

# Practice Relating to Rule 14.

## Proportionality in Attack

### Section A. General

**Note:** For practice concerning indiscriminate attacks, see Rules 11 to 13. For practice concerning precautions to be taken before and during attacks in order to respect the principle of proportionality, see Rules 18 and 19. For practice concerning the limitation of destruction of enemy property to what is required by the mission, see Rule 50.

#### I. Treaties

##### Additional Protocol I

Article 51(5)(b) of the 1977 Additional Protocol I prohibits

an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

*Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 8 June 1977, Article 51(5)(b). Article 51 was adopted by 77 votes in favour, one against and 16 abstentions. CDDH, Official Records, Vol. VI, CDDH/SR.41, 26 May 1977, p. 163.*

##### Additional Protocol I

Under Article 85(3)(b) of the 1977 Additional Protocol I, “launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 a) iii) is a grave breach.

*Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 8 June 1977, Article 85(3)(b). Article 85 was adopted by consensus. CDDH, Official Records, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.*

##### Additional Protocol II (draft)

Article 26(3)(b) of the draft Additional Protocol II submitted by the ICRC to the CDDH provided that it was forbidden “to launch attacks which may be expected to entail incidental losses among the civilian population and cause the destruction of civilian objects to an extent disproportionate to the direct and substantial military advantage anticipated”.

*CDDH, Official Records, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 40.*

This provision was deleted from the proposal adopted by Committee III of the CDDH.

*CDDH, Official Records, Vol. XV, CDDH/215/Rev.1, 3 February–18 April 1975, p. 321.*

##### Protocol II to the Convention on Certain Conventional Weapons

Article 3(3)(c) of the 1980 Protocol II to the Convention on Certain Conventional Weapons prohibit any placement of mines, booby-traps and other devices “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”.

*Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October 1980, Article 3(3)(c).*

##### Amended Protocol II to the Convention on Certain Conventional Weapons

Article 3(8)(c) of the 1996 Amended Protocol II to the Convention on Certain Conventional Weapons prohibit any placement of mines, booby-traps and other devices “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”.

*Protocol on Prohibitions on the Use of Mines, Booby-Traps and Other Devices, as amended, to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 3 May 1996, Article 3(8)(c).*

##### ICC Statute

Pursuant to Article 8(2)(b)(iv) of the 1998 ICC Statute, the following constitutes a war crime in international armed conflicts:

Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects ... which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

*Statute of the International Criminal Court, adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 17 July 1998, UN Doc. A/CONF.183/9, Article 8(2)(b)(iv).*

#### II. Other Instruments

Lieber Code

Article 15 of the 1863 Lieber Code states: “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.”

*Instructions for the Government of Armies of the United States in the Field, prepared by Francis Lieber, promulgated as General Order No. 100 by President Abraham Lincoln, Washington D.C., 24 April 1863, Article 15.*

Hague Rules of Air Warfare

Article 24(4) of the 1923 Hague Rules of Air Warfare states:

In the immediate neighbourhood of the operations of land forces, the bombardment of cities, towns, villages, dwellings or buildings is legitimate provided that there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population.

*Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare, Part II, drafted by a Commission of Jurists, The Hague, December 1922–February 1923, Article 24(4).*

Memorandum of Understanding on the Application of IHL between Croatia and the Socialist Federal Republic of Yugoslavia

Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the Socialist Federal Republic of Yugoslavia requires that hostilities be conducted in accordance with Article 51(5)(b) of the 1977 Additional Protocol I.

*Memorandum of Understanding on the Application of International Humanitarian Law between Croatia and the Socialist Federal Republic of Yugoslavia, Geneva, 27 November 1991, § 6.*

Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina

Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 51(5)(b) of the 1977 Additional Protocol I.

*Agreement between Representatives of Mr. Alija Izetbegović (President of the Republic of Bosnia and Herzegovina and President of the Party of Democratic Action), Representatives of Mr. Radovan Karadžić (President of the Serbian Democratic Party), and Representative of Mr. Miljenko Brkić (President of the Croatian Democratic Community), Geneva, 22 May 1992, § 2.5.*

San Remo Manual

Paragraph 46(d) of the 1994 San Remo Manual provides:

An attack shall not be launched if it may be expected to cause collateral casualties or damage which would be excessive in relation to the concrete and direct military advantage anticipated from the attack as a whole.

*Louise Doswald-Beck (ed.), San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994, Prepared by international lawyers and naval experts convened by the International Institute of Humanitarian Law, Cambridge University Press, Cambridge, 1995, § 46(d).*

ILC Draft Code of Crimes against the Peace and Security of Mankind (1996)

Pursuant to Article 20(b)(ii) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, “[l]aunching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects” constitutes a war crime.

*Draft Code of Crimes against the Peace and Security of Mankind, adopted by the International Law Commission, reprinted in Report of the International Law Commission on the work of its forty-eighth session, 6 May–26 July 1996, UN Doc. A/51/10, 1996, Article 20(b)(ii).*

UN Secretary-General’s Bulletin

Section 5.5 of the 1999 UN Secretary-General’s Bulletin provides:

The United Nations force is prohibited from launching operations ... that may be expected to cause incidental loss of life among the civilian population or damage to civilian objects that would be excessive in relation to the concrete and direct military advantage anticipated.

*Observance by United Nations Forces of International Humanitarian Law, Secretary-General’s Bulletin, UN Secretariat, UN Doc. ST/SGB/1999/13, 6 August 1999, Section 5.5.*

UNTAET Regulation No. 2000/15

The UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(iv), the following constitutes a war crime in international armed conflicts:

Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects ... which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

*Regulation on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UN Doc. UNTAET/REG/2000/15, Dili, 6 June 2000, Section 6(1)(b)(iv).*

III. Military Manuals

Argentina’s LOAC Manual (2010), which replaces the Law of War Manual (1989), states in a section titled “International law of armed conflict – Definition, purpose and principles”:

Australia

Australia’s Defence Force Manual (1994) states:

Collateral damage may be the result of military attacks. This fact is recognised by LOAC and, accordingly, it is not unlawful to cause such injury and damage. The principle of proportionality dictates that the results of such action must not be excessive in light of the military advantage anticipated from the attack.

*Australia, Manual on Law of Armed Conflict, Australian Defence Force Publication, Operations Series, ADFP 37 – Interim Edition, 1994, § 535.*

The manual further states, in the specific context of siege warfare, that “if there are noncombatants in the locality, the anticipated collateral damage must not be excessive in relation to the concrete and direct military advantage expected to result from the bombardment”.

*Australia, Manual on Law of Armed Conflict, Australian Defence Force Publication, Operations Series, ADFP 37 – Interim Edition, 1994, § 733.*

Both the Defence Force Manual and the Commanders’ Guide list “launching indiscriminate attacks that affect the civilian population or civilian objects in the knowledge that such attack will cause extensive and disproportionate loss of life, injury to civilians or damage to civilian objects” as an example of acts which constitute “grave breaches or serious war crimes likely to warrant institution of criminal proceedings”.

*Australia, Manual on Law of Armed Conflict, Australian Defence Force Publication, Operations Series, ADFP 37 – Interim Edition, 1994, § 1315(h); Law of Armed Conflict, Commanders’ Guide, Australian Defence Force Publication, Operations Series, ADFP 37 Supplement 1 – Interim Edition, 7 March 1994, § 1305(h).*

Australia

Australia’s LOAC Manual (2006) states:

5.1 ... Due regard must be paid to the principle of proportionality ...

...

5.9 Proportionality requires a commander to weigh the military value arising from the success of the operation against the possible harmful effects to protected persons and objects. There must be an acceptable relationship between the legitimate destruction of military targets and the possibility of consequent collateral damage.

...

5.30 ... Attacks on military objectives that cause incidental loss or damage to civilians are not prohibited as long as the proportionality rule is complied with ...

...

5.38 Collateral damage may be the result of military attacks. This fact is recognised by the LOAC and, accordingly, it is not unlawful to cause such injury and damage. The principle of proportionality dictates that the results of such action must not be excessive in light of the military advantage anticipated from the attack.

...

5.61 [Duties of Australian Defence Force commanders include] refraining from launching any attack which may be expected to cause collateral injury, or collateral damage, which would be excessive in relation to the concrete and direct military advantage anticipated.

*Australia, The Manual of the Law of Armed Conflict, Australian Defence Doctrine Publication 06.4, Australian Defence Headquarters, 11 May 2006, §§ 5.1, 5.9, 5.30, 5.38 and 5.61; see also §§ 2.8, 2.10, 4.2, 4.5, 4.48 and 6.26.*

The manual further states, in the context of siege warfare: “If there are non-combatants in the locality, the anticipated collateral damage must not be excessive in relation to the concrete and direct military advantage expected to result from the bombardment.”

*Australia, The Manual of the Law of Armed Conflict, Australian Defence Doctrine Publication 06.4, Australian Defence Headquarters, 11 May 2006, § 7.36.*

The manual’s Glossary defines “collateral damage” as: “Incidental damage to persons, objects or locations arising out of combat action against a legitimate military objective.”

*Australia, The Manual of the Law of Armed Conflict, Australian Defence Doctrine Publication 06.4, Australian Defence Headquarters, 11 May 2006, Glossary.*

The manual’s chapter on “Compliance” states:

[The 1977 Additional Protocol I] extends the definition of grave breaches to include the following ... acts when committed wilfully, in violation of the relevant provisions of the protocol, and causing death or serious injury to body or health:

...

– launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects.

*Australia, The Manual of the Law of Armed Conflict, Australian Defence Doctrine Publication 06.4, Australian Defence Headquarters, 11 May 2006, § 13.26.*

The LOAC Manual (2006) replaces both the Defence Force Manual (1994) and the Commanders’ Guide (1994).

Belgium

Belgium’s Law of War Manual (1983) states:

An attack against a military objective must not be launched when it is to be expected that such an attack will cause incidental loss or damage to civilians and civilian objects which would be excessive in relation to the concrete and direct military advantage expected.

*Belgium, Droit Pénal et Disciplinaire Militaire et Droit de la Guerre, Deuxième Partie, Droit de la Guerre, Ecole Royale Militaire, par J. Maes, Chargé de cours, Avocat-général près la Cour Militaire, D/1983/1187/029, 1983, p. 26; see also p. 28.*

Benin

Benin’s Military Manual (1995) requires respect for the principle of proportionality. According to the manual, “a military action is proportionate if it does not cause loss or damage to civilians which is excessive in relation to the expected overall result. This rule cannot justify unlimited destruction or attacks against civilians and civilian objects as such.”

*Benin, Le Droit de la Guerre, III fascicules, Forces Armées du Bénin, Ministère de la Défense nationale, 1995, Fascicule III, p. 14; see also Fascicule II, p. 6.*

The manual also states: “The principle of proportionality requires that needless suffering and damage be avoided. Pursuant to this principle, all forms of violence which are not indispensable to gain superiority over an enemy are prohibited.”

*Benin, Le Droit de la Guerre, III fascicules, Forces Armées du Bénin, Ministère de la Défense nationale, 1995, Fascicule III, p. 11.*

Burundi

Burundi’s Regulations on International Humanitarian Law (2007) states: “The utilization of methods and means of combat may not be excessive in relation to the direct and concrete military advantage anticipated.”

*Burundi, Règlement n° 98 sur le droit international humanitaire, Ministère de la Défense Nationale et des Anciens Combattants, Projet “Moralisation” (BDI/B-05), August 2007, Part I bis, p. 81; see also Part I bis, p. 33.*

The Regulations also states:

It is prohibited to cause suffering and destruction which are excessive in relation to the aim of the mission. The means utilized must be proportionate to the objective sought. Thus, bombarding a village because a single sniper is located there violates the principle of proportionality.

*Burundi, Règlement n° 98 sur le droit international humanitaire, Ministère de la Défense Nationale et des Anciens Combattants, Projet “Moralisation” (BDI/B-05), August 2007, Part I bis, p. 33; see also Part I bis, pp. 3, 17, 23, 26, 40, 54, 63, 86 and 93.*

The Regulations further states: “The rule of proportionality must be respected. ... The rule of proportionality does not justify unlimited destruction or attacks against civilians or civilian objects as such.”

*Burundi, Règlement n° 98 sur le droit international humanitaire, Ministère de la Défense Nationale et des Anciens Combattants, Projet “Moralisation” (BDI/B-05), August 2007, Part I bis, p. 40.*

Cameroon

Cameroon’s Instructor’s Manual (1992) states: “The rule of proportionality prohibits the launching of attacks which will cause loss or damage to civilians and civilian objects which is excessive in relation to the military advantage anticipated.”

*Cameroon, Droit international humanitaire et droit de la guerre, Manuel de l’instructeur en vigueur dans les Forces Armées, Présidence de la République, Ministère de la Défense, Etat-major des Armées, Troisième Division, Edition 1992, p. 83; see also p. 149.*

Cameroon

Cameroon’s Instructor’s Manual (2006), under the heading “Rules of Conduct Regarding Military Objectives”, states: “The rule of proportionality prohibits the launching of attacks if they will cause loss or damage to civilian populations or civilian objects which is excessive in relation to the military advantage anticipated.”

*Cameroon, Droit des conflits armés et droit international humanitaire, Manuel de l’instructeur en vigueur dans les forces de défense, Ministère de la Défense, Présidence de la République, Etat-major des Armées, 2006, p. 216, § 522.*

The manual also states: “Blind bombardments are formally prohibited just like any other disproportionate attack.”

*Cameroon, Droit des conflits armés et droit international humanitaire, Manuel de l’instructeur en vigueur dans les forces de défense, Ministère de la Défense, Présidence de la République, Etat-major des Armées, 2006, p. 59, § 251; see also p. 85, § 341, p. 230, § 542 and p. 259, § 614.*

Canada

Canada’s LOAC Manual (1999) states:

The fact that an attack on a legitimate target may cause civilian casualties or damage to civilian objects does not necessarily make the attack unlawful under the LOAC. However, such collateral civilian damage must not be disproportionate to the concrete and direct military advantage anticipated from the attack.

The proportionality test is as follows: Is the attack expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof (“collateral civilian damage”) which would be excessive in relation to the concrete and direct military advantage anticipated? If the answer is “yes”, the attack must be cancelled or suspended. The proportionality test must be used in the selection of any target.

*Canada, The Law of Armed Conflict at the Operational and Tactical Level, Office of the Judge Advocate General, 1999, pp. 4-2 and 4-3, §§ 17 and 18; see also p. 2-2, § 15, p. 6-3, § 29, p. 7-5, § 47 and p. 8-6, § 40.*

The manual also states that “launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive collateral civilian damage” constitutes a grave breach.

*Canada, The Law of Armed Conflict at the Operational and Tactical Level, Office of the Judge Advocate General, 1999, p. 16-3, § 16(b).*

Canada

Canada’s Code of Conduct (2001) explains that the principle of proportionality “imposes a duty to ensure that the collateral civilian damage created is not excessive in relation to the concrete and direct military advantage anticipated”.

*Canada, Code of Conduct for CF Personnel, Office of the Judge Advocate General, 4 June 2001, Rule 2, § 1.*

Canada

Canada’s LOAC Manual (2001) states:

This concept of humanity results in a specific prohibition against unnecessary suffering, a requirement of proportionality, and a variety of more specific rules. The concept of humanity also confirms the basic immunity of civilian populations and civilians from being objects of attack during armed conflict. This immunity of the civilian population does not preclude unavoidable incidental civilian casualties that may occur during the course of attacks against legitimate targets and that are not excessive in relation to the concrete and direct military advantage anticipated.

Canada, *The Law of Armed Conflict at the Operational and Tactical Levels*, Office of the Judge Advocate General, 13 August 2001, § 202.6.

The manual further states:

4. *Proportionality.* The principle of proportionality establishes a link between the concepts of military necessity and humanity. This principle implies that collateral civilian damage arising from military operations must not be excessive in relation to the direct and concrete military advantage anticipated from such operations.
5. In deciding whether the principle of proportionality is being respected, the standard of measurement is the anticipated contribution to the military purpose of an attack or operation considered as a whole. The anticipated military advantage must be balanced against other consequences of the action, such as the adverse effect upon civilians or civilian objects. It involves weighing the interests arising from the success of the operation on the one hand, against the possible harmful effects upon protected persons and objects on the other.
6. There must be a rational balance between the legitimate destructive effect and undesirable collateral effects. As an example, you are not allowed to bomb a refugee camp if its only military significance is that refugees in the camp are knitting socks for soldiers. As a converse example, you are not obliged to hold back an air strike on an ammunition dump simply because a farmer is ploughing a field beside it. Unfortunately, most applications of the principle of proportionality are not quite so clear cut.

Canada, *The Law of Armed Conflict at the Operational and Tactical Levels*, Office of the Judge Advocate General, 13 August 2001, § 204.4–6.

In its chapter on targeting, the manual states:

1. The fact that an attack on a legitimate target may cause civilian casualties or damage to civilian objects does not necessarily make the attack unlawful under the LOAC. However, such collateral civilian damage must not be disproportionate to the concrete and direct military advantage anticipated from the attack.
2. The proportionality test is as follows: Is the attack expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof (“collateral civilian damage”), which would be excessive in relation to the concrete and direct military advantage anticipated? If the answer is “yes”, the attack must be cancelled or suspended. The proportionality test must be used in the selection of any target.

Canada, *The Law of Armed Conflict at the Operational and Tactical Levels*, Office of the Judge Advocate General, 13 August 2001, § 413.1–2.

The manual also explains, in the context of indiscriminate attacks:

1. Indiscriminate attacks are those that may strike legitimate targets and civilians or civilian objects without distinction. They are prohibited ...
2. The following are examples of indiscriminate attacks:

...

- b. an attack which does not meet the requirements of proportionality.

Canada, *The Law of Armed Conflict at the Operational and Tactical Levels*, Office of the Judge Advocate General, 13 August 2001, § 416.1 and 2.b.

In its chapters on land warfare and naval warfare, the manual further states: “An attack expected to cause collateral civilian damage that is excessive in relation to the concrete and direct military advantage anticipated is prohibited.”

Canada, *The Law of Armed Conflict at the Operational and Tactical Levels*, Office of the Judge Advocate General, 13 August 2001, §§ 613.2 (land warfare) and 827.3 (naval warfare).

In its chapter on air warfare, the manual also states:

Air to land operations must be conducted in accordance with the principle of proportionality. This implies that collateral civilian damage must never be excessive in relation to the concrete and direct military advantage anticipated.

Canada, *The Law of Armed Conflict at the Operational and Tactical Levels*, Office of the Judge Advocate General, 13 August 2001, § 716.3.

In its chapter on “War crimes, individual criminal liability and command responsibility”, the manual provides that “launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive collateral civilian damage” constitutes a grave breach of the 1977 Additional Protocol I.

Canada, *The Law of Armed Conflict at the Operational and Tactical Levels*, Office of the Judge Advocate General, 13 August 2001, § 1608.2.b.

In its glossary, the manual defines “collateral civilian damage” as “incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, arising from the use of military force”.

Canada, *The Law of Armed Conflict at the Operational and Tactical Levels*, Office of the Judge Advocate General, 13 August 2001, Glossary, p. GL–3.

Canada

Rule 2 of Canada’s Code of Conduct (2005) instructs Canadian Forces (CF) personnel: “In accomplishing your mission, use only the necessary force that causes the least amount of collateral civilian damage.”

Canada, *Code of Conduct for CF Personnel*, Office of the Judge Advocate General, 2005, Rule 2.

The Code of Conduct further explains:

1. Rule #2 deals with the legal obligation to minimize harm to civilians and their property while carrying out your mission. It balances the needs of military necessity against the humanitarian principle that civilians should be spared the hardship of conflict. This is known as the principle of proportionality. This principle imposes a duty to ensure that the collateral civilian damage created is not excessive in relation to the concrete and direct military advantage anticipated.
- ...
4. Whenever military force is used, civilians who are not directly involved in the conflict may be hurt and their property may be damaged ... CF operations must be conducted in such a way that damage to civilians and their property is minimized. ...



5. The question whether collateral civilian damage is acceptable is often referred to in terms of proportionality. Unfortunately, there is no scientific scale of “proportionality” on which to measure the permissible amount of collateral civilian damage. International law states that force should only be used against “military objectives.” Your commanders (and in some cases you) must decide if the collateral civilian damage resulting from the use of force is excessive in light of the direct and concrete military advantage anticipated. In most cases the assessment of what is an acceptable level of damage boils down to common sense. For example, the complete destruction of a town in order to eliminate a small pocket of opposing forces would be seen as unacceptable. In that case, the collateral civilian damage (numerous civilian casualties and widespread destruction of civilian property) would be excessive in light of the military advantage anticipated. Depending upon the goal of the mission and the accuracy or destructiveness of certain weapons systems, commanders may limit the types of weapons subordinates may use, or restrict the circumstances under which those weapons can be employed. Such restrictions are often found in the ROE [rules of engagement]. These restrictions are put in place to ensure that decisions with respect to the use of force made at the local level do not interfere with the overall goals of the military mission. Achieving your own local objective by any means, regardless of the consequences, cannot be allowed to place the overall mission at risk. The actions of each individual CF member must fit within the overall plan and goals of the mission, including the commander’s direction on the use of force.

