportionality in self-defense [decisive response, using no more force than required] should not be confused with attempts to minimize collateral damage during *offensive* operations.”⁴⁹ The basis under IHL for drawing this distinction is unclear. Why this language was added to the SROE is unknown.⁵⁰ However, a plain reading suggests that while other *jus in bello* principles apply during defensive operations, the Article 51 and 57 requirements to minimize collateral damage and conduct proportionality balancing apply during offensive operations only.

The SROE language is vague about whether *jus in bello* proportionality is required during self-defense. This can lead to confusion because other military publications do not address this question. For instance, the *Operational Law Handbook*, designed as a “how to” guide for judge advocates,⁵¹ does not address the applicability of *jus in bello* proportionality in self-defense situations.⁵² In the Army Judge Advocate General University (JAGU) SROE Standard Training Package (STP),⁵³ the concept of proportionality

⁴⁹ *Id.* § 4.a.(3) (emphasis added). The previous version of the SROE, updated in 2000, used the section heading “Means of Self-Defense” rather than “Principles of Self-Defense,” and the former “Proportionality” paragraph was entitled “Proportional Force.” The language of this paragraph made no reference to collateral damage or offensive versus defensive operations, and stated: “When the use of force in self-defense is necessary, the nature, duration, and scope of the engagement should not exceed that which is required to decisively counter the hostile act or demonstrated hostile intent and to ensure the continued protection of US forces or other protected personnel or property.” CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3121.01A, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES, at A-6 (15 Jan. 2000) (unclassified portions).

⁵⁰ Drafter’s commentary regarding this 2005 revised language regarding proportionality is unavailable.

⁵¹ OPERATIONAL LAW HANDBOOK, *supra* note 20, at ii.

⁵² *Id.* at 75–76. In its exposition of the topic of self-defense under the SROE, the handbook simply repeats the *jus ad bellum* definition of proportionality. *Id.* at 76. In a separate section related to the *jus in bello* principle of proportionality, the handbook does define a triggering attack as either offensive or defensive in nature, but does not elucidate what types of self-defense actions would qualify as a defensive attack. Neither section references or explains the 2005 SROE update regarding the duty to minimize collateral damage as distinctly applicable to offensive operations.

⁵³ PowerPoint Presentation, Training Devs. Dir., The Judge Advocate Gen.’s Legal Ctr. & Sch., U.S. Army, The Standing Rules of Engagement (SROE) Standard Training Package (STP) (1 Oct. 2011), available at <https://jag.ellc.learn.army.mil/bbcdwebdav/institution/JAG%20Institution/Library/Main%20Page/STPs/OpLaw/ROE.ppt> (JAG University account required) (referencing the *jus ad bellum* self-defense proportionate force rules, but only referencing collateral damage to link it as a concept relevant to offensive operations).

balancing is not addressed. Neither is it addressed in the JAGU LoW STP for Soldiers who may end up as on-scene commanders with IDF and CAS request authority.⁵⁴ Thus, while the Army systematically trains its forces on the requirements of AP I, Articles 51 and 57 CIL as applied to deliberate “offensive” targeting, and incorporates these requirements into such targeting,⁵⁵ they may get short shrift as applied to TIC, self-defense, and defensive operations (apart from non-uniform local training based on the expertise of individual judge advocates and commanders).

IV. Applicability of *Jus in Bello* Proportionality During Defensive Operations

Despite the confusing SROE language and the paucity of standardized U.S. military training and doctrine on the subject, customary IHL requirements set out by Articles 51 and 57 of API do apply to defensive attacks.

A. What Are Proportionality Balancing Requirement-Triggering “Attacks”?

Any attacks, offensive or defensive, trigger the proportionality balancing requirements and duties to minimize collateral damage under Articles 51 and 57 of AP I. Article 49 defines “attacks” as “acts of violence against the adversary, whether in offence or in defence.”⁵⁶ Thus, the SROE language indicating a distinction between offensive and defensive operations for the applicability of minimizing collateral damage is inapt. The ICRC commentary on the AP I definition suggests that attacks are “co-ordinated acts of violence against the adversary by a specific military formation engaged in a specific military operation, rather than . . . each act of violence of the individual combatants who are members of that formation.”⁵⁷ The definition’s plural use of “acts” supports this interpretation. However,

⁵⁴ LoW Standard Training Package, *supra* note 47. The Law of War Standard Training Package (LoW STP) briefly addresses the proportionality requirement, but unlike its treatment of other *jus in bello* principles which are explained at a Soldier-on-the-ground level, it simply terms it a “commander’s tool” and does not discuss what constitutes an attack, or when positive conduct of a balancing test may be required. *Id.* at 11.

⁵⁵ See, e.g., JOINT CHIEFS OF STAFF, JOINT MAN. 3160.01, NO STRIKE AND THE COLLATERAL DAMAGE ESTIMATION METHODOLOGY (13 Feb. 2009) [hereinafter JOINT MAN. 3160.01] (assisting commanders in their obligation to assess proportionality in the context of deliberate offensive targeting, and requiring training and certification of personnel preparing formal collateral damage estimates).

⁵⁶ API, *supra* note 7, art. 49(1).

⁵⁷ BOTHE, PARTSCH & SOLF, *supra* note 19, at 288. See ICRC DRAFT ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS OF AUGUST 12, 1949 COMMENTARY 54 (1973) [hereinafter ICRC DRAFT]. This formulation of the definition of attacks comports with the declaration made by the United Kingdom upon ratifying AP I, regarding Article 51 and 57 military advantage calculations being applicable to an attack as a whole, rather than individual or isolated pieces thereof. See United Kingdom Declarations, *supra* note 26.

when the entirety of an attack consists of a special operative acting alone, or an individual aircraft dropping bombs, that attack still meets the Article 49 definition and requires whoever plans or directs the attack to consider proportionality.⁵⁸

“Acts of violence” refer to uses of physical force, and do not include such things as military information support to operations. Thus, as used in AP I, the term “attacks” has a broad but concrete definition.⁵⁹ Individual, uncoordinated acts of violence are not considered part of an “attack.” Other than that, nothing in the language, origins, or scholarly interpretation of AP I excepts a TIC situation, a self-defense scenario involving coordinated acts of violence, or any other defensive operation from necessitating proportionality balancing and efforts to minimize collateral damage.

B. Certain Troops-in-Contact and Self-Defense Use of Force as Ostensibly Offensive

In recent conflicts, self-defense and TIC scenarios involving U.S. Forces have often been quasi-offensive in nature.⁶⁰ For example, some patrol missions in Afghanistan have been designed to draw out adversaries, thereby triggering TIC and self-defense authorities under the ROE.⁶¹ Further, the U.S. definition of self-defense includes pursuit doctrine, which could otherwise be characterized as a hasty conduct-based offensive operation.⁶² Consequently, even if the U.S. position was that proportionality balancing and attempts to minimize collateral damage are required for offensive operations only, commanders preparing for TIC and self-defense operations would need training on these subjects, because these situations blur the line between offense and defense. But such operations are often directed

⁵⁸ BOTHE, PARTSCH & SOLF, *supra* note 19, at 288.

⁵⁹ By contrast, common military maneuver doctrine associates the term with offensive operations only. *Id.* at 289.

⁶⁰ Notably, the doctrinal definition of TIC is unrelated to the offensive or defensive posture of the situation. See *supra* note 3. Prior to the issuance of the 2009–2011 tactical directives in Afghanistan, TICs commonly turned into hasty offensive operations. Telephone Interview with Captain Gilbert J. Comley, Judge Advocate, U.S. Army (Dec. 14, 2011) [hereinafter Comley Telephone Interview]. Captain Comley was deployed to Afghanistan as the Chief, Operational Law, 10th Mountain Division and Regional Command-South, from 2010 to 2011. Captain Comley’s responsibilities included developing, training, and providing guidance regarding the tactical directives and IHL as applied to CAS and IDF in TIC and self-defense situations within his unit’s area of responsibility. *Id.*

⁶¹ Interview with Major Christopher Harry, Judge Advocate, U.S. Army, in Charlottesville, Va. (Jan. 29, 2012). Major Harry was deployed to Kandahar, Afghanistan, as a Special Operations Task Force (SOTF) Judge Advocate in 2009 and 2010. During this deployment, his responsibilities included operational law advice to SOTF kinetic operations throughout southern Afghanistan and parts of western and central Afghanistan. *Id.*

⁶² The pursuit doctrine extends the right of self-defense to include “the authority to pursue and engage forces that have committed a hostile act or demonstrated hostile intent, if those forces continue to commit hostile acts or demonstrate hostile intent.” SROE, *supra* note 9, § 4.b.

by on-scene commanders at the lowest levels of leadership. That is why basic practical training on proportionality principles is important at all levels of military organizations.