*Canada, Code of Conduct for CF Personnel, Office of the Judge Advocate General, 2005, Rule 1, §§ 1, 4 and 5.*

Canada

Canada’s Use of Force Manual (2008) states:

*Section I – General*

*101. Introduction*

1. ... The Canadian government, military commanders and all members of the CF [Canadian Forces] are subject to national and international laws. Both national and international law require that any use of force by the CF must be controlled and limited to the extent that is proportional or reasonable and necessary to achieve legitimate military objectives.

...

*Section II – Legal foundations*

...

*104. International law*

...

5. *LOAC.* The LOAC [law of armed conflict] was designed primarily for international armed conflicts (i.e., conflicts between states), though it has more recently developed rules for non-international armed conflicts (i.e., civil wars). ...

6. ... The LOAC ... permits attacks that will result in the unintended death or wounding of innocent civilians, provided that these individuals are not the object of the attack, if the casualties suffered by them are incidental to an attack against a legitimate military objective, and that such incidental injuries or loss of life are proportional to the military objective sought.

7. As a matter of law, the LOAC applies to the conduct of CF operations whenever Canada is a party to an armed conflict. Armed conflict could be generally defined as the resort to the use of armed force between states (international armed conflict) or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state (non-international armed conflict).

...

*Section IV – Principles and rules governing the use of force*

...

*112. Principles and rules governing the use of force that directly relates to the conduct of an armed conflict*

...

4. *Proportionality.* Planners and commanders must refrain from launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

*Canada, Use of Force for CF Operations, Canadian Forces Joint Publication, Chief of the Defence Staff, B-GJ-005-501/FP-001, August 2008, §§ 101.1, 104.5–104.7 and 112.4.*

In its Glossary, the manual defines “proportionality” as follows: “The use of no more force than is reasonable and necessary for the proposed military task so as to avoid incidental loss of life, injury, damage to property, or combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

*Canada, Use of Force for CF Operations, Canadian Forces Joint Publication, Chief of the Defence Staff, B-GJ-005-501/FP-001, August 2008, Glossary, p. GL-4.*

Central African Republic

The Central African Republic’s Instructor’s Manual (1999) states in Volume 1 (Basic and team leader instruction): “Combatants must: ... limit destruction to the necessities of the mission.”

*Central African Republic, Le Droit de la Guerre, Fascicule No. 1: Formation élémentaire toutes armés (FETA), formation commune de base (FCB), certificat d’aptitude technique No. 1 (Chef d’équipe), Ministère de la Défense, Forces Armées Centrafricaines, 1999, Chapter III, Section IV; see also Le Droit de la Guerre, Fascicule No. 2: Formation pour l’obtention du certificat technique No. 2 (Chef de Groupe), du certificat Inter-Armé (CIA), du certificat d’aptitude de Chef de Patrouille (CACP), Ministère de la Défense, Forces Armées Centrafricaines, 1999, Chapter II, Section 1.2; see also Le Droit de la Guerre, Fascicule No. 3: Formation pour l’obtention du Brevet d’Armes No. 1, du Brevet d’Armes No. 2 et le stage d’Officier de Police Judiciaire (OPJ), Ministère de la Défense, Forces Armées Centrafricaines, 1999, Chapter V, Section II, § 3.*

In Volume 2 (Instruction for group and patrol leaders), the manual states: “Inspired by a feeling of humanity, ... [IHL’s] underlying principle is that the warring parties may not inflict on their adversary suffering that is not proportional to the purpose of war, which is to destroy or weaken the enemy.”

*Central African Republic, Le Droit de la Guerre, Fascicule No. 2: Formation pour l’obtention du certificat technique No. 2 (Chef de Groupe), du certificat Inter-Armé (CIA), du certificat d’aptitude de Chef de Patrouille (CACP), Ministère de la Défense, Forces Armées Centrafricaines, 1999, Chapter II, Section 1.2; see also Le Droit de la Guerre, Fascicule No. 3:*

*Formation pour l’obtention du Brevet d’Armes No. 1, du Brevet d’Armes No. 2 et le stage d’Officier de Police Judiciaire (OPJ), Ministère de la Défense, Forces Armées Centrafricaines, 1999, Chapter I, Introduction.*

Also in Volume 2, the manual states:

Precautions must be taken to reduce civilian losses and damage to a minimum. These precautions include respect for the rule of proportionality. A military action is proportionate if it does not cause excessive loss of civilian life or damage to civilian objects in relation to the expected overall result. This rule cannot justify unlimited destruction or attacks against civilians and civilian objects as such.

*Central African Republic, Le Droit de la Guerre, Fascicule No. 2: Formation pour l’obtention du certificat technique No. 2 (Chef de Groupe), du certificat Inter-Armé (CIA), du certificat d’aptitude de Chef de Patrouille (CACP) , Ministère de la Défense, Forces Armées Centrafricaines, 1999, Chapter II, Section 1.2; see also Le Droit de la Guerre, Fascicule No. 3: Formation pour l’obtention du Brevet d’Armes No. 1, du Brevet d’Armes No. 2 et le stage d’Officier de Police Judiciaire (OPJ), Ministère de la Défense, Forces Armées Centrafricaines, 1999, Chapter II, Section I, § 1.1.*

In Volume 3 (Instruction for non-commissioned officers studying for the level 1 and 2 certificates and for future officers of the criminal police), the manual states: “The conduct of hostilities is subject to the following constraints: ... the principle of proportionality requires that needless suffering and damage be avoided. It therefore prohibits any form of violence which is not indispensable for gaining superiority over an enemy.”

*Central African Republic, Le Droit de la Guerre, Fascicule No. 3: Formation pour l’obtention du Brevet d’Armes No. 1, du Brevet d’Armes No. 2 et le stage d’Officier de Police Judiciaire (OPJ), Ministère de la Défense, Forces Armées Centrafricaines, 1999, Chapter III, Section 1.*

Also in Volume 3, the manual states: “The rule of proportionality must be respected at all times.”

*Central African Republic, Le Droit de la Guerre, Fascicule No. 3: Formation pour l’obtention du Brevet d’Armes No. 1, du Brevet d’Armes No. 2 et le stage d’Officier de Police Judiciaire (OPJ), Ministère de la Défense, Forces Armées Centrafricaines, 1999, Chapter III, Section 2.*

## Colombia

Colombia’s Instructors’ Manual (1999) prohibits the disproportionate use of force. The manual states: “In time of war, the principle of proportionality must be observed. This principle means that the degree of force, the weapons used and the actions taken must be proportionate to the seriousness of the situation.”

*Colombia, Derechos Humanos & Derecho Internacional Humanitario – Manual de Instrucción de la Guía de Conducta para el Soldado e Infante de Marina, Ministerio de Defensa Nacional, Oficina de Derechos Humanos, Fuerzas Militares de Colombia, Santafé de Bogotá, 1999, p. 19; see also p. 20.*

## Côte d’Ivoire

Côte d’Ivoire’s Teaching Manual (2007) provides in Book I (Basic instruction):

II.2 *Principles of the Law of War*

The Law of War is based on three fundamental principles:

- The principle of distinction;
- The principle of limitation;
- The principle of proportionality.

...

The *principle of proportionality* demands the fulfilment of one’s mission without causing unnecessary damage. It entails the adaptation of the means of combat to the military result anticipated. Recourse to excessive force is a **flagrant violation of international humanitarian law**.

*Côte d’Ivoire, Droit de la guerre, Manuel d’instruction, Livre I: Instruction de base, Ministère de la Défense, Forces Armées Nationales, November 2007, pp. 14 and 16.*

In Book III, Volume 1 (Instruction of first-year trainee officers), the Teaching Manual provides:

II. *The fundamental principles of IHL*

Just as military operations are based on principles concerning attack, defence, withdrawal, etc., the law of armed conflicts contains a set of well-defined principles. These concrete principles reflect the realities of conflicts. They represent a balance between the principle of humanity and military necessity, and they are valid at all times, in all places, and in all circumstances. It is essential that these rules are known by all combatants. They must permanently be taken into consideration in every activity of assessment, planning, and military training or operation. The following principles can be found throughout the texts of the law of armed conflicts.

...

II.2. *Proportionality*

When military objectives are attacked, civilians and civilian objects must to the greatest extent practicable be protected against any incidental or collateral damage. Incidental damage caused must not be excessive in relation to the operation’s direct and concrete military advantage anticipated. Excessive recourse to force constitutes a **flagrant violation of the law of armed conflicts**.

Here we are addressing fundamental military demands, especially for commanders. Avoiding an infringement of this principle requires constant reflection and effort. Deficiencies in the area of preparation, intelligence or command can easily lead to the destruction of a town or village with its hospitals, religious buildings and its civilian population.

*Côte d’Ivoire, Droit de la guerre, Manuel d’instruction, Livre III, Tome 1: Instruction de l’élève officier d’active de 1ère année, Manuel de l’élève, Ministère de la Défense, Forces Armées Nationales, November 2007, pp. 12–13; see also Droit de la guerre, Manuel d’instruction, Livre III, Tome 2: Instruction de l’élève officier d’active de 2ème année, Manuel de l’instructeur, Ministère de la Défense, Forces Armées Nationales, November 2007, pp. 13–14; Droit de la guerre, Manuel d’instruction, Livre IV: Instruction du chef de section et du commandant de compagnie, Manuel de l’élève, Ministère de la Défense, Forces Armées Nationales, November 2007, p. 13.*

In Book IV (Instruction of heads of division and company commanders), the Teaching Manual provides:

The fact that an attack launched against a legitimate objective can cause losses among civilians or damage to civilian objects does not necessarily render the attack illegitimate in the sense of the LOAC. However, these

collateral damages must not be excessive in relation to the concrete and direct military advantage anticipated at the moment of the attack.  
*Côte d’Ivoire, Droit de la guerre, Manuel d’instruction, Livre IV: Instruction du chef de section et du commandant de compagnie, Manuel de l’élève, Ministère de la Défense, Forces Armées Nationales, November 2007, p. 28; see also p. 50.*

Croatia

Croatia’s LOAC Compendium (1991) considers a military action to be proportionate “when it does not cause collateral civilian casualties and excessive damage in relation to the expected military advantage of the operation”.

*Croatia, Compendium “Law of Armed Conflicts”, Republic of Croatia, Ministry of Defence, 1991, p. 38.*

Djibouti

Djibouti’s Manual on International Humanitarian Law (2004) states that IHL “has several principles [one of which is] ... proportionality: the damage caused to the civilian population and civilian objects may not be excessive in relation to the direct advantage anticipated from the military operation”.

*Djibouti, Manuel sur le droit international humanitaire et les droits de l’homme applicables au travail du policier, Ministère de l’Intérieur, Direction Générale de la Police, 2004, p. 11.*

Ecuador

Ecuador’s Naval Manual (1989) states: “Loss of civilian life, injury to civilians or damage to civilian objects, incidental to an attack upon a legitimate military objective, are not illegal. Such injury or collateral damage must not, however, be excessive in light of the military advantage anticipated by the attack.”

*Ecuador, Aspectos Importantes del Derecho Internacional Marítimo que Deben Tener Presente los Comandantes de los Buques, Academia de Guerra Naval, 1989, § 8.1.2.1.*

The manual further specifies: “A weapon is not indiscriminate simply because it may cause incidental or collateral civilian casualties, provided such casualties are not foreseeably excessive in light of the expected military advantage to be gained.”

*Ecuador, Aspectos Importantes del Derecho Internacional Marítimo que Deben Tener Presente los Comandantes de los Buques, Academia de Guerra Naval, 1989, § 9.1.2.*

France

France’s LOAC Teaching Note (2000) provides that the action of both commanders and combatants must be guided by respect for the fundamental principle of proportionality.

*France, Fiche didactique relative au droit des conflits armés, Directive of the Ministry of Defence, 4 January 2000, annexed to the Directive No. 147 of the Ministry of Defence of 4 January 2000, p. 2.*

France

France’s LOAC Manual (2001) states that the principle of proportionality requires that no attack must be launched,

which may be expected to cause incidental loss of civilian lives, injuries to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. The application of this principle raises the question of the balance between the means used and the desired military effect. The application of the principle of proportionality does not exclude that collateral damage may be suffered by the civilian population or civilian objects provided they are not excessive in relation to the concrete and direct military advantage anticipated.

*France, Manuel de droit des conflits armés, Ministère de la Défense, Direction des Affaires Juridiques, Sous-Direction du droit international humanitaire et du droit européen, Bureau du droit des conflits armés, 2001, pp. 13–14.*

Germany

Germany’s Military Manual (1996) states: “Attacks on military objects shall not cause any loss of civilian life that would be excessive in relation to the concrete and direct military advantage anticipated.”

*Germany, Humanitarian Law in Armed Conflicts – Manual, DSK VV207320067, edited by The Federal Ministry of Defence of the Federal Republic of Germany, VR II 3, August 1992, English translation of ZDv 15/2, Humanitäres Völkerrecht in bewaffneten Konflikten – Handbuch, August 1992, § 509.*

Germany

According to Germany’s IHL Manual (1996), “attacks against the civilian population, including launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attacks will cause excessive loss of life, injury to civilians or damage to civilian objects” are war crimes.

*Germany, ZDv 15/1, Humanitäres Völkerrecht in bewaffneten Konflikten – Grundsätze, DSK VV230120023, Bundesministerium der Verteidigung, June 1996, § 404.*

Germany

Germany’s Soldiers’ Manual (2006) states: “Military objectives may not be fought if loss of civilian life and/or damage to civilian objects is excessive in relation to the military advantage to be anticipated.”

*Germany, Druckschrift Einsatz Nr. 03, Humanitäres Völkerrecht in bewaffneten Konflikten – Grundsätze, Erarbeitet nach ZDv 15/2, Humanitäres Völkerrecht in bewaffneten Konflikten – Handbuch, DSK SFO09320187, Bundesministerium der Verteidigung, R II 3, August 2006, p. 3.*

Greece

The Hellenic Navy’s International Law Manual (1995) provides:

In cases where a naval operation is expected to achieve a military advantage causing incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, if the level of damage can be



considered as excessive in relation to the advantage anticipated, then this naval operation should be called off.  
*Greece, International Law Manual, Hellenic Navy General Staff, Directorate A2, Division IV, 1995, Chapter 7, Part I, § 2(c).*

Guinea

Guinea’s Soldier’s Manual (2010), under the heading “Principles of law of war”, states:  
The law of [w]ar rests on three fundamental principles:

- ...
3. Principle of proportionality
- ...
- Principle of proportionality requires to complete one’s mission without causing unnecessary damage.  
*Guinea, Soldier’s Manual, Ministry of National Defence, 2010, p. 2.*

Hungary

Hungary’s Military Manual (1992) considers a military action to be proportionate “when it does not cause collateral civilian casualties and excessive damage in relation to the expected military advantage of the operation”.  
*Hungary, A Hadijog, Jegyzet a Katonai, Főiskolák Hallgatói Részére, Magyar Honvédség Szolnoki Repülőtiszti Főiskola, 1992, p. 62.*

Indonesia

Indonesia’s Directive on Human Rights in Irian Jaya and Maluku (1995) states:  
The use of force should be proportionate, meaning there should be a balance between military necessity and humanity. Force must only be used in accordance with the objectives of the task or the achievement of the target.  
*Indonesia, Directive concerning Human Rights, issued by the Commander of the Regional Military Command of Irian Jaya and Maluku, 1995, § 7(d) and (e).*

Israel

With reference to Israel’s Law of War Booklet (1997), the Report on the Practice of Israel states: “The IDF [Israel Defense Forces] would not attack a target in cases in which it is expected that the attack would cause civilian loss, injury or damage excessive in relation to the military advantage anticipated.”  
*Report on the Practice of Israel, 1997, Chapter 1.5, referring to Conduct in the Battlefield in Accordance with the Law of War, Israel Defense Forces, 1986, pp. 4–5.*

Israel

Israel’s Manual on the Laws of War (1998) states:  
Even when it is not possible to isolate the civilians from an assault and there is no other recourse but to attack, this does not constitute a green light to inflict unbridled harm on civilians. The commander is required to refrain from an attack that is expected to inflict harm on the civilian population that is disproportionate to the expected military gain.  
*Israel, Laws of War in the Battlefield, Manual, Military Advocate General Headquarters, Military School, 1998, p. 40.*

Israel

Israel’s Manual on the Rules of Warfare (2006) states:  
In any attack, it is a duty to ensure that:  
...  
– That the military gain expected from the attack is proportional to the expected damage that would be caused to civilians as a result of the offensive.  
*Israel, Rules of Warfare on the Battlefield, Military Advocate-General’s Corps Command, IDF School of Military Law, Second Edition, 2006, p. 26.*

The manual further states: “Proportionality must be maintained: an act must not be performed if the damage to civilians/the environment exceeds the concomitant military benefit.”  
*Israel, Rules of Warfare on the Battlefield, Military Advocate-General’s Corps Command, IDF School of Military Law, Second Edition, 2006, p. 49.*

The Manual on the Rules of Warfare (2006) is a second edition of the Manual on the Laws of War (1998).

Kenya

Kenya’s LOAC Manual (1997) states that one of the main principles which places constraints on the conduct of hostilities is “the principle of proportionality which calls for the avoidance of unnecessary suffering and damage and therefore prohibits all forms of violence not indispensable for the overpowering of the enemy”.  
*Kenya, Law of Armed Conflict, Military Basic Course (ORS), 4 Précis, The School of Military Police, 1997, Précis No. 4, p. 1; see also Précis No. 4, p. 9.*

Madagascar

Madagascar’s Military Manual (1994) states: “The rule of proportionality must be respected so that civilian losses are not excessive in relation to the expected military advantage.”  
*Madagascar, Le Droit des Conflits Armés, Ministère des Forces Armées, August 1994, Fiche No. 5–SO, § A.*

Mexico

Mexico’s IHL Guidelines (2009) states: “*Proportionality*. The use of methods and means of warfare must not be excessive in relation to the military advantage anticipated.”  
*Mexico, Cartilla de Derecho Internacional Humanitario, Ministry of National Defence, 2009, § 11.*

Netherlands

The Military Manual (1993) of the Netherlands states:  
During an attack on a military objective, the collateral damage (loss of civilian life and damage to civilian objects) may not be excessive in relation to the military advantage anticipated from the attack. In every combat action, therefore, the commander must assess whether the action is to take place in the proximity of civilians or civilian objects.  
*Netherlands, Toepassing Humanitair Oorlogsrecht, Voorschrift No. 27-412/1, Koninklijke Landmacht, Ministerie van Defensie, 1993, p. V-5.*

Netherlands

The Military Manual (2005) of the Netherlands states that “the humanitarian law of war” limits “military force in order to avoid ... unnecessary suffering”.  
*Netherlands, Humanitair Oorlogsrecht: Handleiding, Voorschrift No. 27-412, Koninklijke Landmacht, Militair Juridische Dienst, 2005, § 0118.*

The manual lists “proportionality and subsidiarity” as one of five “generally accepted principles of the humanitarian law of war”.  
*Netherlands, Humanitair Oorlogsrecht: Handleiding, Voorschrift No. 27-412, Koninklijke Landmacht, Militair Juridische Dienst, 2005, §§ 0221 and 0223; see also § 1028.*

The manual further states:  
Collateral damage and degree of force used must not be excessive in relation to the expected military advantage. This is known as the principle of *proportionality*. Proportionality implies that no more force may be used than is strictly necessary to achieve the set purpose. Moreover, no more force must be used than necessary to defeat the enemy. The principle of *subsidiarity* requires a commanding officer, when choosing from a number of means, to choose that which causes the least collateral damage. The principles of proportionality and subsidiarity are developed further in Chapter 5 (points 0541 ff.) and elsewhere.  
During the Second Gulf War, the Iraqi military had placed aircraft in hangars in residential districts. To destroy these aircraft from the air, by indiscriminate bombing, would not have been proportionate. In any case, since the aircraft were in hangars in residential districts, they posed no direct threat, and indiscriminate bombing would undoubtedly have caused (severe) collateral damage to civilian property.  
*Netherlands, Humanitair Oorlogsrecht: Handleiding, Voorschrift No. 27-412, Koninklijke Landmacht, Militair Juridische Dienst, 2005, § 0229 and p. 33.*  
[emphasis in original]

In its chapter on behaviour in battle, the manual states that “disproportionate damage to civilian objects and the civilian population caused by attacking military targets must be limited”.  
*Netherlands, Humanitair Oorlogsrecht: Handleiding, Voorschrift No. 27-412, Koninklijke Landmacht, Militair Juridische Dienst, 2005, § 0504.*

The manual also states:  
0516. The following attacks are also considered indiscriminate:  
...  
- attacks which may be expected to strike the civilian population excessively hard. AP I [1977 Additional Protocol I] describes these as attacks that may be expected to cause collateral loss of life among civilians, damage to civilian objects on a scale that is excessive in relation to the military advantage anticipated.  
0517. Put more simply, in an attack on a military objective, the collateral damage (loss of life among the civilian population and damage to civilian objects) must not be disproportionate to the military advantage to be gained by the attack on the military objective. The commanding officer must therefore weigh up, when an action is contemplated near civilians or civilian objects, whether it should take place (proportionality).  
*Netherlands, Humanitair Oorlogsrecht: Handleiding, Voorschrift No. 27-412, Koninklijke Landmacht, Militair Juridische Dienst, 2005, §§ 0516-0517.*

In addition, the manual states: “An attack should not be carried out if it can be expected to cause collateral damage to cultural property on a scale out of proportion to the expected military advantage.”  
*Netherlands, Humanitair Oorlogsrecht: Handleiding, Voorschrift No. 27-412, Koninklijke Landmacht, Militair Juridische Dienst, 2005, § 0529.*

In its chapter on non-international armed conflict, the manual states: “In attacks, the basic principle of proportionality must be central. This imposes an obligation to avoid excessive damage with regard to the civilian population and civilian objects.”  
*Netherlands, Humanitair Oorlogsrecht: Handleiding, Voorschrift No. 27-412, Koninklijke Landmacht, Militair Juridische Dienst, 2005, § 1035; see also § 1046.*

In that same chapter, the manual further states: “Military operations in which civilians or civilian objects may be affected must be carried out with due regard for the principle of proportionality.”  
*Netherlands, Humanitair Oorlogsrecht: Handleiding, Voorschrift No. 27-412, Koninklijke Landmacht, Militair Juridische Dienst, 2005, § 1054.*

In its chapter on peace operations, under the heading “Code of Conduct for the Armed Forces”, the manual states: “Members of the armed forces may be ordered to use force, but must refrain from using it unnecessarily or to excess.”  
*Netherlands, Humanitair Oorlogsrecht: Handleiding, Voorschrift No. 27-412, Koninklijke Landmacht, Militair Juridische Dienst, 2005, p. 198.*

In this chapter, the manual further states:

The RoE [Rules of Engagement] describe the way in which a peace force may use force (and actions classifiable as provocative) and the means to be used to this end. The RoE are based on the principles of proportionality and subsidiarity in the use of force: use no more force than necessary to achieve the purpose, and ensure that no less invasive alternatives are available.

*Netherlands, Humanitair Oorlogsrecht: Handleiding, Voorschrift No. 27-412, Koninklijke Landmacht, Militair Juridische Dienst, 2005, § 1218.*

In addition, the manual provides: “The use of force to protect goods is (also) always conditional on the principles of legality, necessity and proportionality (often called use of minimum force).”

*Netherlands, Humanitair Oorlogsrecht: Handleiding, Voorschrift No. 27-412, Koninklijke Landmacht, Militair Juridische Dienst, 2005, § 1220.*

New Zealand

New Zealand’s Military Manual (1992) states: “As a general rule, an attack is not to be carried out if it would result in collateral civilian casualties clearly disproportionate to the expected military advantage.”

*New Zealand, Interim Law of Armed Conflict Manual, DM 112, New Zealand Defence Force, Headquarters, Directorate of Legal Services, Wellington, November 1992, §§ 517(2) and 630(2).*

The manual considers:

The principle of proportionality establishes a link between the concepts of military necessity and humanity. This means that the commander is not allowed to cause damage to non-combatants which is disproportionate to military need ... It involves weighing the interests arising from the success of the operation on the one hand, against the possible harmful effects upon protected persons and objects on the other. That is, there must be an acceptable relation between the legitimate destructive effect and the undesirable collateral effects.

*New Zealand, Interim Law of Armed Conflict Manual, DM 112, New Zealand Defence Force, Headquarters, Directorate of Legal Services, Wellington, November 1992, § 207.*

The manual also states that “launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects” constitutes a grave breach.

*New Zealand, Interim Law of Armed Conflict Manual, DM 112, New Zealand Defence Force, Headquarters, Directorate of Legal Services, Wellington, November 1992, § 1703(3).*

Nigeria

Nigeria’s Military Manual (1994) states:

Every commander has ... to respect the rule of proportionality, i.e. the use of proportional military force so as to avoid causing incidental civilian casualties and damage which is excessive in relation to the value of the expected result of the whole operation.

*Nigeria, International Humanitarian Law (IHL), Directorate of Legal Services, Nigerian Army, 1994, p. 42, § 11.*

Nigeria

Nigeria’s Manual on the Laws of War states: “In any case of attack or bombardment of a defended locality, the killing and destruction must be proportionate to the military advantage sought.”

*Nigeria, The Laws of War, by Lt. Col. L. Ode PSC, Nigerian Army, Lagos, undated, § 13.*

Peru

Peru’s IHL Manual (2004) states: “The Principle of Proportionality establishes that the use of methods and means of warfare must not be excessive in relation to the concrete and direct military advantage anticipated.”

*Peru, Manual de Derecho Internacional Humanitario para las Fuerzas Armadas, Resolución Ministerial Nº 1394-2004-DE/CCFFAA/CDIH-FFAA, Lima, 1 December 2004, § 21; see also §§ 29.i.(1) and 75.c.*

The manual further states: “The rule of proportionality must be respected. According to this rule, all unnecessary suffering and damage must be avoided. It also prohibits all forms of violence that are not absolutely necessary to make the enemy submit.”

*Peru, Manual de Derecho Internacional Humanitario para las Fuerzas Armadas, Resolución Ministerial Nº 1394-2004-DE/CCFFAA/CDIH-FFAA, Lima, 1 December 2004, § 27.a.(4).*

The manual also states: “Attacks are considered to be indiscriminate ... if they violate the rule of proportionality.”

*Peru, Manual de Derecho Internacional Humanitario para las Fuerzas Armadas, Resolución Ministerial Nº 1394-2004-DE/CCFFAA/CDIH-FFAA, Lima, 1 December 2004, § 29.j.*

The manual further states:

In the immediate vicinity of the operations of the land forces, the bombardment of cities, towns, villages, habitations and buildings is legitimate, provided there is a reasonable presumption that the military concentration is important enough to justify the bombardment, taking into account the danger to which the civil population will be exposed.

*Peru, Manual de Derecho Internacional Humanitario para las Fuerzas Armadas, Resolución Ministerial Nº 1394-2004-DE/CCFFAA/CDIH-FFAA, Lima, 1 December 2004, § 172.f.*

Peru

Peru’s IHL and Human Rights Manual (2010) states: “The Principle of Proportionality establishes that the use of methods and means of warfare must not be excessive in relation to the concrete and direct military advantage anticipated.”

*Peru, Manual de Derecho Internacional Humanitario y Derechos Humanos para las Fuerzas Armadas, Resolución Ministerial No. 049-2010/DE/VPD, Lima, 21 May 2010, § 22 p. 224.*

The manual also states: “The rule of proportionality must be respected, according to which unnecessary suffering and damage must be avoided. It also prohibits all forms of

violence that are not absolutely necessary to make the enemy submit.”

Peru, *Manual de Derecho Internacional Humanitario y Derechos Humanos para las Fuerzas Armadas*, Resolución Ministerial No. 049-2010/DE/VPD, Lima, 21 May 2010, § 28(4), p. 237.

In its Glossary of Terms, the manual also states: “*Proportionality*. The term defines the principle designed to limit the harm caused by military operations. Proportionality requires that the effect of the means and methods of warfare employed not be disproportionate in relation to the military advantage sought.”

Peru, *Manual de Derecho Internacional Humanitario y Derechos Humanos para las Fuerzas Armadas*, Resolución Ministerial No. 049-2010/DE/VPD, Lima, 21 May 2010, p. 419.

In a section entitled “Armed conflicts and the right to legitimate defence”, the manual further states:

The principles of Military Necessity and Proportionality apply to all armed conflicts and require that the use of force by the State, if not prohibited in any other way by International Humanitarian Law, does not exceed in terms of intensity or in terms of the means employed what is necessary to repel an armed attack against the State and to re-establish its security.

Peru, *Manual de Derecho Internacional Humanitario y Derechos Humanos para las Fuerzas Armadas*, Resolución Ministerial No. 049-2010/DE/VPD, Lima, 21 May 2010, § 11(b), p. 304; see also § 114(b), p. 305.

Philippines

The Philippines’ Joint Circular on Adherence to IHL and Human Rights (1991) states: “When the use of armed force is inevitable, strict controls must be exercised to insure that only reasonable force necessary for mission accomplishment shall be taken.”

Philippines, *Implementation Guidelines for Presidential Memorandum Order No. 393, dated 9 September 1991, Directing the Armed Forces of the Philippines and the Philippines National Police to Reaffirm their Adherence to the Principles of Humanitarian Law and Human Rights in the Conduct of Security/Police Operations*, Joint Circular Number 2-91, Department of National Defense, Department of Interior and Local Government, 1991, § 2(a)(2).

Philippines

The Philippines’ Air Power Manual (2000) provides:

1-6.3. The 1949 Geneva Convention includes the doctrine of proportionality – a concept which provides foundation for LOAC. It states that nations are to refrain from attacks that may be expected to cause corresponding damage which is excessive in relation to the concrete and direct military advantage anticipated. It deals with the relationship between people likely to be affected by war and its military objectives. It also embodies the protection of the various classes of people affected by the hostilities.

1-6.4. However, LOAC should not serve as an obstacle in the conduct of operations. In fact, the law recognizes the belief that the destruction of vital targets, especially if it shortens the conflict, has its long term humane effects. The chief unifying principle always applies – that the importance of the military mission (military necessity) determines, as a matter of balanced judgment (proportionality), the extent of permissible collateral or incidental injury to [an] otherwise protected person or object.

1-6.5. In addition to the conventions, Additional Protocols are incorporated which deal with people and their claim to protection under defined circumstances, such as medical and religious personnel. Additional Protocol One includes international conflicts and wars of national liberation. In effect, it defines the protection of the civilian population in times of international conflict.

1-6.6. Additional Protocol Two defines two things: limitations in the conduct of operations and principles relating to the protection of civilians in a non-international conflict. Thus, every combatant should understand the consequences of this Protocol.

Philippines, *Air Power Manual*, Philippine Air Force, Headquarters, Office of Special Studies, May 2000, §§ 1-6.3.–1-6.6.

Philippines

The Philippines’ AFP Standing Rules of Engagement (2005) states:

8. *General Rules for the Correct Use of Force towards Mission Accomplishment*

...

b. The use of force to accomplish authorized missions should be reasonable in intensity, duration and magnitude.

...

9. *General Rules for Self-Defense*

...

b. Action in Self-Defense

1) Means of Self-Defense. All necessary means available and all appropriate actions may be used in self-defense. The following guidelines apply for individual and unit self-defense:

a) Attempt to De-escalate the Situation. When time and circumstances permit, the hostile force should be warned and given the opportunity to withdraw or cease the threatening actions.

b) Use of Proportionate Force ... may include non-lethal weapons to control the situation ... [T]he 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 AFP [Armed Forces of the Philippines] forces or other protected personnel or property.

Philippines, *AFP Standing Rules of Engagement*, Armed Forces of the Philippines, General Headquarters, Office of the Chief of Staff, 1 December 2005, §§ 8(b) and 9(b)(1)(a)–(b); see also § 9(a)(4).

Russian Federation

The Russian Federation’s Regulations on the Application of IHL (2001) states:

The prohibited methods of warfare include ... launching indiscriminate attacks including attacks against objects (targets) which may cause losses among the civilian population and damage to civilian objects which would be excessive in relation to the anticipated military advantage.

*Russian Federation, Regulations on the Application of International Humanitarian Law by the Armed Forces of the Russian Federation, Ministry of Defence of the Russian Federation, Moscow, 8 August 2001, § 7; see also § 26.*

The Regulations further states: “Indiscriminate attacks are ... attacks which would result in violation of the principle of proportionality.”

*Russian Federation, Regulations on the Application of International Humanitarian Law by the Armed Forces of the Russian Federation, Ministry of Defence of the Russian Federation, Moscow, 8 August 2001, § 54.*

Russian Federation

The Russian Federation’s Combat Manual (2005) states that “causing severe suffering or damage, which is excessive for the achievement of a military objective is prohibited”.

*Russian Federation, Combat Manual on the Preparation and Conducting of Combined-Arms Battles (Boevoi ustav po podgotovke i vedeniu obshevoiskovogo boya), Part 3, Platoon, Subdivision, Tank, endorsed by Order of the Commander-in-Chief of the Ground Forces No. 19, 24 February 2005, § 24.*

Sierra Leone

Sierra Leone’s Instructor Manual (2007) states:

*III Proportionality*

This seeks to balance the sometimes conflicting interests of military necessity with the requirements of humanity. It requires that a soldier, in carrying out his mission, does so without causing excessive damage to the civilian population or civilian objects.

It therefore requires an assessment of likely casualties, both military and civilian, and damage compared with the specific military advantage expected from the attack. For example, an attack on a military objective with few enemies located in a densely populated area should not be carried out if the probable damage to civilians is likely to exceed the military advantage to be gained from the attack.

... The aim is to avoid or at the very least minimize collateral damage.

*Sierra Leone, The Law of Armed Conflict. Instructor Manual for the Republic of Sierra Leone Armed Forces (RSLAF), Armed Forces Education Centre, September 2007, p. 20; see also p. 34.*

[emphasis in original]

South Africa

South Africa’s LOAC Manual (1996) lists the principle of proportionality among the general principles of the law of armed conflict. It states: “The loss of life and damage to property caused by military action must not be disproportionate to the military advantage to be gained.”

*South Africa, Presentation on the South African Approach to International Humanitarian Law, Appendix A, Chapter 4: International Humanitarian Law (The Law of Armed Conflict), National Defence Force, 1996, § 8(c). This manual is also included in Chapter 4 of the Draft Civic Education Manual of 1997.*

The manual further states: “The law of war does not prohibit effective military action. Its purpose is to prevent unnecessary suffering and damage which would afford no military advantage or which is disproportionate to the military advantage obtained.”

*South Africa, Presentation on the South African Approach to International Humanitarian Law, Appendix A, Chapter 4: International Humanitarian Law (The Law of Armed Conflict), National Defence Force, 1996, § 16. This manual is also included in Chapter 4 of the Draft Civic Education Manual of 1997.*

South Africa

South Africa’s Revised Civic Education Manual (2004) states:

35. The following three principles govern the LOAC:

...

c. *Proportionality.* The loss of life and damage to property caused by military action must not be disproportionate to the military advantage to be gained.

*South Africa, Revised Civic Education Manual, South African National Defence Force, 2004, Chapter 4, § 35(c).*

South Africa

South Africa’s LOAC Teaching Manual (2008) states:

*Proportionality*

– The principle of proportionality is found in the [1907] Regulations to Hague Convention IV article 23 and [1977] Additional Protocol I article 57 (precautions in an attack) and is linked to Additional Protocol I article 51 (Protection of the civilian population).

– The LOAC [law of armed conflict] accepts the reality that the civilian population will be affected by the ravages of armed conflict. However, such suffering may only be incidental. In terms of the principle of proportionality, it must be ensured that the incidental loss of civilian life or damage to civilian property is not excessive when compared to (i.e. is proportional to) the concrete and direct advantage anticipated.

– A commander is not allowed to cause harm to civilian life or property, which is disproportionate to the military need.

– The test here is whether the incidental or collateral damage caused by the force is not excessive in comparison with the military utility of the force. In other words, the standard of measurement is the contribution to the military purpose of an attack or operations considered as a whole, as compared with the other consequences of the action, such as the effect on civilians or civilian objects.

– It involves weighing the interest arising from the success of the operation on the one hand, against the possible harmful effect upon protected persons and objects on the other. That is, there must be an acceptable relation between the legitimate destructive effect and the undesirable collateral effects.

– The rule of proportionality cannot be used to justify unlimited destruction or attacks focused on civilian persons or objects.

*Planning.* Already at the planning stage of military operations or actions that could endanger civilian persons and objects, [it is] important to consider and provide for the principles of military necessity, no undue suffering and proportionality.



*South Africa, Advanced Law of Armed Conflict Teaching Manual, School of Military Justice, 1 April 2008, as amended to 25 October 2013, Learning Unit 1, p. 45.*

The manual also states:

Additional Protocol I article 51.5 specifically states that, amongst others, the following types of attacks are indiscriminate:

...

An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof which would be excessive in relation to the concrete and direct military advantage anticipated.

*South Africa, Advanced Law of Armed Conflict Teaching Manual, School of Military Justice, 1 April 2008, as amended to 25 October 2013, Learning Unit 2, p. 119.*

The manual further states:

*Targeting Considerations*

*General*

The principles of military necessity, distinction, proportionality and (the prevention of) unnecessary suffering form the basis for all targeting considerations undertaken in the absence of specific guidelines set forth under international and domestic law.

*How to Determine Proper Targets*

...

Once the target is confirmed as a military objective, it must be asked whether the destruction of the objective might result in incidental death of or injury to non-combatants, or collateral damage to protected property that is excessive to the direct and concrete military advantage to be gained.

*South Africa, Advanced Law of Armed Conflict Teaching Manual, School of Military Justice, 1 April 2008, as amended to 25 October 2013, Learning Unit 3, p. 181.*

The manual also states:

*Blockade*

...

- The declaration or establishment of a blockade is prohibited if it has the sole purpose of starving the civilian population or denying it other objects essential for its survival or the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade.

*South Africa, Advanced Law of Armed Conflict Teaching Manual, School of Military Justice, 1 April 2008, as amended to 25 October 2013, Learning Unit 4, p. 206.*

The manual further states:

Additional Protocol I article 85 provides further examples of grave breaches, in that it stipulates that the following acts shall be regarded as grave breaches when committed willfully, and causing death or serious injury to body or health:

...

- Launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects.

*South Africa, Advanced Law of Armed Conflict Teaching Manual, School of Military Justice, 1 April 2008, as amended to 25 October 2013, Learning Unit 5, p. 237.*

## Spain

Spain’s LOAC Manual (1996) states:

The principle of proportionality seeks to limit the damage caused by military operations. It is based on a recognition of the fact that it is difficult to limit the effects of modern means and methods of warfare exclusively to military objectives and that it is likely that they will cause collateral damage to civilians and civilian objects.

*Spain, Orientaciones. El Derecho de los Conflictos Armados, Publicación OR7-004, 2 Tomos, aprobado por el Estado Mayor del Ejército, Division de Operaciones, 18 March 1996, Vol. I, § 2.5.*

The manual specifies, however:

An attack is prohibited if, during the planning phase, the available information makes it foreseeable that the damage to the civilian population and/or to civilian objects which the attack will cause is excessive in relation to the military advantage anticipated from the attack as a whole.

*Spain, Orientaciones. El Derecho de los Conflictos Armados, Publicación OR7-004, 2 Tomos, aprobado por el Estado Mayor del Ejército, Division de Operaciones, 18 March 1996, Vol. I, § 2.5.a; see also § 4.3.*

The manual further states that “launching an indiscriminate attack affecting the civilian population or civilian objects which would be excessive in relation to the military advantage anticipated” constitutes a grave breach.

*Spain, Orientaciones. El Derecho de los Conflictos Armados, Publicación OR7-004, 2 Tomos, aprobado por el Estado Mayor del Ejército, Division de Operaciones, 18 March 1996, Vol. I, § 11.8.b.(1).*

## Spain

Spain’s LOAC Manual (2007) states:

### 2.5. PRINCIPLE OF PROPORTIONALITY

While the principle of military necessity alters the normal conduct of combatants, the principle of proportionality seeks to limit the harm and damage caused by military operations, acknowledging that, with the use of modern methods and means of warfare, it is unlikely that the impact will be confined to military objectives and there is likely to be incidental loss of civilian life, injury to civilians and collateral damage to civilian objects. The principle of proportionality obliges military commanders to weigh the anticipated military advantage that it expects to gain with the attack against the incidental harm and collateral damage that it could cause. The principle of proportionality is established, in general terms, in the prohibition on using means and methods of warfare capable of causing superfluous injury or unnecessary suffering and, in specific terms, in the provisions listed below.

#### 2.5.a. PRINCIPLE OF PROPORTIONALITY IN PLANNING

It is prohibited to launch an attack on a military objective when, based on information available in the planning phase, it could be expected to lead to casualties among the civilian population or cause damage to



civilian property which would be excessive in relation to the military advantage anticipated from the attack considered as a whole.  
*Spain, Orientaciones. El Derecho de los Conflictos Armados, Tomo 1, Publicación OR7–004, (Edición Segunda), Mando de Adiestramiento y Doctrina, Dirección de Doctrina, Orgánica y Materiales, 2 November 2007, §§ 2.5 and 2.5.a; see also §§ 3.1.c, 4.3 and 4.5.a.(1).(a).*

Sweden

Sweden’s IHL Manual (1991) considers that the principle of proportionality as contained in Article 51(5)(b) of the 1977 Additional Protocol I reflects customary international law.  
*Sweden, International Humanitarian Law in Armed Conflict, with reference to the Swedish Total Defence System, Swedish Ministry of Defence, January 1991, Section 3.2.3, p. 19.*

Switzerland

Switzerland’s Basic Military Manual (1987) states: “If the military advantage is not proportionate to the damage [suffered by the civilian population], [commanders] must cancel an attack”.  
*Switzerland, Lois et coutumes de la guerre (Extrait et commentaire), Règlement 51.7/II f, Armée Suisse, 1987, Article 29(1).*

The manual further states that “an attack which is launched without making any distinction [between civilians and civilian objects on the one hand and military objectives on the other hand] and which may affect the civilian population or civilian objects in the knowledge that the attack will cause loss of human life, injuries to civilians and damage to civilian objects which would be excessive in the sense of Article 57(2)(a)(iii) [of the 1977 Additional Protocol I]” constitutes a grave breach.  
*Switzerland, Lois et coutumes de la guerre (Extrait et commentaire), Règlement 51.7/II f, Armée Suisse, 1987, Article 193(1)(b).*

Switzerland

Switzerland’s Regulation on Legal Bases for Conduct during an Engagement (2005) states:

12 The four basic principles of the international law of armed conflict

158 ...