V. When Is an On-Scene Commander Required to Conduct a Proportionality Balancing Test?

The responsibility under IHL to take precautions in attacks rests with those who “plan or decide” to attack.⁶³ In conventional warfare, these precautions must be decided on by commanders and staff officers at relatively high organizational levels. However, in current contingency operations, smaller units may have to plan or decide attacks—especially hasty offensive or defensive attacks— independently. The language of AP I does not limit the requirements to take precautions to minimize collateral damage, and to avoid or suspend attacks that fail the proportionality balancing test, to any specific level of command. Rather, the Article 57 obligations “apply at whatever level the regulated functions are being performed.”⁶⁴ Thus, even a squad leader planning a hasty attack must comply with CIL as expressed in Article 57(a) to spare civilians and civilian objects. Further, the obligation to cancel or suspend an attack does not rest solely with whoever planned or authorized the attack. A commander actually engaged in combat, who has authority to cancel or suspend an attack, must do so if it becomes apparent that the attack would violate the principle of proportionality. This obligation is clear from the organizational structure of Article 57, which divorces the obligation to “cancel or suspend” from the “those who plan or decide” jurisdictional language.⁶⁵

Many TIC scenarios do not require the on-scene commander to conduct a proportionality analysis. If the target is purely military in nature, with no known civilian persons or objects in jeopardy, the attack is not “expected to cause” any incidental loss to civilians and no proportionality balancing is required.⁶⁶ Likewise, when members of a formation are exercising individual self-defense as a subset of the inherent right of unit self-defense,⁶⁷ the triggering

⁶³ AP I, *supra* note 7, art. 57(2)(a).

⁶⁴ BOTHE, PARTSCH & SOLF, *supra* note 19, at 363.

⁶⁵ Additionally, the original proposed language regarding AP I, Article 57(b) expressly addressed the requirement to cancel or suspend violative attacks with “those who launch an attack.” The adopted language was instead made passive to be applicable to any commander with authority to cancel or suspend an attack. ICRC DRAFT, *supra* note 57, at 64; BOTHE, PARTSCH & SOLF, *supra* note 19, at 366.

⁶⁶ However, the commander has a continuing duty to perform proportionality balancing and cancel or suspend the attack if it subsequently becomes apparent that civilian persons or property are in jeopardy, and the expected incidental civilian loss would be excessive as defined by IHL proportionality principles. AP I, *supra* note 7, art. 57(2)(b).

⁶⁷ “Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Unless otherwise directed by a unit commander . . . , military

condition of “coordinated acts of violence” by a “specific military formation” is not met, and no balancing test is required.⁶⁸ However, when coordinated acts of violence are planned or decided at the on-scene commander level and civilian persons or objects are potentially in jeopardy, that military leader—of whatever rank—is obligated to assess (1) whether the attack is proportional, (2) what practicable measures can minimize collateral damage, (3) whether the attack has become disproportionate and should be suspended, and (4) whether circumstances permit advance warning to civilians.⁶⁹ Whether an attack is coordinated and whether it places civilians or civilian property at risk is fuzzy at the margins, as is often the case at the point of impact between IHL and a real battlefield scenario. However, directing CAS, IDF, or organic unit firepower with equivalent destructive capabilities against structures or terrain likely to contain civilians or civilian property would trigger the requirements of Article 57.⁷⁰

VI. Practical Requirements Article 57 Places on On-Scene Commanders

On-scene commanders obligated to take actions in accordance with AP I Article 57 must take “*all reasonable steps* to ensure . . . that [the] objectives may be attacked without probable losses in lives and damage to [civilian] property disproportionate to the military advantage anticipated.”⁷¹ To be reasonable, the responsible leader must be aware of the obligation and affirmatively balance the proportionality of the attack. The extent of that deliberative

members may exercise individual self-defense” SROE, *supra* note 9, § 2.a.

⁶⁸ As discussed above in Part III.B and note 50, attacks triggering the requirements of AP I, Article 57 are limited to “co-ordinated acts of violence against the adversary by a specific military formation engaged in a specific military operation, rather than . . . each act of violence of the individual combatants who are members of that formation.” BOTHE, PARTSCH & SOLF, *supra* note 19, at 288.

⁶⁹ This is so because the obligations of Article 57 apply at every level where regulated functions are performed, including the on-scene commander level. *Id.* at 636.

⁷⁰ See, e.g., 2009 Tactical Directive, *supra* note 4. Although based most directly on strategic goals in the Afghanistan counterinsurgency environment, rather than IHL obligations, the tactical directive requires

leaders *at all levels* to scrutinize and limit the use of force like close air support (CAS) against residential compounds and other locations likely to produce civilian casualties Commanders must weigh the gain of using CAS against the cost of civilian casualties, which in the long run make mission success more difficult and turn the Afghan people against us.

Id. at 1–2 (emphasis added).