- ...
- the principle of proportionality;
- ...

...

12.3 Principle of proportionality

163 Military action is only permissible if the loss of human life and damage to civilian or specially protected objects are not excessive in relation to the concrete and direct military advantage anticipated.  
*Switzerland, Bases légales du comportement à l’engagement (BCE), Règlement 51.007/IVf, Swiss Army, issued based on Article 10 of the Ordinance for the Organization of the Federal Department for Defence, Civil Protection and Sports of 7 March 2003, entry into force on 1 July 2005, §§ 158 and 163. The German language version notes in § 163: “... if the loss of human life and damage to civilian or, respectively, specially protected objects caused or to be anticipated are reasonable in relation to the military advantage concretely to be anticipated [“... wenn die dadurch verursachten oder zu erwartenden Verluste an Menschenleben sowie Schäden an zivilen bzw. speziell geschützten Objekten zum konkret zu erwartenden militärischen Vorteil in einem vernünftigen Verhältnis stehen.”]”.*

The Regulation also explains with respect to the situation of a “[c]onvoy of refugees intermingled with some combatants” that, in application of the principle of proportionality, the “concrete military advantage is not in an acceptable proportion”.  
*Switzerland, Bases légales du comportement à l’engagement (BCE), Règlement 51.007/IVf, Swiss Army, issued based on Article 10 of the Ordinance for the Organization of the Federal Department for Defence, Civil Protection and Sports of 7 March 2003, entry into force on 1 July 2005, § 172.*

Togo

Togo’s Military Manual (1996) requires respect for the principle of proportionality. The manual states:  
A military action is proportionate if it does not cause loss or damage to civilians which is excessive in relation to the expected overall result. This rule cannot justify unlimited destruction or attacks against civilians and civilian objects as such.  
*Togo, Le Droit de la Guerre, III fascicules, Etat–major Général des Forces Armées Togolaises, Ministère de la Défense nationale, 1996, Fascicule III, p. 14; see also Fascicule II, p. 6.*

The manual also states:

The principle of proportionality requires that needless suffering and damage be avoided. Pursuant to this principle, all forms of violence which are not indispensable to gain superiority over an enemy are prohibited.  
*Togo, Le Droit de la Guerre, III fascicules, Etat–major Général des Forces Armées Togolaises, Ministère de la Défense nationale, 1996, Fascicule III, p. 11.*

Ukraine

Ukraine’s IHL Manual (2004) states:  
Principle of proportionality means that the parties to the conflict during hostilities must refrain from damaging civilian objects and causing losses of human population that would be excessive in order to obtain sufficient advantage in strength over the enemy.  
The principle of proportionality must not be used to justify unlimited damage or attacks against civilian persons and objects.  
*Ukraine, Manual on the Application of IHL Rules, Ministry of Defence, 11 September 2004, § 2.1.8.*

United Kingdom of Great Britain and Northern Ireland

The UK Military Manual (1958) states:

In defended towns and localities modern methods of bombardment will inevitably destroy many buildings and sites which are not military objectives. Such destruction, if incidental to the bombardment of military objectives, is not unlawful.  
*United Kingdom, The Law of War on Land being Part III of the Manual of Military Law, The War Office, HMSO, 1958, § 288.*

United Kingdom of Great Britain and Northern Ireland

The UK LOAC Manual (2004) states:  
An attack is not to be launched, or is to be cancelled, suspended or re-planned, if “the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”.  
*United Kingdom, The Manual of the Law of Armed Conflict, Ministry of Defence, 1 July 2004, § 5.33; see also §§ 2.4, 2.6–2.7.3 and 13.32 (maritime warfare).*

The manual further states: “The fact that a military objective is located in a populated area means that civilians and civilian objects may legitimately suffer indirectly if those objectives are attacked, subject to the rule of proportionality.”  
*United Kingdom, The Manual of the Law of Armed Conflict, Ministry of Defence, 1 July 2004, § 5.24.4.*

United Kingdom of Great Britain and Northern Ireland

The UK LOAC Manual (2004), as amended in 2010, states:  
[C]ivilian immunity does not make unlawful the unavoidable incidental civilian casualties and damage which may result from legitimate attacks upon military objectives, provided that the expected incidental casualties and damage are not excessive in relation to the concrete and direct military advantage anticipated. This is the principle of proportionality.  
*United Kingdom, The Manual of the Law of Armed Conflict, Ministry of Defence, 1 July 2004, as amended by Amendment 3, Ministry of Defence, September 2010, § 2.4.2.*

The manual also states: “The principle of proportionality requires that the expected losses resulting from a military action should not be excessive in relation to the anticipated military advantage.”  
*United Kingdom, The Manual of the Law of Armed Conflict, Ministry of Defence, 1 July 2004, as amended by Amendment 3, Ministry of Defence, September 2010, § 2.6.*

United States of America

The US Field Manual (1956) states, in the context of sieges and bombardments, that “loss of life and damage to property must not be out of proportion to the military advantage to be gained”.  
*United States, Field Manual 27–10, The Law of Land Warfare, US Department of the Army, 18 July 1956, as modified by Change No. 1, 15 July 1976, § 41.*

United States of America

The US Air Force Pamphlet (1976) states:  
Complementing the principle of necessity and implicitly contained within it is the principle of humanity which forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes. This principle of humanity results in a specific prohibition against unnecessary suffering, a requirement of proportionality and a variety of more specific rules examined later. The principle of humanity also confirms the basic immunity of civilian populations and civilians from being objects of attack during armed conflict. This immunity of the civilian population does not preclude unavoidable incidental civilian casualties which may occur during the course of attacks against military objectives, and which are not excessive in relation to the concrete and direct military advantage anticipated.  
*United States, Air Force Pamphlet 110–31, International Law – The Conduct of Armed Conflict and Air Operations, US Department of the Air Force, 1976, § 1–3(a).*

United States of America

The US Air Force Commander’s Handbook (1980) states that “a weapon is not unlawful simply because its use may cause incidental or collateral casualties to civilians, as long as those casualties are not foreseeably excessive in light of the expected military advantage”.  
*United States, Air Force Pamphlet 110–34, Commander’s Handbook on the Law of Armed Conflict, Judge Advocate General, US Department of the Air Force, 25 July 1980, § 6–2(b).*

United States of America

The US Instructor’s Guide (1985) states:  
In attacking a military target, the amount of suffering or destruction must be held to the minimum necessary to accomplish the mission. Any excessive destruction or suffering not required to accomplish the objective is illegal as a violation of the law of war.  
*United States, Instructor’s Guide – The Law of War, Headquarters Department of the Army, Washington, April 1985, p. 6.*

United States of America

The US Naval Handbook (1995) states:  
It is not unlawful to cause incidental injury to civilians or collateral damage to civilian objects, during an attack upon a legitimate military objective. Incidental injury or collateral damage must not, however, be excessive in light of the military advantage anticipated by the attack.  
*United States, The Commander’s Handbook on the Law of Naval Operations, NWP 1–14M/MCWP 5–2.1/COMDTPUB P5800.7, issued by the Department of the Navy, Office of the Chief of Naval Operations and Headquarters, US Marine Corps, and Department of Transportation, US Coast Guard, October 1995 (formerly NWP 9 (Rev. A)/FMFM 1–10, October 1989), § 8.1.2.1.*

The manual further specifies that “a weapon is not indiscriminate simply because it may cause incidental or collateral civilian casualties, provided such casualties are not foreseeably excessive in light of the expected military advantage to be gained”.

*United States, The Commander’s Handbook on the Law of Naval Operations, NWP 1–14M/MCWP 5–2.1/COMDTPUB P5800.7, issued by the Department of the Navy, Office of the Chief of Naval Operations and Headquarters, US Marine Corps, and Department of Transportation, US Coast Guard, October 1995 (formerly NWP 9 (Rev. A)/FMFM 1–10, October 1989), § 9.1.2.*

United States of America

The US Naval Handbook (2007) states:

The principle of proportionality is directly linked to the principle of distinction. While distinction is concerned with focusing the scope and means of attack so as to cause the least amount of damage to protected persons and property, 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. 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. Note that the principle of proportionality under the law of armed conflict is different than the term proportionality as used in self-defense.

*United States, The Commander’s Handbook on the Law of Naval Operations, NWP 1–14M/MCWP 5–12.1/COMDTPUB P5800.7, issued by the Department of the Navy, Office of the Chief of Naval Operations and Headquarters, US Marine Corps, and Department of Homeland Security, US Coast Guard, July 2007, § 5.3.3.*

The Handbook also states:

It is not unlawful to cause incidental injury to civilians, or collateral damage to civilian objects, during an attack upon a legitimate military objective. The principle of proportionality requires that the anticipated incidental injury or collateral damage must not, however, be excessive in light of the military advantage expected to be gained.

*United States, The Commander’s Handbook on the Law of Naval Operations, NWP 1–14M/MCWP 5–12.1/COMDTPUB P5800.7, issued by the Department of the Navy, Office of the Chief of Naval Operations and Headquarters, US Marine Corps, and Department of Homeland Security, US Coast Guard, July 2007, § 8.3.1.*

The Handbook further states that “excessive collateral damage must be avoided to the extent possible and, consistent with mission accomplishment and the security of the force, unnecessary human suffering prevented”.

*United States, The Commander’s Handbook on the Law of Naval Operations, NWP 1–14M/MCWP 5–12.1/COMDTPUB P5800.7, issued by the Department of the Navy, Office of the Chief of Naval Operations and Headquarters, US Marine Corps, and Department of Homeland Security, US Coast Guard, July 2007, § 8.1.*

The Handbook also states:

A military objective within a city, town, or village may, however, be bombarded if required for the submission of the enemy with the minimum expenditure of time, life, and physical resources. The anticipated incidental injury to civilians, or collateral damage to civilian objects, must not be excessive in light of the military advantage anticipated by the attack.

*United States, The Commander’s Handbook on the Law of Naval Operations, NWP 1–14M/MCWP 5–12.1/COMDTPUB P5800.7, issued by the Department of the Navy, Office of the Chief of Naval Operations and Headquarters, US Marine Corps, and Department of Homeland Security, US Coast Guard, July 2007, § 8.9.1.1.*

IV. National Legislation

Armenia

Under Armenia’s Penal Code (2003), launching, during an armed conflict, an “indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause loss of life to civilians or damage to civilian objects excessive in relation to the concrete and direct military advantage anticipated” constitutes a crime against the peace and security of mankind.

*Armenia, Penal Code, 2003, Article 390.3(2).*

Australia

Australia’s Geneva Conventions Act (1957), as amended in 2002, provides: “A person who, in Australia or elsewhere, commits a grave breach ... of [the 1977 Additional Protocol I] is guilty of an indictable offence.”

*Australia, Geneva Conventions Act, 1957, as amended in 2002, Section 7(1).*

The grave breaches provisions in this Act were removed in 2002 and incorporated into the Criminal Code Act (1995).

Australia

Australia’s Criminal Code Act (1995), as amended to 2007, states with respect to serious war crimes that are committed in the course of an international armed conflict:

268.38 War crime – excessive incidental death, injury or damage

(1) A person (the perpetrator) commits an offence if:

- (a) the perpetrator launches an attack; and
- (b) the perpetrator knows that the attack will cause incidental death or injury to civilians; and
- (c) the perpetrator knows that the death or injury will be of such an extent as to be excessive in relation to the concrete and direct military advantage anticipated; and
- (d) the perpetrator’s conduct takes place in the context of, and is associated with, an international armed conflict.

Penalty: Imprisonment for life.

(2) A person (the perpetrator) commits an offence if:

- (a) the perpetrator launches an attack; and

(b) the perpetrator knows that the attack will cause:
- (i) damage to civilian objects; or

(ii) widespread, long-term and severe damage to the natural environment; and
- (c) the perpetrator knows that the damage will be of such an extent as to be excessive in relation to the concrete and direct military advantage anticipated; and

(d) the perpetrator’s conduct takes place in the context of, and is associated with, an international armed conflict.

Penalty for a contravention of this subsection: Imprisonment for 20 years.  
*Australia, Criminal Code Act, 1995, as amended to 2007, Chapter 8, § 268.38, pp. 327–328.*

Australia

Australia’s ICC (Consequential Amendments) Act (2002) incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including launching an attack which causes “excessive incidental death, injury or damage” in international armed conflicts.  
*Australia, ICC (Consequential Amendments) Act, 2002, Schedule 1, § 268.38.*

Belarus

Belarus’s Criminal Code (1999) provides that it is a war crime “to launch an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects”.  
*Belarus, Criminal Code, 1999, Article 136(11).*

Belgium

Belgium’s Penal Code (1867), as amended in 2003, provides:

War crimes envisaged in the 1949 [Geneva] Conventions ... and in the [1977 Additional Protocols I and II] ... , as well as in Article 8(2)(f) of the [1998 ICC Statute], and listed below, ... constitute crimes under international law and shall be punished in accordance with the provisions of the present title ... :

...

22. intentionally launching an attack in the knowledge that such attack will cause incidental loss of life, injury to civilians or damage to civilian objects ... which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

*Belgium, Penal Code, 1867, as amended on 5 August 2003, Chapter III, Title I bis, Article 136 quater, § 1(22).*

Belgium

Belgium’s Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols (1993), as amended in 1999, provides that it is a crime under international law to launch

an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause loss of human life, injury to civilians or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated, without prejudice to the criminal nature of an attack whose harmful effects, even where proportionate to the military advantage anticipated, would be inconsistent with the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

*Belgium, Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols, 1993, as amended in 1999, Article 1(3)(12).*

Belgium

Belgium’s Law relating to the Repression of Grave Breaches of International Humanitarian Law (1993), as amended in 2003, provides:

War crimes envisaged in the 1949 [Geneva] Conventions ... and in the [1977 Additional Protocols I and II] ... , as well as in Article 8(2)(f) of the [1998 ICC Statute], and listed below, ... constitute crimes under international law and shall be punished in accordance with the provisions of the present title ... :

...

12. intentionally launching an attack in the knowledge that such attack will cause incidental loss of life, injury to civilians or damage to civilian objects ... which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

*Belgium, Law relating to the Repression of Grave Breaches of International Humanitarian Law, 1993, as amended on 23 April 2003, Article 1 ter, § 1(12).*

Brazil

The Report on the Practice of Brazil (1997) considers that the provision in Brazil’s Military Penal Code which punishes the excessive execution of an order is relevant in the context of the principle of proportionality.  
*Report on the Practice of Brazil, 1997, Chapter 1.5, referring to Military Penal Code, 1969, Article 38(2).*

Burundi

Burundi’s Law on Genocide, Crimes against Humanity and War Crimes (2003) states:

[The following are] considered as war crimes:

...

B. Other serious violations of the laws and customs applicable in international armed conflicts, within the established framework of international law, namely, any of the following acts:

...

d) launching a deliberate attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects ... which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.  
*Burundi, Law on Genocide, Crimes against Humanity and War Crimes, 2003, Article 4(B)(d).*

Burundi

Burundi’s Penal Code (2009) states:  
“War crimes” means crimes which are committed as part of a plan or policy or as part of a large-scale commission of such crimes, in particular:  
...  
2. ... [S]erious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

...  
4°. Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians [or] damage to civilian objects ... which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.  
*Burundi, Penal Code, 2009, Article 198(2)(4°).*

Canada

Canada’s Geneva Conventions Act (1985), as amended in 2007, provides that “every person who, whether within or outside Canada, commits a grave breach [of the 1977 Additional Protocol I] ... is guilty of an indictable offence”.  
*Canada, Geneva Conventions Act, 1985, as amended in 2007, Section 3(1).*

Canada

Canada’s Crimes against Humanity and War Crimes Act (2000) provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are “crimes according to customary international law” and, as such, indictable offences under the Act.  
*Canada, Crimes against Humanity and War Crimes Act, 2000, Section 4(1) and (4).*

Colombia

Colombia’s Penal Code (2000) imposes a criminal sanction on “anyone who, during an armed conflict, carries out or orders the carrying out of ... excessive attacks”.  
*Colombia, Penal Code, 2000, Article 144; see also Article 154.*

Colombia

Colombia’s Directive No. 10 (2007), whose objective is to prevent the killing of protected persons, states: “The principles of legality, distinction, necessity and proportionality must guide all military action.”  
*Colombia, Directive No. 10, 2007, § IV.*

Congo

The Congo’s Genocide, War Crimes and Crimes against Humanity Act (1998) defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.  
*Congo, Genocide, War Crimes and Crimes against Humanity Act, 1998, Article 4.*

Cook Islands

The Geneva Conventions and Additional Protocols Act (2002) of the Cook Islands punishes “any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach ... of [the 1977 Additional Protocol I]”.  
*Cook Islands, Geneva Conventions and Additional Protocols Act, 2002, Section 5(1).*

Cyprus

Cyprus’s Additional Protocol I Act (1979) punishes “any person who, whatever his nationality, commits in the Republic or outside the Republic any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach”.  
*Cyprus, Additional Protocol I Act, 1979, Section 4(1).*

Denmark

Denmark’s Military Criminal Code (1973), as amended in 1978, provides:  
Any person who uses war instruments or procedures the application of which violates an international agreement entered into by Denmark or the general rules of international law, shall be liable to the same penalty [i.e. a fine, lenient imprisonment or up to 12 years’ imprisonment].  
*Denmark, Military Criminal Code, 1973, as amended in 1978, § 25(1).*

Denmark’s Military Criminal Code (2005) provides:  
Any person who deliberately uses war means [“krigsmiddel”] or procedures the application of which violates an international agreement entered into by Denmark or international customary law, shall be liable to the same penalty [i.e. imprisonment up to life imprisonment].  
*Denmark, Military Criminal Code, 2005, § 36(2).*

Finland

Finland’s Criminal Code (1889), as amended in 2008, provides that any person who “initiates an attack that causes the loss of human life or injuries ... that are clearly excessive in comparison with the anticipated real and direct military benefit” shall be “sentenced for a *war crime* to imprisonment for at least one year or for life”.

*Finland, Criminal Code, 1889, as amended in 2008, Chapter 11, Section 5(1)(8).*

(emphasis in original)

France

France’s Code of Defence (2004), as amended in 2008, states: “Combatants must refrain from any attack that may incidentally inflict damage to protected persons or objects which is excessive in relation to the military advantage anticipated.”

*France, Code of Defence, 2004, as amended in 2008, Article D4122–10.*

The Code also states that “civilians ... are protected persons”.

*France, Code of Defence, 2004, as amended in 2008, Article D4122–10.*

France

France’s Penal Code (1992), as amended in 2010, states in its section on war crimes related to international armed conflict:

Intentionally launching an attack in the knowledge that it will cause incidental loss of life or injury among the civilian population which would be clearly disproportionate in relation to the concrete and direct military advantage anticipated for the overall attack is punishable by life imprisonment.

*France, Penal Code, 1992, as amended in 2010, Article 461–27.*

The Penal Code also states, under the same section:

Intentionally launching an attack in the knowledge that it will cause incidental ... damage to civilian objects which would be clearly disproportionate in relation to the concrete and direct military advantage anticipated for the overall attack ... is punishable by 20 years’ imprisonment.

*France, Penal Code, 1992, as amended in 2010, Article 461–28.*

Georgia

Under Georgia’s Criminal Code (1999), any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, is a crime, such as “intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects ... which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated” in international armed conflicts.

*Georgia, Criminal Code, 1999, Article 413(d).*

Germany

Germany’s Law Introducing the International Crimes Code (2002) punishes anyone who, in connection with an international or a non–international armed conflict, “carries out an attack by military means and definitely anticipates that the attack will cause death or injury to civilians or damage to civilian objects on a scale out of proportion to the concrete and direct overall military advantage anticipated”.

*Germany, Law Introducing the International Crimes Code, 2002, Article 1, § 11(1)(3).*

Iraq

Iraq’s Law of the Supreme Iraqi Criminal Tribunal (2005) identifies the following as a serious violation of the laws and customs of war applicable in international armed conflicts:

Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or civilian damage which would be clearly excessive in relation to the concrete and direct overall military advantages anticipated.

*Iraq, Law of the Supreme Iraqi Criminal Tribunal, 2005, Article 13(2)(D).*

Ireland

Ireland’s Geneva Conventions Act (1962), as amended 1998, provides that grave breaches of the 1977 Additional Protocol I are punishable offences.

*Ireland, Geneva Conventions Act, 1962, as amended in 1998, Section 3(1).*

The Act adds that any “minor breach” of the 1977 Additional Protocol I, including violations of Article 51(5)(b), is also a punishable offence.