⁷¹ FM 27-10, *supra* note 14, para. 41 (emphasis added). “All reasonable steps” and “all practicable precautions” are used interchangeably in the U.S. interpretation of Article 57 as an expression of CIL, as a substitute for the treaty language of “all *feasible* precautions.” See Matheson, *supra* note 11, at 426–27; AP I, *supra* note 7, art. 57(2)(a)(ii).

balancing and the factors considered on each side of the balancing equation will vary based on the combat circumstances in which the test is applied. This is because, under IHL, a commander's actions are judged based on the situation as the commander sees it—including reasonably available information—at the time of decision.⁷² At a minimum, the on-scene commander must consciously consider the potential for collateral damage in light of the military objective. In a TIC scenario, the military objective will often be preservation of the lives of friendly forces, a legitimate factor to weigh on the military advantage side of the calculus.⁷³ Time constraints and combat conditions considered, the commander should gather a reasonable amount of information to inform the decision.

If the attack is anticipated to affect the civilian population, even in a self-defense scenario the on-scene commander must positively determine whether circumstances permit advance warning of the attack. If heavily armed adversaries are being pursued into a likely civilian structure, with the number of civilian occupants unknown, circumstances may allow the engaged unit to maintain a temporary safe standoff distance, warn the civilians, and give them time to exit the building before continuing the engagement.⁷⁴ The potential gradations of such a scenario are endless, but the key requirement is that the option to warn be considered, resulting in a reasonable decision based on the information available at that time.

A. Military Advantage Side of the Proportionality Calculus

In a “true” self-defense scenario, as where a squad is pinned down by fire from an adversary taking cover in a civilian structure, the “concrete and direct military advantage” side of the calculus is no more complex than protecting the lives of servicemembers.⁷⁵ When the troops

⁷² This proposition is known as the “Rendulic Rule.” General Lothar Rendulic was found not guilty of a charge before the Nuremberg Tribunal, since the conditions, as they appeared to him at the time, were both subjectively and objectively sufficient to support the decision made, despite what was later determined to be unnecessary destruction of civilian property. 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 1296 (1951), available at http://www.loc.gov/tr/frd/Military_Law/NTs_war-criminals.html; see also Geoffrey Corn & Gary Corn, *The Law of Operational Targeting: Viewing the LOAC Through an Operational Lens*, 47 TEX. INT'L L.J. 337, 375 (2012). “Commanders must determine if use of force is proportional based on all information reasonably available at the time.” AIR FORCE OPERATIONS, *supra* note 14, at 20.

⁷³ See BOTHE, PARTSCH & SOLF, *supra* note 19, at 311.

⁷⁴ Comley Telephone Interview, *supra* note 60.

⁷⁵ See 2009 Tactical Directive, *supra* note 4, at 2. In this scenario, IHL does not forbid the commander to attack and cause collateral civilian casualties unless there are no other means available to counter the threat. However, political or strategic considerations may lead to such a requirement in counterinsurgency operations. “This directive does not prevent commanders from protecting the lives of their men and women as a matter of self-defense where it is determined no other options . . . are available to effectively counter the threat. *Id.* (emphasis added).

are not pinned down—when, for example, they are pursuing an adversary per the U.S. self-defense pursuit doctrine—the military advantage considerations for the on-scene commander will expand. These include preventing the adversaries from later reengaging friendly forces and nesting the effect of the attack within overall strategic objectives.⁷⁶ The on-scene commander's consideration of strategic objectives in a counterinsurgency environment may be as simple as recognizing that even collateral loss that is not unlawfully excessive can undermine the objective of protecting and de-radicalizing the civilian population, so that the military advantage of using force is reduced.⁷⁷

B. Expected Incidental Civilian Loss Side of the Proportionality Calculus

The information reasonably available to responsible on-scene commanders about expected civilian losses in an attack will vary greatly. However, on-scene commanders should usually be able to reference training and intelligence regarding the demographics, typical civilian patterns of life, and types of structures commonly occupied by civilians.⁷⁸ Additionally, they should be trained on the general effects of the weapons system they intend to use. In introducing its draft proposal for precautions in attack, which formed the basis for AP I Article 57, the ICRC opined that factors regarding the potential for civilian loss which should be considered include “configuration of the terrain (danger of landslide, or of ricocheting); the relative accuracy of the weapons used . . .; the specific nature of the military objectives,” time of day, and weather conditions.⁷⁹

In situations where the on-scene commander is responsible for the proportionality balancing test, time

⁷⁶ See BOTHE, PARTSCH & SOLF, *supra* note 19, at 311. Such consideration of military advantage at the strategic level by an on-scene commander during an engagement with the enemy may appear overly burdensome; however, through training and pre-mission consideration of the requirement in the context of the specific operation, extended contemplation on the objective should be unnecessary. Further, this type of strategic contemplation is already being required at all levels of leadership in Afghanistan for mission success, if not for IHL compliance purposes. See 2009 Tactical Directive, *supra* note 4, at 1–2.