*Ireland, Geneva Conventions Act, 1962, as amended in 1998, Section 4(1) and (4).*

Mali

Under Mali’s Penal Code (2001), the following constitutes a war crime in international armed conflicts:

intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects ... which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

*Mali, Penal Code, 2001, Article 31(i)(4).*

Netherlands

Under the International Crimes Act (2003) of the Netherlands, it is a crime, during an international armed conflict, to commit



the following acts, when they are committed intentionally and in violation of the relevant provisions of Additional Protocol (I) and cause death or serious injury to body or health: ... launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects.  
*Netherlands, International Crimes Act, 2003, Article 5(2)(c)(ii).*

Likewise, “intentionally launching an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians or damage to civilian objects ... which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated” is also a crime, when committed in an international armed conflict.  
*Netherlands, International Crimes Act, 2003, Article 5(5)(b).*

New Zealand

New Zealand’s Geneva Conventions Act (1958), as amended in 1987, provides that “any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach ... of [the 1977 Additional Protocol I] is guilty of an indictable offence”.  
*New Zealand, Geneva Conventions Act, 1958, as amended in 1987, Section 3(1).*

New Zealand

Under New Zealand’s International Crimes and ICC Act (2000), war crimes include the crime defined in Article 8(2)(b)(iv) of the 1998 ICC Statute.  
*New Zealand, International Crimes and ICC Act, 2000, Section 11(2).*

Niger

According to Niger’s Penal Code (1961), as amended in 2003, it is a war crime to launch against persons and objects protected under the 1949 Geneva Conventions or their Additional Protocols of 1977  
an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause loss of human life, injury to civilians or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated, without prejudice to the criminal nature of an attack whose harmful effects, even where proportionate to the military advantage anticipated, would be inconsistent with the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.  
*Niger, Penal Code, 1961, as amended in 2003, Article 208.3(12).*

Norway

Norway’s Military Penal Code (1902), as amended in 1981, provides:  
Anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the two additional protocols to [the 1949 Geneva] Conventions ... is liable to imprisonment.  
*Norway, Military Penal Code, 1902, as amended in 1981, § 108(b).*

Norway

Norway’s Penal Code (1902), as amended in 2008, states:  
Any person is liable to punishment for a war crime who in connection with an armed conflict ... launches an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects ... which would be excessive in relation to the concrete and direct overall military advantage anticipated.  
*Norway, Penal Code, 1902, as amended in 2008, § 106(c).*

Peru

Peru’s Code of Military and Police Justice (2006) states:  
A member of the military or police shall be imprisoned for a period of no less than eight and no more than 15 years if he or she in the context of an international or non-international armed conflict:  
...  
3. Directs an attack by any means in the knowledge that such an attack will cause incidental loss of life or injury to civilians or damage to civilian objects which would be excessive in relation to the concrete military advantage anticipated.  
*Peru, Code of Military and Police Justice, 2006, Article 95(3).*

This article is no longer in force. Along with certain other articles in this legislation, it was declared unconstitutional by the Constitutional Court (*en banc* decision for case file No. 0012-2006-PI-TC, 8 January 2007) because it does not stipulate a crime committed in the line of duty that would fall under the jurisdiction of a military court pursuant to Article 173 of Peru’s Constitution.

Peru

Peru’s Decree on the Use of Force by the Armed Forces (2010) states:  
For the purposes of the present decree, the following terms are defined as:  
...  
b. *Incidental (collateral) damage*: Unintentional consequence of military operations which may result in harming civilians or damaging civilian objects and whose qualification as excessive can be determined by assessing military necessity and proportionality in relation to the concrete and direct military advantage anticipated.  
*Peru, Decree on the Use of Force by the Armed Forces, 2010, Article 3(b).*

The Decree also states:

The following principles are recognized by the norms of international humanitarian law as applying before, during and after the use of force:

- ...
  - e. *Proportionality* ... authorizes a military operation when it is foreseeable that it will not cause incidental injury to the civilian population or incidental damage to civilian objects that would be excessive in relation to the anticipated concrete military advantage.
- Peru, Decree on the Use of Force by the Armed Forces, 2010, Article 7(e).*

Peru

Peru’s Military and Police Criminal Code (2010), in a chapter titled “Crimes involving the use of prohibited methods in the conduct of hostilities”, states:

A member of the military or the police shall be punished with deprivation of liberty of not less than six years and not more than twenty-five years if, in a state of emergency and when the Armed Forces assume control of the internal order, he or she:

- ...
  - 3. Carries out an attack by any means and in a way which may surely be expected to cause incidental loss of life or injury to civilians or damage to civilian objects that is disproportionate to the concrete military advantage anticipated.
- Peru, Military and Police Criminal Code, 2010, Article 91(3).*

Republic of Korea

The Republic of Korea’s ICC Act (2007) provides for the punishment of anyone who commits the war crime of “[l]aunching an attack with the knowledge that such attack would cause death or injury to civilians or damage to civilian objects clearly excessive in relation to the concrete and direct overall military advantage anticipated” in both international and non-international armed conflicts.

*Republic of Korea, ICC Act, 2007, Article 13(1)(3).*

Rwanda

Rwanda’s Law Repressing the Crime of Genocide, Crimes against Humanity and War Crimes (2003) provides:

Article: 8

A war crime is one of the following acts, committed during armed conflicts against persons or property protected under the Geneva Conventions of 12 August 1949 and its Additional Protocols I and II of 8 June 1977:

- ...
- 9° launching a deliberate attack against the civilian population or against its objects, in the knowledge that such attack will cause loss of life or injury or grave damage to their objects, which would be judged as excessive in relation to the military advantage anticipated;

...

Article: 9

Shall be punished by one of the following penalties any person having committed one of the war crimes provided for in Article 8 of this law:

- 1° the death penalty or life imprisonment where he has committed a crime provided for in point 1°, 2°, 3°, 9°, 11° or 16° of Article 8 of this law.
- Rwanda, Law Repressing the Crime of Genocide, Crimes against Humanity and War Crimes, 2003, Articles 8–9.*

Senegal

Senegal’s Penal Code (1965), as amended in 2007, states that the following constitutes a war crime:

b) [O]ther serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

- ...
  - 3. launching a deliberate attack in the knowledge that such attack will cause [incidental] loss of life or injury to civilians or damage to civilian objects ... which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.
- Senegal, Penal Code, 1965, as amended in 2007, Article 431–3(b)(3).*

Serbia

Serbia’s Criminal Code (2005) states that ordering or committing an “attack against military targets knowing that such an attack would cause collateral damage among civilians or damage to civilian buildings that is obviously disproportionate to the military effect” constitutes a war crime.

*Serbia, Criminal Code, 2005, Article 372(1).*

Sierra Leone

Sierra Leone’s Geneva Conventions Act (2012) states:

2. *Grave breaches of the [1949 Geneva] Conventions and the [1977] First [Additional] Protocol.*

(1) A person of whatever nationality commits an offence if that person, whether within or outside Sierra Leone[,] commits, aids, abets or procures any other person to commit a grave breach specified in –

- ...
- (e) ... paragraph ... 3 ... of Article 85 of the First Protocol [on, *inter alia*, the grave breach of launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57(2)(a)(iii) of the Protocol].

Sierra Leone, Geneva Conventions Act, 2012, Section 2(1)(e).

South Africa

South Africa’s ICC Act (2002) reproduces the war crimes listed in the 1998 ICC Statute, including in international armed conflicts:

intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects ... which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

South Africa, ICC Act, 2002, Schedule 1, Part 3, § (b)(iv).

South Africa

South Africa’s Prohibition or Restriction of Certain Conventional Weapons Act (2008) states:

6. (1) No person may use or direct any mine, booby-trap or other device–

...

(e) in an indiscriminate manner–

...  
(iii) which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

South Africa, Prohibition or Restriction of Certain Conventional Weapons Act, 2008, Section 6(e)(iii).

South Africa

South Africa’s Implementation of the Geneva Conventions Act (2012) states:

5. Breach of Conventions or penalties

(1) Any person who, whether within or outside the Republic, commits a grave breach of the [1949 Geneva] Conventions, is guilty of an offence.

(2) For the purposes of subsection (1), “a grave breach” means–

...

(e) a grave breach referred to in Article ... 85 of [the 1977 Additional] Protocol I.

South Africa, Implementation of the Geneva Conventions Act, 2012, Section 5(1)–(2)(e).

Spain

Spain’s Penal Code (1995) punishes “anyone who, during an armed conflict, ... carries out or orders an ... excessive attack”.

Spain, Penal Code, 1995, Article 611(1).

Spain

Spain’s Law on the Rights and Duties of Members of the Armed Forces (2011) states:

Article 2. Scope of application

1. This law applies to all members of the Armed Forces who acquire the status of military personnel in accordance with Law 39/2007, of 19 November, on Military Career. Accordingly, it applies to official members of the armed forces, except for those persons in administrative roles whose status as military personnel is suspended and students undergoing military training.

2. This status applies to members of the reserves and aspirants when they are incorporated into the armed forces ...

...

Article 6. Rules of conduct of military personnel

1. The essential rules governing the conduct of military personnel are the following:

...

Fourth

To be prepared to face with courage, self-denial and a spirit of service, situations of combat, in all missions of the Armed Forces and situations of crisis, conflict or war in which they carry out or exercise their functions.

...

Sixth

To use force in a gradual and proportionate way in the legitimate use of force, in accordance with the rules of engagement established for the operation participated in.

Spain, Law on the Rights and Duties of Members of the Armed Forces, 2011, Articles 2 and 6(1).

Sweden

Under Sweden’s Penal Code (1962), as amended in 1998, “initiating an indiscriminate attack knowing that such attack will cause exceptionally heavy losses or damage to civilians or to civilian property” constitutes a crime against international law.

Sweden, Penal Code, 1962, as amended in 1998, Chapter 22, § 6.

Switzerland

Switzerland’s Military Criminal Code (1927), taking into account amendments entered into force up to 2011, states in a chapter entitled “War crimes”:

Art. 110

Articles 112–114 apply in the context of international armed conflicts, including in situations of occupation, and, if the nature of the offence does not exclude it, in the context of non-international armed conflicts.

...

Art. 112c

1 The penalty shall be a custodial sentence of not less than three years for any person who, in the context of an armed conflict:

- a. launches an attack although he knows or must assume that such an attack will cause loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be excessive in relation to the concrete and direct military advantage anticipated.

Switzerland, Military Criminal Code, 1927, taking into account amendments entered into force up to 2011, Articles 110 and 112c (1)(a).

## Switzerland

Switzerland’s Penal Code (1937), taking into account amendments entered into force up to 2011, states under the title “War crimes”:

Art. 264b

Articles 264d–264j apply in the context of international armed conflicts, including in situations of occupation, and, if the nature of the offence does not exclude it, in the context of non-international armed conflicts.

...

Art. 264g

1 The penalty shall be a custodial sentence of not less than three years for any person who, in the context of an armed conflict:

- a. launches an attack although he knows or must assume that such an attack will cause loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be excessive in relation to the concrete and direct military advantage anticipated.

Switzerland, Penal Code, 1937, taking into account amendments entered into force up to 2011, Articles 264b and 264g (1)(a).

## United Kingdom of Great Britain and Northern Ireland

The UK Geneva Conventions Act (1957), as amended in 1995, punishes “any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of ... [the 1977 Additional Protocol I]”.

United Kingdom, Geneva Conventions Act, 1957, as amended in 1995, Section 1(1).

## United Kingdom of Great Britain and Northern Ireland

Under the UK ICC Act (2001), it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(iv) of the 1998 ICC Statute.

United Kingdom, ICC Act, 2001, Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

## Uruguay

Uruguay’s Law on Cooperation with the ICC (2006) states:

26.2. Persons and objects affected by the war crimes set out in the present provision are persons and objects which international law protects in international or internal armed conflict.

26.3. The following are war crimes:

...

- 12. Intentionally launching an attack which may be expected to cause incidental loss of life or injury to civilians or persons or damage to civilian objects ... which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

Uruguay, Law on Cooperation with the ICC, 2006, Articles 26.2 and 26.3.12.

## Zimbabwe

Zimbabwe’s Geneva Conventions Act (1981), as amended in 1996, punishes “any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of ... [the 1977 Additional Protocol I]”.

Zimbabwe, Geneva Conventions Act, 1981, as amended in 1996, Section 3(1).

## V. National Case-law

### Argentina

The Report on the Practice of Argentina states that in a case concerning armed operations against insurgents in 1985, “the National Court of Appeals referred to the principle of proportionality, which it considered to be a customary norm based on its repeated doctrinal approbation”.

Report on the Practice of Argentina, 1997, Chapter 1.5, referring to National Court of Appeals, Military Junta Case, Judgment, 9 December 1985.

### Canada

In 2013, in the *Sapkota case*, Canada’s Federal Court dismissed a request for review of a decision denying refugee protection to the applicant on grounds of complicity in crimes against humanity in Nepal between 1991 and 2009. While reviewing the submissions of the respondent, Canada’s Minister of Citizenship and Immigration, the Court stated: “The Respondent notes that the *Rome Statute of the International Criminal Court* ... is endorsed in Canada as a source of customary law.”

Canada, Federal Court, Sapkota case, Reasons for Judgment and Judgment, 15 July 2013, § 28.

Colombia

In 2006, in the *Constitutional Case No. T-165/06*, the First Appeals Chamber of Colombia’s Constitutional Court stated:

[W]ith regard to the conduct of hostilities, it is important to note that IHL is ruled by fundamental principles, such as the principles of distinction, limitation and proportionality. Indeed, ... the principle of proportionality which, based on the fact that an armed conflict necessarily produces unwanted effects on the civilian population and civilian objects, prohibits military actions that predictably and intentionally result in deaths or wounded among the civilian population or harm to civilian property which would be excessive in relation to the concrete and direct military advantage sought.  
*Colombia, Constitutional Court, Constitutional Case No. T-165/06, Judgment of 7 March 2006, pp. 7–8*

Colombia

In 2007, in the *Constitutional Case No. C-291/07*, the Plenary Chamber of Colombia’s Constitutional Court stated:

[The principle of proportionality] requires parties to an armed conflict to abstain from carrying out a military operation whenever it is possible to foresee that the damage expected to be caused to the civilian population or civilian property would be excessive in relation to the concrete and direct military advantage anticipated.  
*Colombia, Constitutional Court, Constitutional Case No. C-291/07, Judgment of 25 April 2007, p. 97.*  
[footnote in original omitted]

Germany

In 2010, in the *Fuel Tankers case*, the Federal Prosecutor General at Germany’s Federal Court of Justice investigated whether war crimes or other crimes under domestic law had been committed in the course of an airstrike which was ordered by a colonel (*Oberst*) of the German armed forces against two tankers transporting fuel for the International Security Assistance Force in Afghanistan stolen by the Taliban near Kunduz and which resulted in the deaths of a number of civilians. The Federal Prosecutor General stated:

Pursuant to § 170 para. 2 StPO [Penal Procedure Code], the investigation proceedings which were initiated by the order of 12 March 2010 against Colonel (*Oberst*) Klein and Company Sergeant Major (*Hauptfeldwebel*) Wilhelm due to suspected offences under the VStGB [International Crimes Code] and other offences are to be terminated as a result of the investigations conducted and based on the sources of information set out hereafter and on the reasons given in detail hereafter.  
*Germany, Federal Court of Justice, Federal Prosecutor General, Fuel Tankers case, Decision, 16 April 2010, p. 1.*

The Federal Prosecutor General also stated:

3.  
Criminal liability under § 11 para. 1 no. 3 VStGB [for carrying out an attack by military means and definitely anticipating that the attack will cause death or injury to civilians or damage to civilian objects on a scale out of proportion to the concrete and direct overall military advantage anticipated]
- a)  
The objective element of § 11 para. 1 no. 3 VStGB is fulfilled in the present case because it merely requires that an attack is conducted by military means in the context of an international or non-international armed conflict ...  
An attack under Art. 49 AP I [the 1977 Additional Protocol I] is defined as acts of violence against the adversary. While Additional Protocol I only applies to international armed conflicts, its definition of attack also applies to non-international armed conflicts under customary international law ... The dropping of two 500-pound bombs constituted an act of violence by military means. The fulfillment of the objective element of § 11 para. 1 no. 3 VStGB does not presuppose that civilian collateral damage has actually occurred ... Civilian collateral damage can merely be relevant as indicators for the fulfilment of the subjective element of the crime ...
- b)  
The subjective element of § 11 para. 1 no. 3 VStGB, according to which the perpetrator must have definitely anticipated that the attack would result in the killing or injury of civilians or the damage of civilian objects to an extent that is out of proportion to the overall concrete and direct military advantage anticipated, is not fulfilled in the present case. Direct intent (*dolus directus*) is required ... The perpetrator must want to attack a military objective and must, on the one hand, definitely anticipate that the attack will result in “collateral damage”. On the other hand, he must expect that this “collateral damage” is out of proportion to the anticipated military advantage.

According to the credible statement by Colonel (*Oberst*) Klein, he definitely anticipated that the bomb attack would solely hit the fuel tankers, up to 70 Taliban located in the proximity of the fuel tankers on the sand bank and the two towing vehicles standing next to the fuel tankers. These were not civilians or civilian objects in the sense of the [International Crimes] Code. Since the accused considered that only insurgents were present on the ground, he not only did not definitely expect the injury of civilians as required by § 11 para. 1 no. 3 VStGB, but rather he did not expect such injury at all. The question of whether anticipated civilian injuries are out of proportion to the overall military advantage anticipated therefore does not even arise in the context of examining § 11 para. 1 no. 3 VStGB.  
*Germany, Federal Court of Justice, Federal Prosecutor General, Fuel Tankers case, Decision, 16 April 2010, pp. 45–47.*

The Federal Prosecutor General also stated:

- Criminal responsibility under § 211 StGB [i.e. for murder under Germany’s Penal Code]
- ...
- b)  
Colonel (*Oberst*) Klein’s actions were lawful under international law and therefore justified under domestic criminal law ...
- ...
- cc)  
Even considering the fact that the bombing killed civilians to be protected under the international law of armed conflict, the order to attack was lawful under international law.
- (1)

The reason for this is not that civilians consciously approached the fuel tankers which were surrounded by armed Taliban. Thereby they did in fact put themselves at risk to become victims of a legitimate military attack as “collateral damage”. However, from a legal perspective the protection of international humanitarian law applies irrespective of whether civilians know about the danger of such an attack or of whether they found themselves at the place of military confrontations out of their free will or under coercion ... Yet, the protection of civilians does not apply in an unlimited way. International humanitarian law ... prohibits ... attacks ... against a military objective if at the time of the order to attack the anticipated civilian damage is out of proportion (“excessive” see Art. 51 para. 5 sub-para. b AP I [the 1977 Additional Protocol I]) to the anticipated concrete and direct military advantage (see ICRC Customary International Humanitarian Law, 2005 – hereafter ICRC Customary IHL [Study] – p. 46ff). This prohibition of excessiveness is a specific military proportionality clause which cannot be compared to the effects of the prohibition of excess under the law that applies in times of peace. “Out of proportion” is not to be equated with the stricter standard of lack of appropriateness; the killing of uninvolved persons can never be appropriate under human rights law ...

(2)

The standard of prohibiting excess first requires a military advantage of a tactical nature ..., such as the destruction or weakening of hostile troops or their means of combat, or territorial gain ... Collateral damage such as the death of civilians is not out of proportion merely because the military advantage is only a short-term advantage which does not decide the conflict. Thus, the bombarding of a broadcasting centre by NATO in Belgrade with the foreseeable result of numerous civilian deaths was not considered to be out of proportion, even though the anticipated tactical advantage only lay in the interruption of the adversary’s telecommunication for a few hours (Final Report to the Prosecutor by the Committee established to review the NATO Bombing Campaign against the Federal Republic of Yugoslavia, marginal no. 78). In the present case the bombing pursued to military goals, namely the destruction of the fuel tankers robbed by the Taliban and of the fuel as well as the killing of the Taliban, including not least the high-level regional commander of the insurgents. The anticipated military advantage, namely on the one hand the final prevention of using the fuel and the fuel tankers as “driving bombs” or to fuel the insurgents’ militarily used vehicles and on the other hand the at least temporary disruption of the Taliban’s regional command structure fall within the usual, recognized tactical military advantages ... The fact that the goal mentioned in second place was not fully achieved is irrelevant for the legal assessment because the expectations at the time of the military action based on the facts are decisive (“ex ante view”, see ICRC Customary IHL [Study] p. 50 ...) ...

(3)

The anticipated civilian collateral damages are also to be assessed from the perspective of the attacker at the time of the attack, rather than with hindsight according to the actual unfolding of events (see also the wording of Art. 51 para. 5 sub-para. b AP I ... “may be expected”; ICRC Customary IHL [Study] p. 50 ...). The Federal Republic of Germany has, like a number of other States ..., particularly emphasized this fact when it ratified the [1977] Additional Protocols to the Geneva Conventions by making a declaration ... Only if a commander refrained from taking feasible precautions in violation of international law (“feasible precaution”; see. Art. 57 para. 2 sub-para. a AP I; ICRC Customary IHL [Study] p. 51 ff.) and such precautions would have led to the anticipation of greater civilian collateral damage which then in fact materialized is this relevant for an analysis of the proportionality of an attack. The putting into danger of own troops or of own means of warfare does not have to be accepted (see ICRC Customary IHL [Study] pp. 50, 64 ...). In view of the circumstances known to Colonel (*Oberst*) Klein (distance to inhabited settlements, night time, presence of armed Taliban) and the informant’s statements, he considered the presence of protected civilians unlikely ... Further feasible reconnaissance and precautionary measures (“feasible precautions”) were not promptly available in the concrete situation. Colonel (*Oberst*) Klein did not have to accept the danger of the fuel tankers or the fuel being retrieved by the Taliban ... The international law of armed conflict requires that in case of doubt a person is to be considered a civilian (see Art. 50 para. 1 sentence 2 AP I). However, there is no such case of doubt if – as is the case here – there are sufficient indications, considering the concrete circumstances, that the persons concerned are a legitimate objective of a military attack; absolute certainty is not necessary ...

(4)

Even if the killing of several dozen civilians would have had to be anticipated (which is assumed here for the sake of the argument), from a tactical-military perspective this would not have been out of proportion to the anticipated military advantages. The literature consistently points out that general criteria are not available for the assessment of specific proportionality because unlike legal goods, values and interests are juxtaposed which cannot be “balanced” ... Therefore, considering the particular pressure at the moment when the decision had to be taken, an infringement is only to be assumed in cases of obvious excess where the commander ignored any considerations of proportionality and refrained from acting “honestly”, “reasonably” and “competently” ... This would apply to the destruction of an entire village with hundreds of civilian inhabitants in order to hit a single enemy fighter, but not if the objective was to destroy artillery positions in the village ... There is no such obvious disproportionality in the present case. Both the destruction of the fuel tankers and the destruction of high-level Taliban had a military importance which is not to be underestimated, not least because of the thereby considerably reduced risk of attacks by the Taliban against own troops and civilians. There is thus no excess.

*Germany, Federal Court of Justice, Federal Prosecutor General, Fuel Tankers case, Decision, 16 April 2010, pp. 63–66 .*

## Israel

In its judgment in the *Public Committee against Torture in Israel case* in 2006, Israel’s High Court of Justice stated:

### *A. The Principle of Proportionality and its Application in Customary International Law*

41. The principle of proportionality is a general principle in law. It is part of our legal conceptualization of human rights ... It is an important component of customary international law ... It is an integral part of the law of self defense. It is a substantive component in protection of civilians in situations of armed conflict ... It is a central part of the law of belligerent occupation ... In a long list of judgments, the Supreme Court has examined the authority of the military commander in the area according to the standards of proportionality. It has done so, inter alia, regarding restriction of place of residence (*Ajuri*); regarding encirclement of villages and positioning checkpoints on the access roads to and from them in order to frustrate terrorism (HCJ 2847/03 *Alauna v. The Commander of IDF Forces in Judea and Samaria* (unpublished)); regarding harm to property of protected persons due to army operations (see HCJ 9525/00 *Ali Skai v. The State of Israel* (unpublished)); regarding the safeguarding of freedom of worship and the right to access to holy places (*Hass*); regarding demolition of houses due to operational needs (see HCJ 4219/02 *Gusin v. The Commander of IDF Forces in the Gaza Strip*, 56(4) PD 608); regarding the laying of siege (*Almandi*); regarding the erection of the security fence (*Beit Sourik*; *Mara’abe*).

### *B. Proportionality in an International Armed Conflict*

42. The principle of proportionality is a substantial part of international law regarding armed conflict (compare §51(5)(b) and 57 of *The First Protocol* [1977 Additional Protocol I] ... That law is of customary



character (see ... *Prosecutor v. Kupreskic*, ICTY Case no. IT-95-16 (2000)). The principle of proportionality arises when the military operation is directed toward combatants and military objectives, or against civilians at such time as they are taking a direct part in hostilities, yet civilians are also harmed. The rule is that the harm to innocent civilians caused by collateral damage during combat operations must be proportionate ... Civilians might be harmed due to their presence inside of a military target, such as civilians working in an army base; civilians might be harmed when they live or work in, or pass by, military targets; at times, due to a mistake, civilians are harmed even if they are far from military targets; at times civilians are forced to serve as “human shields” from attack upon a military target, and they are harmed as a result. In all those situations, and in other similar ones, the rule is that the harm to the innocent civilians must fulfill, inter alia, the requirements of the principle of proportionality.

43. The principle of proportionality applies in every case in which civilians are harmed at such time as they are not taking a direct part in hostilities. Judge Higgins pointed that out in the *Legality of Nuclear Weapons* case:

“The principle of proportionality, even if finding no specific mention, is reflected in many provisions of Additional Protocol I to the Geneva Conventions of 1949. Thus even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack” (p. 587).

A manifestation of this customary principle can be found in *The First Protocol*, pursuant to which indiscriminate attacks are forbidden § 51(4)). *The First Protocol* further determines (§51(5)):

Among others, the following types of attacks are to be considered as indiscriminate:

(a) ...

(b) An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

44. The requirement of proportionality in the laws of armed conflict focuses primarily upon what our constitutional law calls proportionality “*stricto sensu*”, that is, the requirement that there be a proper proportionate relationship between the military objective and the civilian damage. However, the laws of armed conflict include additional components, which are also an integral part of the theoretical principle of proportionality in the wider sense. The possibility of concentrating that law into the legal category to which it belongs, while formulating a comprehensive doctrine of proportionality, as is common in the internal law of many states, should be considered. That cannot be examined in the framework of the petition before us. We shall concentrate upon the aspect of proportionality which is accepted, without exception, as relevant to the subject under discussion.

*Israel, High Court of Justice, Public Committee against Torture in Israel case, Judgment, 14 December 2006, §§ 41–44.*

## South Africa

In 1987, in the *Petane* case, the Cape Provincial Division of South Africa’s Supreme Court dismissed the accused’s claim that the 1977 Additional Protocol I reflected customary international law. The Court stated:

The accused has been indicted before this Court on three counts of terrorism, that is to say, contraventions of s 54(1) of the Internal Security Act 74 of 1982. He has also been indicted on three counts of attempted murder.

...

The accused’s position is stated to be that this Court has no jurisdiction to try him.

...

... The point in its early formulation was this. By the terms of [the 1977 Additional] Protocol I to the [1949] Geneva Conventions the accused was entitled to be treated as a prisoner-of-war. A prisoner-of-war is entitled to have notice of an impending prosecution for an alleged offence given to the so-called “protecting power” appointed to watch over prisoners-of-war. Since, if such a notice were necessary, the trial could not proceed without it, Mr *Donen* suggested that the necessity or otherwise for giving such a notice should be determined before evidence was led. ...

...

On 12 August 1949 there were concluded at Geneva in Switzerland four treaties known as the Geneva Conventions. ...

South Africa was among the nations which concluded the treaties. ... Except for the common art 3, which binds parties to observe a limited number of fundamental humanitarian principles in armed conflicts not of an international character, they apply to wars between States.

After the Second World War many conflicts arose which could not be characterised as international. It was therefore considered desirable by some States to extend and augment the provisions of the Geneva Conventions, so as to afford protection to victims of and combatants in conflicts which fell outside the ambit of these Conventions. The result of these endeavours was Protocol I and Protocol II to the Geneva Conventions, both of which came into force on 7 December 1978.

Protocol II relates to the protection of victims of non-international armed conflicts. Since the State of affairs which exists in South Africa has by Protocol I been characterised as an international armed conflict, Protocol II does not concern me at all.

...

The extension of the scope of art 2 of the Geneva Conventions was, at the time of its adoption, controversial. ... The article has remained controversial. More debate has raged about its field of operation than about any other articles in Protocol I. ...

South Africa is one of the countries which has not acceded to Protocol I. Nevertheless, I am asked to decide, as I indicated earlier, as a preliminary point, whether Protocol I has become part of customary international law. If so, it is argued that it would have been incorporated into South African law. If it has been so incorporated it would have to be proved by one or other of the parties that the turmoil which existed at the time when the accused is alleged to have committed his offences was such that it could properly be described as an “armed conflict” conducted by “peoples” against a “ra[c]ist regime” in the exercise of their “right of self-determination”. Once all this has been shown it would have to be demonstrated to the Court that the accused conducted himself in such a manner as to become entitled to the benefits conferred by Protocol I on combatants, for example that, broadly speaking, he had, while he was launching an attack, distinguished himself from civilians and had not attacked civilian targets. ...

...

... I am prepared to accept that where a rule of customary international law is recognised as such by international law it will be so recognised by our law.

...

To my way of thinking, the trouble with the first Protocol giving rise to State practice is that its terms have not been capable of being observed by all that many States. At the end of 1977 when the treaty first lay open for ratification there were few States which were involved in colonial domination or the occupation of other States and there were only two, South Africa and Israel, which were considered to fall within the third category of ra[c]ist regimes. Accordingly, the situation sought to be regulated by the first Protocol was one

faced by few countries; too few countries in my view, to permit any general usage in dealing with armed conflicts of the kind envisaged by the Protocol to develop.

...  
Mr *Donen* contended that the provisions of multilateral treaties can become customary international law under certain circumstances. I accept that this is so. There seems in principle to be no reason why treaty rules cannot acquire wider application than among the parties to the treaty.  
Brownlie *Principles of International Law* 3rd ed at 13 agrees that non-parties to a treaty may by their conduct accept the provisions of a multilateral convention as representing general international law. ...

...  
I incline to the view that non-ratification of a treaty is strong evidence of non-acceptance.

...  
It is interesting to note that the first Protocol makes extensive provision for the protection of civilians in armed conflict. ...

...  
In this sense, Protocol I may be described as an enlightened humanitarian document. If the strife in South Africa should deteriorate into an armed conflict we may all one day find it a cause for regret that the ideologically provocative tone of s 1(4) has made it impossible for the Government to accept its terms.

...  
To my mind it can hardly be said that Protocol I has been greeted with acclaim by the States of the world. Their lack of enthusiasm must be due to the bizarre mixture of political and humanitarian objects sought to be realised by the Protocol. ...

...  
According to the *International Review of the Red Cross* (January/February 1987) No 256, as at December 1986, 66 States were parties to Protocol I and 60 to Protocol II, which, it will be remembered, deals with internal non-international armed conflicts. With the exception of France, which acceded only to Protocol II, not one of the world’s major powers has acceded to or ratified either of the Protocols. This position should be compared to the 165 States which are parties to the Geneva Conventions.  
This approach of the world community to Protocol I is, on principle, far too half-hearted to justify an inference that its principles have been so widely accepted as to qualify them as rules of customary international law. The reasons for this are, I imagine, not far to seek. For those States which are contending with “peoples[’]” struggles for self-determination, adoption of the Protocol may prove awkward. For liberation movements who rely on strategies of urban terror for achieving their aims the terms of the Protocol, with its emphasis on the protection of civilians, may prove disastrously restrictive. I therefore do not find it altogether surprising that Mr *Donen* was unable to refer me to any statement in the published literature that Protocol I has attained the status of [f] customary international [law].

...  
I have not been persuaded by the arguments which I have heard on behalf of the accused that the assessment of Professor Dugard, writing in the *Annual Survey of South African Law* (1983) at 66, that “it is argued with growing conviction that under contemporary international law members of SWAPO [South-West Africa People’s Organisation] and the ANC [African National Congress] are members of liberation movements entitled to prisoner-of-war status, in terms of a new customary rule spawned by the 1977 Protocols”, is correct. On what I have heard in argument I disagree with his assessment that there is growing support for the view that the Protocols reflect a new rule of customary international law. No writer has been cited who supports this proposition. Here and there someone says that it may one day come about. I am not sure that the provisions relating to the field of application of Protocol I are capable of ever becoming a rule of customary international law, but I need not decide that point today.  
For the reasons which I have given I have concluded that the provisions of Protocol I have not been accepted in customary international law. They accordingly form no part of South African law.  
This conclusion has made it unnecessary for me to give a decision on the question of whether rules of customary international law which conflict with the statutory or common law of this country will be enforced by its courts.  
In the result, the preliminary point is dismissed. The trial must proceed.

*South Africa, Supreme Court, Petane case, Judgment, 3 November 1987, pp. 2–8.*

South Africa

In 2010, in the *Boeremag case*, South Africa’s North Gauteng High Court stated:

In *Petane*, ... Conradie J found that the provisions of [the 1977 Additional] Protocol I are not part of customary international law, and therefore are also not part of South African law.

...  
Referring to the fact that in December 1986 only 66 of the 165 States party to the Geneva Conventions had ratified Protocol I, the Court [in *Petane*] stated:

This approach of the world community to Protocol I is, on principle, far too half-hearted to justify an inference that its principles have been so widely accepted as to qualify them as rules of customary international law. The reasons for this are, I imagine, not far to seek. For those States which are contending with “peoples[’]” struggles for self-determination, adoption of the Protocol may prove awkward. For liberation movements who rely on strategies of urban terror for achieving their aims the terms of the Protocol, with its emphasis on the protection of civilians, may prove disastrously restrictive. I therefore do not find it altogether surprising that Mr Donen was unable to refer me to any statement in the published literature that Protocol I has attained the status of customary international law.

Important changes with respect to certain aspects applicable at the time of *Petane* have taken place. The ANC [African National Congress] has become South Africa’s ruling party and in 1995 ratified Protocol I. The total number of States that have ratified it, is now ... 162.

This last aspect forms the basis on which the First Respondent [the State] and the applicants agree that Protocol I forms part of customary international law as well as of South African law. As requested, this position is accepted for the purposes of the decision, without deciding on the matter.  
Despite these changes, it remains debatable whether the provisions of Protocol I have become a part of South African law in this way.

The consensus of both parties to the conflict is required. See *Petane* ... and Article 96 of Protocol I. ...  
Parliament’s failure to incorporate Protocol I into legislation in accordance with Article 231(4) of the Constitution in fact points to the contrary, and is indicative that the requirements of *usus* and/or *opinio juris* have not been met. See *Petane*.

*South Africa, North Gauteng High Court, Boeremag case, Judgment, 26 August 2010, pp. 21–22.*

[footnotes in original omitted]

The Court also held:



If the [1977 Additional Protocol I] applies in South Africa as customary international law, the two requirements that form the basis of customary law must be met. It is arguable that the requirement of *usus* has been met by the vast number of States that have acceded or ratified it. By ratifying Protocol I the Republic of South Africa has indicated its intention to apply the Protocol, thereby fulfilling the requirement of *opinio juris*.  
*South Africa, North Gauteng High Court, Boeremag case, Judgment, 26 August 2010, p. 66.*

# Spain

In 2010, in the *Couso case*, which concerned the killing of a Spanish journalist in Baghdad on 8 April 2003 by troops of the United States of America, the Criminal Chamber of Spain’s Supreme Court held:

As alleged [by the appellants], the appealed order [presently under review] seems to place an emphasis, in order to terminate the proceedings, on the *second section of Article 611(1) of the PC* [Penal Code (1995)] ... when it is clear that on the last occasion the examining magistrate also based his proceedings on the first section referring to those who *carry out or order an ... excessive attack ...* [T]he latter should be evaluated by the Court, as was expressed in the dissenting opinion, according to the principles of International Humanitarian and customary law, and not in an anticipated manner. As a result the appealed order lacks the necessary reasoning, as it ignores the substantial grounds [raised] in the second indictment order ...

In addition, the appealed order ... reaches a conclusion concerning the termination of the proceedings in accordance with Article 637(2) LECr [Law on Criminal Prosecution of 1881] (as the *facts did not constitute an offence*) solely based on the allegation that there was a mistake by the acting [US] armed forces.

In this way, the order insists ...

“[the event] is an isolated attack, characterized as a military operation in the context of the armed conflict in Iraq in 2003, ... and not seeking to result in an extreme physical or psychological disturbance aimed at punishing the presence of authorized members of the media”.  
*Spain, Supreme Court, Couso case, Judgment, 13 July 2010, Section II(II), Segundo, § 3, p. 8.*  
[emphasis in original]

On the issue concerning breach of the law due to the failure to apply Article 611 of the Penal Code, the Court noted:

2. *Article 611 of the PC* effectively punishes

“anyone who in the event of an armed conflict commits [any of the following acts], without prejudice to the penalty for the results of such acts, shall be punished with ten to fifteen years’ imprisonment:

1. Carries out or orders an *excessive ... attack*”.

*Spain, Supreme Court, Couso case, Judgment, 13 July 2010, Section II(II), Sexto, § 2, p. 11.*  
[emphasis in original]

The Court also referred to norms of IHL relevant to the case under review, including Article 57(2)(a)(iii) of the 1977 Additional Protocol I.

*Spain, Supreme Court, Couso case, Judgment, 13 July 2010, Section II(II), Sexto, § 2, p. 15.*

On the breach of the law, the Court held:

The appealed decision declared the termination of the proceedings ... as it considered that the “*facts [of] the case did not constitute an offence*” ... [H]owever, the proceedings carried out do not permit sharing the conclusions of the first instance tribunal; rather, the facts [denounced] merit being subsumed under the cited penal provisions and the aforementioned norms of International Humanitarian Law.

*Spain, Supreme Court, Couso case, Judgment, 13 July 2010, Section II(II), Sexto, § 2, p. 16.*  
[emphasis in original]

In deciding upon the failure to apply the national and international provisions on the principle of proportionality, the Court held:

1. ... [T]here is no indication that the hotel was being used as a “*shield*” to commit an action against the accused, as was claimed by the Prosecution Service at one point and accepted by the appealed order. There is no trace – as opposed to what is stated in the order – that there was a *visual mistake* concerning the presence of a sniper ... in the hotel. ... [There is also no evidence] that the [US] tank was fired upon in the 35 minutes prior [to the attack on the hotel] or that there was anti-vehicle artillery capable of reaching it from the hotel, taking into account that the tank was more than 1500 metres away and that an RPG grenade launcher does not reach more than 650 metres. ...

2. Due to their similarity with this matter, we must refer to what has been said in relation to the fifth and sixth issues raised by the previous appellants concerning the existence of rational indications of the commission of an offence which violate the *ius in bello*, namely the norms of International Humanitarian Law that must be observed by belligerents.

*Spain, Supreme Court, Couso case, Judgment, 13 July 2010, Section II(III), Octavo, §§ 1–2, p. 17.*  
[emphasis in original]

The Court upheld the appeal against the order of 23 October 2009 by the Third Section of the Criminal Chamber of the Spanish National Court, which declared the termination of the proceedings, and held that “the proceedings must continue, and the outstanding preparatory enquiries must be undertaken, as well as any others arising from the clarification of the events under investigation.”

*Spain, Supreme Court, Couso case, Judgment, 13 July 2010, Section III, pp. 20–21.*

# United States of America

The *Agent Orange case* before the US Eastern States District Court in 2005 involved a class action suit filed on behalf of various Vietnamese nationals and an organization, the Vietnamese Association for Victims of Agent Orange/Dioxin, against Dow Chemical and other US chemical manufacturers for harms allegedly done to them and their land through the United States’ use of Agent Orange and other herbicides during the Vietnam War from 1965 to 1971 and by the South Vietnamese Government’s subsequent use of such herbicides until 1975. In dismissing the claims, the Court found that, while recognizing the evolution of international law since 1975, the use of herbicides did not violate, at the time they were used, either customary or conventional international law binding on the United States. On the question of proportionality and the use of herbicides, the Court stated:

The concept of military necessity or proportionality is a well accepted international norm governing the conduct of war. The United States Army’s manual, *The Law of Land Warfare*, states the rule succinctly: “[L]oss

of life and damage to property must not be out of proportion to the military advantage to be gained.” U.S. DEP’T OF THE ARMY, FIELD MANUAL NO. 27–10, THE LAW OF LAND WARFARE ¶ 41 (1956).

...

American courts are fully capable of applying the proportionality concept in civil litigations as demonstrated by their handling of comparative negligence, proximate cause and other sophisticated doctrines. Nevertheless, the criminal procedural aspects of proportionality, the inherently subjective judgments necessary to determine whether the concept applies, and the dearth of illustrative prosecutions, all demonstrate that federal courts should pause before recognizing a civil private cause of action under the ATS [Alien Tort Statute] on the theory that the United States may have properly used herbicides in some situations for legitimate military purposes, but that it used too much of them in too many places ... It cannot be shown that the military in the field – or the executive and legislative branches at home – violated proportionality norms when using herbicides in the Vietnam War.

As plaintiffs argue, a consensus among nations may gradually solidify into recognized international law provided that such consensus is reflected in state practice accompanied by *opinio juris*. No such understanding or consensus existed with respect to herbicides prior to 1975 – possibly in part because of the proportionality problem.

*United States, Eastern States District Court (EDNY), Agent Orange case, Judgment, 28 March 2005, pp. 219–221.*

## Venezuela

In 2001, in the *Ballestas case*, the Colombian Government requested the preventive detention and extradition of a Colombian citizen belonging to the armed group known as the Ejército de Liberación Nacional (National Liberation Army) for the crimes of rebellion, kidnapping, wrongful death, seizure and diversion of aircraft. The Chamber of Criminal Appeals of Venezuela’s Supreme Tribunal of Justice stated:

[R]ebellion ... [is an] offence emblematic of political crimes, and one of which ... *Ballestas* is accused ... The notion of “*jus rebelium*,” or the right to rebellion, clearly exists, but it is subject to several conditions, one being ... [the requirement of] proportionality between the damage that the insurrectional action will cause and the presumed benefits that it will achieve.