⁷⁷ The tactical directive requires that while considering the advantage of use of CAS, the commander must consider that even non-excessive civilian casualties may “make mission success more difficult and turn the Afghan people against us.” *Id.* See also 2011 Tactical Directive, *supra* note 4, at 1 (noting that “every civilian casualty is a detriment to our interests”). Recent scholarship concerning proportionality balancing in the context of counterinsurgency operations proposes that when the mission is one of “providing for the safety and security of the local population,” collateral loss should be weighed as a negative on the military advantage side of the balancing test, potentially counterbalancing the weight of safety of friendly forces or destruction of the enemy. Beran, *supra* note 16, at 10.

⁷⁸ Harry, *supra* note 61.

⁷⁹ Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva 1974–1977, Summary Records 21, para. 3, accord to BOTHE, PARTSCH & SOLF, *supra* note 19, at 364.

constraints or tactical circumstances are unlikely to permit extended surveillance or technical intelligence collection to determine expected civilian losses. However, the on-scene commander should be trained on and visually assess evidence of civilian patterns of life, including the type and number of vehicles, equipment, and animals in the vicinity of a structure, and the presence of toys or women's and children's air-drying laundry.⁸⁰ Article 57 does not require the commander to know precisely the extent of civilian loss that will occur, only that reasonably available information be used to estimate expected loss.⁸¹ This information should be used by the on-scene commander both to decide what precautions may be practically taken to minimize incidental civilian loss and to weigh against the military advantage sought to determine if the attack should proceed.

Since these practical requirements flex with the specific situation under the Rendulic rule, they should never be too onerous for a properly trained on-scene commander to apply within the tactical tempo.⁸²

VII. Conclusion

The proportionality balancing test is inherently subjective, as the AP I drafters, subsequent IHL scholars, and military doctrine alike recognize. Collateral civilian loss defies mathematical comparison to a counterbalancing military advantage outside the rare "X expected collateral civilian deaths versus Y certain friendly forces deaths" scenario. Judge advocates must avoid relying on a complex and time-consuming formal, weighted formula—such as is used in collateral damage estimates for deliberate air

strikes⁸³—in teaching balancing requirements to potential on-scene commanders. Those military leaders, of whatever rank, are already expected to make complex and subjective judgment calls on the battlefield in other areas. International humanitarian law proportionality analysis simply requires similar honest, informed, subjective judgment calls. Training for small group leaders should focus on helping them apply this art to the proportionality analysis they may unexpectedly have to employ.

Informed judge advocates and commanders should bridge the training gap by focusing on what triggers an on-scene commander's IHL obligation to take precautions in attack to minimize collateral civilian loss, what constitutes a compliant proportionality balancing analysis, and what inputs that leader can expect to be able to hastily compare during an ongoing engagement to inform that analysis. Judge advocates can ensure that during LoW and ROE training they emphasize that *jus in bello* proportionality obligations apply not just to senior commanders and staff planning deliberate offensive operations through a formal collateral damage estimate process, but also apply to the on-scene commander responsible for planning or deciding to execute any coordinated acts of violence, whether offensive or defensive in nature. Senior leaders and judge advocates owe meaningful instruction to on-scene commanders, because while exact balancing is impossible and cannot be required, failure to perform a reasonable proportionality analysis during qualifying attacks violates IHL and DoD policy.

⁸⁰ Interview with Major Christopher Harry, *supra* note 61.

⁸¹ Beran indicates a belief that "lack of knowledge regarding the presence, or absence, of civilians already in [a] building [entered by Taliban insurgents] at the time of the engagement [makes] it impossible . . . to complete the required proportionality assessment . . ." Beran, *supra* note 16, at 6. However, what is required is not actual knowledge of the presence of civilians, but affirmative weighing of collateral damage based on reasonably available information. If direct observational or intelligence-based information regarding civilian presence is not available, the required proportionality assessment may still be validly completed based on whatever indirect indications of civilian persons or property are reasonably available.

⁸² Interview with Major Christopher Harry, *supra* note 61; Comley Telephone Interview, *supra* note 60.

⁸³ See generally JOINT MANUAL 3160.01, *supra* note 55.