*Venezuela, Supreme Tribunal of Justice, Ballestas case, Judgment, 10 December 2001, p. 6.*

[emphasis in original]

## VI. Other National Practice

### Australia

During the Second Reading Speech of the Geneva Conventions Amendment Bill 1990 in the House of Representatives, the purpose of which was to amend the Geneva Conventions Act of 1957 so as to enable Australia to ratify the 1977 Additional Protocol I, Australia’s Attorney-General stated:

Additionally, the protocols do not require no civilian casualties. That is not in the game at all. The protocols do not say that in any clause. The protocols require the military leadership to assess whether or not civilian losses would be in proportion to the military objectives to be achieved by the attack in question. We all know that it is not always easy to get the right balance in these areas – that is accepted – but I think that it is just about being obtained here. It is certainly being done as well as it can be.

*Australia, House of Representatives, Attorney-General, Geneva Conventions Amendment Bill 1990: Second Reading Speech, Hansard, 12 February 1991.*

### Australia

In a press release issued in 1991, an Australian Senator asserted that Article 51(5)(b) of the 1977 Additional Protocol I would bar Australian ships from providing “naval gunfire support” (NGS) to an amphibian landing in Kuwait and from engaging batteries located in a heavily populated port. According to the Senator, it would prove very difficult for an Australian naval commander to determine whether a shore bombardment would or would not injure civilians or damage civilian property to an extent that would be excessive in relation to the direct military advantage.

*Australia, Media Release by the Shadow Minister for Defence, Protocol One: A Problem for Naval Operations in the Gulf, 20 February 1991.*

In response to these statements, the Assistant Chief of the Defence Force – Operations (ACOPS) recalled first that Australia was not yet legally bound by the 1977 Additional Protocol I and that even if it had been, such action would not be in breach of Article 51(5) (b). On the basis of the US and Australian Rules of Engagement and given the very high targeting standards shown by the US authorities, ACOPS deemed that both the Australian Government and the warship commanders “can confidently expect that NGS targeting tasks and associated co-ordinates have been rigorously scrutinised to ensure a lawful balance between incidental civilian losses and the anticipated concrete and direct military advantage”. ACOPS also differed with the Senator’s opinion because even if, in retrospect, it should emerge that excessive civilian casualties resulted from such an operation, the Australian warship commanders would not incur personal responsibility for a grave breach of the 1977 Additional Protocol I since such a grave breach can only result “from a ‘wilful’ decision, i.e. deliberate disregard for consequences whilst having full knowledge”.

*Australia, Media Release by the Shadow Minister for Defence, Protocol One and RAN Gulf Operations, 25 February 1991.*

### Australia

In 2008, in response to a question without notice on Georgia in the House of Representatives, Australia’s Minister for Foreign Affairs stated:

[E]arlier this month, following the incursion of Georgian forces into South Ossetia, the Russian Federation deployed a large-scale military offensive in Georgia, not restricted to South Ossetia. That large-scale military offensive implemented and effected large-scale devastation upon parts of Georgia, including military and economic points. ...

The actions of the Russian Federation in this respect were clearly disproportionate. ...

... We urge the Russian Federation ... to engage fully in international affairs through the relevant regional multilateral forums – through discussion, not through the disproportionate use of military force of arms.

Australia, House of Representatives, Minister for Foreign Affairs, Question Without Notice: Georgia, Hansard, 27 August 2008, p. 6835.

While the core challenges in the protection of civilians identified in the previous reports of the Secretary-General still need our sustained attention, the new report also identifies several protection policy priorities that need to be explored. In particular the following “emerging” issues would benefit from our attention, and the Group of Friends stands ready to act as a platform to advance them. ...

...

... [O]n the issue of lethal autonomous weapons systems (LAWS), the Group is of the view that further discussions are needed and it welcomes the fact that the issue will be examined in Geneva in May 2014, in the framework of the CCW [Convention on Certain Conventional Weapons]. The Group hopes that such discussions will also examine the issue with due consideration to the protection of civilians as part of a comprehensive debate including legal, military operational, technological and ethical perspectives. In time discussion should focus on the relevance of such systems to the protection of civilians, in particular in the context of IHL and with regard to the principles of distinction, precaution and proportionality.

Australia, Statement by the permanent representative of Switzerland during a UN Security Council open debate on the protection of civilians in armed conflict made on behalf of the Group of Friends on the Protection of Civilians in Armed Conflict, namely Australia, Austria, Belgium, Brazil, Canada, France, Germany, Italy, Japan, Liechtenstein, Norway, Portugal, Switzerland, the United Kingdom and Uruguay, 12 February 2014, p. 2.

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Belgium, Statement by the permanent representative of Switzerland during a UN Security Council open debate on the protection of civilians in armed conflict made on behalf of the Group of Friends on the Protection of Civilians in Armed Conflict, namely Australia, Austria, Belgium, Brazil, Canada, France, Germany, Italy, Japan, Liechtenstein, Norway, Portugal, Switzerland, the United Kingdom and Uruguay, 12 February 2014, p. 2.

## Bosnia and Herzegovina

The Report on the Practice of Bosnia and Herzegovina states: “During the aggression against the Republic of Bosnia and Herzegovina the aggressor didn’t respect the principle of proportionality in attack, but systematically violated it during the whole time of the aggression.” It provides a number of examples in this respect.

Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 1.5.

## Botswana

The Report on the Practice of Botswana recalls that Article 51(5)(b) of the 1977 Additional Protocol I provides for the principle of proportionality, but it argues that its essence is not well defined because there are no clear criteria concerning the distinction between indiscriminate and disproportionate attacks.

Report on the Practice of Botswana, 1998, Chapter 1.5.

## Brazil

The Report on the Practice of Brazil states that the principle of proportionality binds Brazil, since Brazil has ratified the 1949 Geneva Conventions and their 1977 Additional Protocols, and according to the Constitution of Brazil, international treaties are automatically applicable once ratified and published in the official journal.

Report on the Practice of Brazil, 1997, Chapter 1.5.

While the core challenges in the protection of civilians identified in the previous reports of the Secretary-General still need our sustained attention, the new report also identifies several protection policy priorities that need to be explored. In particular the following “emerging” issues would benefit from our attention, and the Group of Friends stands ready to act as a platform to advance them. ...

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Brazil, Statement by the permanent representative of Switzerland during a UN Security Council open debate on the protection of civilians in armed conflict made on behalf of the Group of Friends on the Protection of Civilians in Armed Conflict, namely Australia, Austria, Belgium, Brazil, Canada, France, Germany, Italy, Japan, Liechtenstein, Norway, Portugal, Switzerland, the United Kingdom and Uruguay, 12 February 2014, p. 2.

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Canada, Statement by the permanent representative of Switzerland during a UN Security Council open debate on the protection of civilians in armed conflict made on behalf of the Group of Friends on the Protection of Civilians in Armed Conflict, namely Australia, Austria, Belgium, Brazil, Canada, France, Germany, Italy, Japan, Liechtenstein, Norway, Portugal, Switzerland, the United Kingdom and Uruguay, 12 February 2014, p. 2.

## Cuba

The Report on the Practice of Cuba states that the principle of proportionality has been applied “in relation to armaments and the means of combat, taking into account the humanitarian principle enshrined in Cuban military doctrine”. The report cites the actions resulting from the Bay of Pigs invasion as an illustration of this point.

*Report on the Practice of Cuba, 1998, Chapter 1.5.*

## Cuba

In 2011, in a statement during the general debate of the United Nations Disarmament Commission, the ambassador and deputy permanent representative of Cuba stated that “unjustifiable wars continue to be waged, like the one occurring in Libya today, which are never the solution and always cause thousands of civilian deaths, astoundingly called ‘collateral damage’”.

*Cuba, Statement by the ambassador and deputy permanent representative of Cuba during the general debate of the United Nations Disarmament Commission, 5 April 2011, p. 1.*

## Cuba

In 2011, in a statement during the meeting of the Group of Governmental Experts on the Convention on Cluster Munitions, the delegation of Cuba stated that “unjustifiable wars continue to be waged, like the one occurring in Libya today, which are never the solution and always cause thousands of civilian deaths, astoundingly called ‘collateral damage’”.

*Cuba, Statement by the delegation of Cuba during the meeting of the Group of Governmental Experts on the Convention on Cluster Munitions, 22 August 2011, p. 2.*

## Denmark

In 2008, in a joint cost benefit analysis of a possible introduction of a national moratorium on all cluster munitions, Denmark’s Ministry of Defence and Ministry of Foreign Affairs stated:

[The] provisions, which are outlined below, are generally recognized as being an expression of customary international law. ...

The purpose of international humanitarian law is to protect the victims of war as much as possible. ...

[T]here are specific international legal requirements to weapons with regard to ... proportionality between the military advantage of neutralising an active opposing military target and the resulting devastating consequences for the civilian population.

...

For military use of weapons, it is necessary to conduct a proportionality assessment between the military advantages of the attack against the expected civilian casualties.

*Denmark, Ministry of Defence and Ministry of Foreign Affairs, A Cost Benefit Analysis of a Possible Introduction of a National Danish Moratorium on All Cluster Munitions, 1 April 2008, p. 15–16.*

## Djibouti

In 2010, in the History and Geography Textbook for 8th Grade, Djibouti’s Ministry of National Education and Higher Education stated:

[T]he principle of proportionality aims to find a balance between two conflicting interests in situations where rights and prohibitions are not absolute: one interest is dictated by considerations of military necessity, the other one by requirements of humanity.

*Djibouti, Ministry of National Education and Higher Education, History and Geography Textbook for 8th Grade, 2010, p. 188.*

## Egypt

In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that the use of nuclear weapons cannot at all be legal because they “are expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”.

*Egypt, Written statement submitted to the ICJ, Nuclear Weapons case, 20 June 1995, § 18; see also § 35(B)(2) and (3).*

## Egypt

The Report on the Practice of Egypt states: “Egypt is of the opinion that the principle of proportionality must be respected [at] all times and in any circumstance.”

*Report on the Practice of Egypt, 1997, Chapter 1.5.*

The annual report of the Secretary-General paints a gloomy picture of the situation around the world for children in armed conflict. ISIL has been listed as violating all triggers of violence against children, a result of their appalling atrocities. In Syria, the systematic use of indiscriminate aerial weapons, such as barrel bombs, account for the overwhelming majority of civilian casualties, including children. This cannot be allowed to continue. And during hostilities in Gaza last summer, civilians, including children, bore the brunt of the suffering. At least 540 Palestinian children were killed and hospitals and schools were severely damaged or destroyed, including UN facilities. The scale of the impact on children was unprecedented and unacceptable.

These facts and all other incidents listed in the report are utterly disturbing and raise serious concern about the observance of the rules of international humanitarian law, including the [principle] of ... proportionality.

*Finland, Statement by the permanent representative of Sweden at the UN Security Council Open Debate on Children and Armed Conflict made on behalf of Finland, Iceland, Norway and Sweden, 18 June 2015.*

## France

At the CDDH, France voted against Article 46 of the draft Additional Protocol I (now Article 51) because it considered:



The provisions of paragraphs 4, 5 and 7 were of a type which by their very complexity would seriously hamper the conduct of defensive military operations against an invader and prejudice the exercise of the inherent right of legitimate defence recognized in Article 51 of the Charter of the United Nations.

*France, Statement at the CDDH, Official Records, Vol. VI, CDDH/SR.41, 26 May 1977, p. 163, § 118.*

France

In 2009, the Minister of Foreign and European Affairs of France stated:

Violations of humanitarian law are ever increasing, as the current crises are unfortunately there to remind us, whether we are looking at Darfur, Somalia, Gaza, Sri Lanka or the Kivus. ... The means and methods of warfare know no limitation or restraint, [such as] ... proportionality in the use of force [and] use of the minimum violence necessary ...

We must react!

*France, Minister of Foreign and European Affairs, “International Humanitarian Law, an Imperative”, La Croix, 12 February 2009, p. 1.*

While the core challenges in the protection of civilians identified in the previous reports of the Secretary-General still need our sustained attention, the new report also identifies several protection policy priorities that need to be explored. In particular the following “emerging” issues would benefit from our attention, and the Group of Friends stands ready to act as a platform to advance them. ...

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... [O]n the issue of lethal autonomous weapons systems (LAWS), the Group is of the view that further discussions are needed and it welcomes the fact that the issue will be examined in Geneva in May 2014, in the framework of the CCW [Convention on Certain Conventional Weapons]. The Group hopes that such discussions will also examine the issue with due consideration to the protection of civilians as part of a comprehensive debate including legal, military operational, technological and ethical perspectives. In time discussion should focus on the relevance of such systems to the protection of civilians, in particular in the context of IHL and with regard to the principles of distinction, precaution and proportionality.

*France, Statement by the permanent representative of Switzerland during a UN Security Council open debate on the protection of civilians in armed conflict made on behalf of the Group of Friends on the Protection of Civilians in Armed Conflict, namely Australia, Austria, Belgium, Brazil, Canada, France, Germany, Italy, Japan, Liechtenstein, Norway, Portugal, Switzerland, the United Kingdom and Uruguay, 12 February 2014, p. 2.*

German Democratic Republic

At the CDDH, the German Democratic Republic stated that it considered:

Protection of the civilian population could not be improved if the concept of proportionality was retained. To permit attacks against the civilian population and civilian objects if such attacks had military advantages was tantamount to making civilian protection dependent on subjective decisions taken by a single person, namely, the military commander.

*German Democratic Republic, Statement at the CDDH, Official Records, Vol. XIV, CDDH/III/SR.7, 18 March 1974, p. 56, § 48.*

Germany

In 1983, in reply to a question in Parliament about the principle of proportionality in attack, the German Government declared that the principle contained in Article 51(5) of the 1977 Additional Protocol I required decisions on a case-by-case basis and that no abstract calculations were possible.

*Germany, Reply by the government to a question in the Lower House of Parliament, Kriegsvölkerrechtliche Grundsätze, BT-Drucksache 10/445, 5 October 1983, pp. 11–12.*

Germany

In 1996, the German Government reminded the Turkish Government to respect the principle of proportionality during hostilities in northern Iraq.

*Germany, Reply by the government to a question in the Lower House of Parliament, Lage der kurdischen Flüchtlinge im Nordirak, BT-Drucksache 13/5451, 27 August 1996, pp. 7–8.*

Germany

In 2009, in reply to a minor interpellation in the Lower House of Parliament (*Bundestag*) entitled “Investigation of serious violations of international humanitarian law in the recent Gaza war”, Germany’s Federal Government wrote:

14. Can the Federal Government confirm or deny that ammunition with white phosphorous has been used in densely populated areas (e.g. Gaza City) and against civilian installations (e.g. the UN), and how does the Federal Government assess such use under international humanitarian law?

The Federal Government is aware of allegations that Israel has used phosphorous weapons in a way that violated international law. This is the subject of a number of investigations, including by Israel. The Federal Government has no information of its own on whether such weapons were used. Smoke ammunition which includes white phosphorus is not prohibited as such under international humanitarian law. But its use must comply with the general rules of international humanitarian law. Hence ... an attack against a military objective which must be expected to cause loss of civilian life that is out of proportion to the concrete and direct advantage ... [is] prohibited.

*Germany, Lower House of Federal Parliament (Bundestag), Reply by the Federal Government to the Minor Interpellation by the Members Winfried Nachtwei, Kerstin Müller (Cologne), Jürgen Trittin, other Members and the Parliamentary Group BÜNDNIS 90/DIE GRÜNEN, BT-Drs. 16/12673, 20 April 2009, p. 6.*

The Federal Government also wrote:

17. Given that armed Palestinian groups and their legitimate military objectives are often placed in populated areas, does the Federal Government consider that it can be justified under international law to subject these populated areas to massive fire even if it can be expected that a large number of injuries and deaths will be caused and will mostly affect civilians?

If yes, how does the Federal Government justify that such a use of weapons complies with international law?

... Attacks are prohibited if they can be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be out of proportion to the concrete and direct advantage anticipated. This has to be analysed on a case by case basis.

*Germany, Lower House of Federal Parliament (Bundestag), Reply by the Federal Government to the Minor Interpellation by the Members Winfried Nachtwei, Kerstin Müller (Cologne), Jürgen Trittin, other Members and the Parliamentary Group BÜNDNIS 90/DIE GRÜNEN, BT-Drs. 16/12673, 20 April 2009, p. 7 .*

While the core challenges in the protection of civilians identified in the previous reports of the Secretary-General still need our sustained attention, the new report also identifies several protection policy priorities that need to be explored. In particular the following “emerging” issues would benefit from our attention, and the Group of Friends stands ready to act as a platform to advance them. ...

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Hungary

At the CDDH, Hungary stated:

The debate had shown that opinion in the [Third] Committee was divided on the principle of proportionality ... [A] rule well established in international law should be reflected in practice and should produce the intended effects. Yet the number of civilians victims had increased alarmingly over the past few years: accordingly, either the rule was not well established and hence not binding; or it existed and could not be applied in armed conflicts; or it existed and was applied, but the results of its application provided the best argument against it. The [proposed] amendments ... improved the ICRC text and maintained the rule of proportionality, but did not provide a satisfactory solution of the problem.

*Hungary, Statement at the CDDH, Official Records, Vol. XIV, CDDH/III/SR.8, 19 March 1974, p. 68, § 8o.*

India

In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, India stated:

The relationship between military advantage and the collateral damage involved also determines the legality of use of a weapon or a method of warfare employed. If the collateral damage is excessive in relation to the military advantage, the attack is forbidden.

*India, Written statement submitted to the ICJ, Nuclear Weapons case, 20 June 1995, p. 3.*

India

In 2006, in a statement regarding the situation in Lebanon, the Prime Minister of India stated:

On July 12, India had condemned the abduction of two Israeli soldiers by the Hezbollah cadres and called for their immediate release. Simultaneously, we had condemned in the strongest possible terms the excessive and disproportionate military retaliation by Israel. We had particularly expressed concern that the actions of the Israeli Defence Forces had resulted in the killing and suffering of innocent civilians, including women and children, that is likely to exacerbate and already tense situation.

*India, Statement by the Prime Minister regarding the situation in Lebanon, 27 July 2006.*

India

In 2008, in a statement on the situation in Gaza, the official spokesperson of India’s Ministry of External Affairs stated:

The Government of India had hoped that military action by Israel against targets in the Gaza strip would abate. It is disappointing to note that the use of disproportionate force is resulting in a large number of civilian casualties on the one hand and the escalating violence on the other. This continued use of indiscriminate force is unwarranted and condemnable.

*India, Statement by the official spokesperson of the Ministry of External Affairs on the situation in Gaza, 29 December 2008.*

India

In 2009, in answer to a written question in the Lower House of Parliament (*Lok Sabha*) regarding the situation in Palestine, the Minister of State in India’s Ministry of External Affairs stated:

(b) In the period 26.12.2008 to 18.1.2009, over 1200 Palestinians, including civilians and children, were reportedly killed. 13 Israelis are also said to have been killed.

The Government of India closely followed the above developments. On 27.12.2008, 29.12.2008, 2.1.2009, 4.1.2009 and 9.1.2009, the Official Spokesperson made statements on this matter calling, inter alia, for an immediate end to the disproportionate and condemnable use of force, particularly against civilians.

*India, Answer by the Minister of State in the Ministry of External Affairs to written question 224 in the Lower House of Parliament (Lok Sabha) regarding the situation in Palestine, 18 February 2009.*

Iraq

On the basis of a press conference and a statement by the President of Iraq, the Report on the Practice of Iraq considers that the armed forces must act with only the degree of force necessary to achieve the specific military objective. The aim is to give due regard to humanitarian requirements and to lessen civilian suffering.

*Report on the Practice of Iraq, 1998, Chapter 1.5, referring to Press Conference of the President, 10 November 1980, Encyclopedia of the Iraqi-Iranian War, Vol. I, p. 318 and Statement by the Iraqi President during preliminary discussions with the Committee of Good Offices, 2 March 1984, Encyclopedia of the Iraqi-Iranian War, Vol. III, p. 54.*

Islamic Republic of Iran

In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Islamic Republic of Iran stated: “Some of the principles of humanitarian international law from which one can deduce the illegitimacy of the use of nuclear weapons are: ... The existence of proportionality between military advantages gained and the used weapons and methods.”

*Islamic Republic of Iran, Written statement submitted to the ICJ, Nuclear Weapons case, 19 June 1995, p. 2; see also Written statement submitted to the ICJ, Nuclear Weapons (WHO) case, undated, pp. 1–2.*

Israel

In 2006, Israel’s Ministry of Foreign Affairs stated:

3. Proportionality

The second legal requirement is that the potential harm to civilians and civilian objects expected in any attack must be proportionate to the military advantage anticipated.

Major General A.P.V. Rogers, a former Director of British Army Legal Services, explains the rationale behind this principle:

Although they are not military objectives, civilians and civilian objects are subject to the general dangers of War in the sense that attacks on military personnel and military objectives may cause incidental damage. It may not be possible to limit the radius of effect entirely to the objective to be attacked ... Members of the armed forces are not liable for such incidental damage, provided it is proportionate to the military gain expected of the attack.

While the principle is clear, in practice weighing the expected military advantage against possible collateral damage can be an extremely complex, especially in the heat of an armed conflict. In their report to the Prosecutor of the International Criminal Tribunal for the former Yugoslavia, the Committee established to review NATO bombings in Yugoslavia highlighted the particular difficulties which arise when military objectives are located in densely populated areas:

The answers to these questions are not simple. It may be necessary to resolve them on a case by case basis, and the answers may differ depending on the background and values of the decision maker. It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to noncombatants. ... It is suggested that the determination of relative values must be that of the “reasonable military commander.”

One important principle established by international law for the “reasonable military commander” seeking to make this difficult balance, is that the proportionality of a response to an attack is to be measured not in regard to the specific attack suffered by a state but in regard to what is necessary to remove the overall threat. As Rosalyn Higgins, currently President of the International Court of Justice, has written, proportionality:

cannot be in relation to any specific prior injury – it has to be in relation to the overall legitimate objective of ending the aggression

Accordingly, the right of self-defense includes not only acts taken to prevent the immediate threat, but also to prevent subsequent attacks.

...

... in relation to the question of proportionality, the IDF Manual states:

Even when it is not possible to isolate the civilians from an assault and there is no other recourse but to attack, the commander is required to refrain from an attack that is expected to inflict harm on the civilian population, which is disproportionate to the expected military gain.

*Israel, Responding to Hizbullah Attacks from Lebanon: Issues of Proportionality, Legal Background, Ministry of Foreign Affairs of Israel, 25 July 2006, §§ 3–4.*

Israel

In 2007, Israel’s Ministry of Foreign Affairs stated in a diplomatic note:

Proportionality

A further legal requirement is that the potential harm to civilians and civilian objects expected in any attack must be proportionate to the military advantage anticipated.

Major General A.P.V. Rogers, a former Director of British Army Legal Services, explains the rationale behind this principle:

Although they are not military objectives, civilians and civilian objects are subject to the general dangers of War in the sense that attacks on military personnel and military objectives may cause incidental damage. It may not be possible to limit the radius of effect entirely to the objective to be attacked ... Members of the armed forces are not liable for such incidental damage, provided it is proportionate to the military gain expected of the attack.

While the principle is clear, in practice weighing the expected military advantage against possible collateral damage can be an extremely complex, especially in the heat of an armed conflict. In their report to the Prosecutor of the International Criminal Tribunal for the former Yugoslavia, the Committee established to review NATO bombings in Yugoslavia highlighted the particular difficulties which arise when military objectives are located in densely populated areas:

The answers to these questions are not simple. It may be necessary to resolve them on a case by case basis, and the answers may differ depending on the background and values of the decision maker. It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to noncombatants. ... It is suggested that the determination of relative values must be that of the “reasonable military commander.”

The test of proportionality to be applied in a case of armed conflict (jus in bellum) is broader than that applied under the principles of self-defense outside the context of actual warfare (jus ad bellum). But it should be noted that the policies applied in practice by the IDF conformed even with this stricter test of proportionality. In relation to the self-defense standard, it should be recalled that international law provides that the proportionality of a response to an attack is to be measured, not in regard to the specific attack suffered by a

state, but in regard to what is necessary to remove the overall threat. As Rosalyn Higgins, currently President of the International Court of Justice, has written, proportionality:

cannot be in relation to any specific prior injury – it has to be in relation to the overall legitimate objective of ending the aggression

Accordingly, the right of self-defense includes not only acts implemented to prevent the immediate threat, but also to prevent subsequent attacks”. In Israel’s case this means that its response had to be measured not only in respect to the initial Hizbullah cross-border attack, or even the 4,000 missiles fired at Israel’s northern towns and villages, but also against the threat of the tens of thousands of missiles which Hizbullah had amassed and continued to receive from Iran and Syria.

...

... in relation to the question of proportionality, the IDF position is clear:

Even when it is not possible to isolate the civilians from an assault and there is no other recourse but to attack, the commander is required to refrain from an attack that is expected to inflict harm on the civilian population, which is disproportionate to the expected military gain.

*Israel, Israel’s War with Hizbullah. Preserving Humanitarian Principles While Combating Terrorism, Diplomatic Notes No. 1, Ministry of Foreign Affairs of Israel, April 2007, pp. 11–13.*

Israel

In 2008, in a briefing to the Diplomatic Corps on Israel’s operations in Gaza, Israel’s Vice Prime Minister and Minister of Foreign Affairs stated:

I think that Israel is the only state in the world in which its Minister of Defense has today, during a time of almost war, met with the Attorney General, the Minister of Justice, and Foreign Ministry experts on international law, in order to speak about and understand the terms of proportionality in accordance with how the IDF [Israel Defense Forces] works and will continue to work on the ground. So, basically, it is not something that can be judged. I hope that the international community knows that we are trying to avoid civilian casualties ... .

Now, it comes down to different examples. We can discuss them. The situation in which you have a family living in a factory where I know there are rockets that can kill Israelis – is this proportionate action? I think that it is proportionate. But these are the decisions that the Israeli Chief of Staff needs to decide on a daily basis.

...

So, yes, I believe that what we are doing is proportionate but I don’t know how you can measure proportionality when you are in this kind of situation. In a way, a war against terrorism is unfair because, on one side, there are these terrorists. Believe me, proportionality is something that isn’t part of their vocabulary, and international law is not part of their vocabulary and the Geneva Convention is not part of their vocabulary. We are working with our hands tied because of all these rules, and because we are part of the free world, and because this is part of our values as well. But accidents can happen and civilians are also being killed by Israeli operations. I am not going to ignore it but I hope that there is a better understanding of what we are trying to avoid.

*Israel, Briefing to the Diplomatic Corps by the Vice Prime Minister and Minister of Foreign Affairs, 3 March 2008.*

Israel

In 2008, in a background paper on Israel’s operations in Gaza, Israel’s Ministry of Foreign Affairs stated:

In practice, two key questions arise in relation to the legitimacy of the ... execution of an operation: 1) Is the target itself a legitimate military objective? and 2) Even if the target is in itself legitimate, is there likely to be disproportionate injury and damage to the civilian population and civilian property.

3. Proportionality

The second legal requirement is that any attack be proportionate, in the sense that incidental loss and damage expected to be caused to civilians and civilian objects must not be excessive in relation to the military advantage anticipated.

...

While the principle is clear, in practice weighing an expected military advantage against possible collateral damage can be an extremely complex calculation to make, especially in the heat of an armed conflict. In their report to the Prosecutor of the International Criminal Tribunal for the former Yugoslavia, the Committee established to review NATO bombings in Yugoslavia highlighted the particular difficulties which arise when military objectives are located in densely populated areas:

The answers to these questions are not simple. It may be necessary to resolve them on a case by case basis, and the answers may differ depending on the background and values of the decision maker. It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to non-combatants. ... It is suggested that the determination of relative values must be that of the “reasonable military commander”. [Final Report to the Prosecutor by the Committee established to review NATO bombings in Yugoslavia para. 50-1]

Furthermore, in making this determination, a military commander is not required to ignore questions relating to the safety of his own forces. To the contrary, As Bothe *et al* note:

The concept of military advantage involves a variety of considerations including the security of the attacking force. *ibid*

4. From theory to practice – Israel’s operations in Gaza

...

Similarly, in relation to the question of proportionality, IDF [Israel Defense Forces] doctrine requires a commander to refrain from an attack that is expected to inflict incidental harm on the civilian population that is excessive in proportion to the expected military gain. In practice this requires the IDF and the commander in the field to assess both the expected military gain and the potential of collateral injury to civilians in the area.

*Israel, Ministry of Foreign Affairs, Background paper, Responding to Hamas Attacks from Gaza: Issues of Proportionality, December 2008, §§ 1 and 3–4.*

[footnotes in original omitted]

Israel

In 2009, in a report on Israeli operations in Gaza between 27 December 2008 and 18 January 2009 (the “Gaza Operation”, also known as “Operation Cast Lead”), Israel’s Ministry of Foreign Affairs stated:

120. In addition to the principle of distinction, customary international law bars military attacks that are anticipated to harm civilians excessively in relation to the expected military advantage. This principle, known as the “principle of proportionality,” is reflected in [the 1977] Additional Protocol I [Article 51(5)(b)], which prohibits launching attacks “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” The “elements of crimes” drafted in the Rome Statute of the International Criminal Court implementation process and approved by the Assembly of States Parties to the Rome [1998 ICC] Statute clarifies two key matters as well – that the actionable offence of causing “excessive incidental death, injury or damage” is established only where these matters were “clearly excessive,” and that excess and proportion is to be judged “in relation to the concrete and direct overall military advantage anticipated.” While Israel is not a party to either Additional Protocol I or the Rome Statute, it accepts these clarifications as reflective of customary international law.
121. The very notion of not inflicting “excessive” harm recognises that some civilian casualties may be unavoidable when pursuing legitimate military objectives. Numerous military manuals reflect this grim reality. ...
122. By definition, then, evaluation of proportionality (or excessive harm to civilians compared to military advantage) requires balancing two very different sets of values and objectives, in a framework in which all choices will affect human life. States have duties to protect the lives of their civilians and soldiers by pursuing proper military objectives, but they must balance this against their duty to minimise incidental loss of civilian lives and civilian property during military operations. That balancing is inherently difficult, and raises significant moral and ethical issues. ...
- ...
128. As with the principle of distinction, a showing of *intent* is required for there to have been any arguable “war crime” based on excessive civilian harm in comparison with military objectives. As customary international law is reflected in the specific relevant section of the Rome Statute, for example, it is clear that a war crime requires the “intentional launching” of an attack “in the *knowledge* that such attack will cause incidental loss of life or injury to civilians ... which would be *clearly excessive* in relation to the concrete and direct overall military advantage anticipated.” In other words, from this very definition, the existence of a war crime turns not on the reasonableness of the commander’s weighing of military advantage against civilian harm, but on whether he or she knew that the attack would cause clearly disproportionate harm, but proceeded intentionally notwithstanding this knowledge.
129. In other words, there is no indication of a “war crime” simply because others conclude, after the conflict, that a different decision – often, a snap decision taken on the battlefield – could have led to fewer civilian casualties. To the contrary, if the commander in the field did not intend and did not know that the attack would cause clearly excessive levels of civil harm, there is no legal basis for labelling it as [a] war crime.
- Israel, Ministry of Foreign Affairs, The Operation in Gaza 27 December 2008–18 January 2009: Factual and Legal Aspects, 29 July 2009, §§ 120–122 and 128–129.*
- [emphasis in original; footnotes in original omitted]

The report also stated:

- The issue of proportionality turns on the reasonableness of a commander’s decision to use a particular munition in a particular context, taking into account the expected military benefit and the expected collateral damage. Second-guessing the reasonableness of a commander’s decision in a rapidly evolving and complex battlefield situation should not be done lightly, and must take into account the information available to the commander at the time of the decision (not what actually occurred) and the value of the military objective to a reasonable commander (rather than to a third-party observer).
- Israel, Ministry of Foreign Affairs, The Operation in Gaza 27 December 2008–18 January 2009: Factual and Legal Aspects, 29 July 2009, § 421.*

Israel

In 2010, in a position paper submitted to the Public Commission to Examine the Maritime Incident of 31 May 2010 (the Turkel Commission), established by the Israeli Government to examine the Gaza flotilla incident, Israel’s Military Advocate General stated:

- In accordance with the principle of proportionality, the expectation that “civilians” will be killed and that “civilian objectives” will be hit in the framework of intentional attack against a legitimate military objective (human or object) does not make it illegal, despite that those “civilians” and “civilian objects” continue to be protected from attack intended to hit them. Such an attack constitutes a breach of the law of armed conflict only if as a result of it, collateral damage – including killing or wounding of “civilians” or damage to their property and to “civilian objectives” – which is disproportional to the military advantage expected to result from the attack, is expected to be caused. This conclusion does not change even when in the framework of the entirety of the combat, very many civilians are killed and wounded: even then, the high number of casualties, in and of itself, does not indicate that there was any breach of the law of armed conflict. To summarize, where activity is taking place in the legal framework of the law of armed conflict, the death of “civilians” does not, in and of itself, constitute a prima facie breach of the law of armed conflict; thus, it does not constitute cause for “setting into motion” the duty to investigate that is entrenched within. Only if suspicion arises that said result occurred as a result of an attack that was directed against those “civilians” (or against “civilian objectives”), with a goal of harming them per se, or as a result of an attack directed against a legitimate objective where it was known that it was likely to cause excessive collateral damage – can it be said that it is a prima facie breach of the principles of distinction and proportionality; and if it turns out that this indeed took place, and that the collateral damage that was expected to be caused thereby was clearly excessive, it is likely to lead to individual criminal liability, pursuant to international law; that is, it is liable to constitute a war crime.
- Israel, Position paper by the Military Advocate General on investigating allegations of violations of IHL, submitted to the Public Commission to Examine the Maritime Incident of 31 May 2010 (the Turkel Commission), 19 December 2010, Part B.*
- [emphasis in original]
- While the core challenges in the protection of civilians identified in the previous reports of the Secretary-General still need our sustained attention, the new report also identifies several protection policy priorities that need to be explored. In particular the following “emerging” issues would benefit from our attention, and the Group of Friends stands ready to act as a platform to advance them. ...
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*Italy, Statement by the permanent representative of Switzerland during a UN Security Council open debate on the protection of civilians in armed conflict made on behalf of the Group of Friends on the Protection of Civilians in Armed Conflict, namely Australia, Austria, Belgium, Brazil, Canada, France, Germany, Italy, Japan, Liechtenstein, Norway, Portugal, Switzerland, the United Kingdom and Uruguay, 12 February 2014, p. 2.*

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*Japan, Statement by the permanent representative of Switzerland during a UN Security Council open debate on the protection of civilians in armed conflict made on behalf of the Group of Friends on the Protection of Civilians in Armed Conflict, namely Australia, Austria, Belgium, Brazil, Canada, France, Germany, Italy, Japan, Liechtenstein, Norway, Portugal, Switzerland, the United Kingdom and Uruguay, 12 February 2014, p. 2.*

Jordan

Prior to the adoption of UN General Assembly Resolution 47/37 in 1992 on the protection of the environment in times of armed conflict, Jordan and the United States submitted a memorandum to the Sixth Committee of the UN General Assembly entitled “International Law Providing Protection to the Environment in Times of Armed Conflict”, which stated that “the customary rule that prohibits attacks which reasonably may be expected at the time to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, are prohibited” provides protection for the environment in times of ar

med conflict.

*Jordan and United States, International Law Providing Protection to the Environment in Times of Armed Conflict, annexed to Letter dated 28 September 1992 to the Chairman of the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/3, 28 September 1992, § 1(h).*

Kuwait

The Report on the Practice of Kuwait affirms that numerous statements by Kuwait highlight the importance of the principle of proportionality in attack.

*Report on the Practice of Kuwait, 1997, Chapter 1.5.*

The report specifies that there is an obvious violation of the principle of proportionality if no military advantage could be expected from the destruction of an object. This point was illustrated by the country’s vigorous protests over violations of the principle of proportionality committed by the Iraqi armed forces in setting oil wells and other facilities on fire without any hope of gaining a military advantage. The report notes that it is the *opinio juris* of Kuwait that the principle of proportionality must be respected, and that objects whose destruction provide no military advantage should be spared.

*Report on the Practice of Kuwait, 1997, Chapter 1.5.*

Malaysia

In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1995, Malaysia quoted with approval the US statement in the same case.

*Malaysia, Written statement submitted to the ICJ, Nuclear Weapons (WHO) case, 19 June 1995, p. 22.*

Malaysia

In 2010, during the consideration of the status of the 1977 Additional Protocols by the Sixth Committee of the UN General Assembly, a statement of the delegation of Malaysia was summarized by the Committee in its records as follows: “[The delegate of Malaysia] said that ... [t]he laws of naval warfare incorporated the fundamental principles of international humanitarian law, including ... proportionality”.

*Malaysia, Statement by the delegation of Malaysia before the Sixth Committee of the UN General Assembly on the Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflict, 18 October 2010, as published in the summary record of the 13th meeting, 8 December 2010, UN Doc. A/C.6/65/SR.13, §§ 8 and 10.*

Netherlands

In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Netherlands stated: “The general principles of international humanitarian law in armed conflict also apply to the use of nuclear weapons ... in particular ... the prohibition on attacking military targets if this would cause disproportionate harm to the civilian population”.

*Netherlands, Written statement submitted to the ICJ, Nuclear Weapons case, 16 June 1995, § 32; see also Written statement submitted to the ICJ, Nuclear Weapons (WHO) case, 6 June 1994, § 39.*

Netherlands

In 2003, in reply to written questions by Parliament concerning, *inter alia*, guidelines for aerial bombardment, the Minister of Defence of the Netherlands stated:

The guidelines for target selection during aerial bombardments are based on the relevant provisions of International Humanitarian Law (IHL). Amongst others, all reasonable precautionary measures must be taken



to avoid civilian casualties and to prevent collateral damage to civilians objects. In practice, Dutch fighter pilots will not attack targets, when it is likely that civilians will be present. Also, an attack may not be carried out if the collateral damage to be expected reasonably does not relate to the actual and direct military advantage.

*Netherlands, Lower House of Parliament, Statement by the Minister of Defence, Handelingen, 2003–2004 Session, 27 October 2003, Appendix No. 206, pp. 439–440.*

New Zealand

In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, New Zealand stated:

Discrimination between combatants and those who are not directly involved in armed conflict is a fundamental principle of international humanitarian law. While it is prohibited to actually target civilians and civilian objects, there is no absolute protection from collateral damage. The application of the principle requires an assessment of whether the civilian casualties are out of proportion to the legitimate military advantage achieved and whether collateral damage is so widespread as to amount to an indiscriminate attack.

*New Zealand, Written statement submitted to the ICJ, Nuclear Weapons case, 20 June 1995, § 71.*

Nigeria

According to the Report on the Practice of Nigeria, it is Nigeria’s *opinio juris* that the rule of proportionality forms part of customary international law.

*Report on the Practice of Nigeria, 1997, Chapter 1.5.*

The report also notes that the principle of proportionality was violated by the Nigerian air force on numerous occasions during the civil war. Senior military officials and aircraft pilots were reported to have regretted such violations.

*Report on the Practice of Nigeria, 1997, Chapter 1.5, referring to The War in the Air, New Nigerian War Souvenir Edition, 12 January 1970.*

Norway

In 2006, during a debate in the UN Security Council, the permanent representative of Norway stated regarding the situation in Gaza: “The current operations raise a number of issues of international law, whether they are police operations or military operations. According to international law any use of violence shall be necessary and proportionate.”

*Norway, Statement by the permanent representative of Norway to the United Nations in the Security Council regarding the situation in Gaza, 30 June 2006.*

Norway

In 2006, during a UN Security Council meeting, the Norwegian Minister for Foreign Affairs stated with regard to the situation in Lebanon and Gaza: “While recognizing Israel’s inherent right to self-defence, all use of armed force must satisfy [the] requirements of ... proportionality. ... Indiscriminate and excessive use of force [is] prohibited. Norway urges Israel not to resort to disproportionate action.”

*Norway, Statement by the Minister for Foreign Affairs in the UN Security Council regarding the situation in Lebanon and Gaza, 21 July 2006.*

Norway

In 2009, in a statement at the Second Review Conference of the Ottawa Convention on Anti-Personnel Mines, the Minister of Foreign Affairs of Norway stated: “In armed conflicts, international humanitarian law accepts the need to strike a balance between military necessity and humanitarian concerns.”

*Norway, Statement by the Minister of Foreign Affairs at the Second Review Conference of the Ottawa Convention on Anti-Personnel Mines, 3 December 2009.*

While the core challenges in the protection of civilians identified in the previous reports of the Secretary-General still need our sustained attention, the new report also identifies several protection policy priorities that need to be explored. In particular the following “emerging” issues would benefit from our attention, and the Group of Friends stands ready to act as a platform to advance them. ...

... [O]n the issue of lethal autonomous weapons systems (LAWS), the Group is of the view that further discussions are needed and it welcomes the fact that the issue will be examined in Geneva in May 2014, in the framework of the CCW [Convention on Certain Conventional Weapons]. The Group hopes that such discussions will also examine the issue with due consideration to the protection of civilians as part of a comprehensive debate including legal, military operational, technological and ethical perspectives. In time discussion should focus on the relevance of such systems to the protection of civilians, in particular in the context of IHL and with regard to the principles of distinction, precaution and proportionality.

*Norway, Statement by the permanent representative of Switzerland during a UN Security Council open debate on the protection of civilians in armed conflict made on behalf of the Group of Friends on the Protection of Civilians in Armed Conflict, namely Australia, Austria, Belgium, Brazil, Canada, France, Germany, Italy, Japan, Liechtenstein, Norway, Portugal, Switzerland, the United Kingdom and Uruguay, 12 February 2014, p. 2.*

The annual report of the Secretary-General paints a gloomy picture of the situation around the world for children in armed conflict. ISIL has been listed as violating all triggers of violence against children, a result of their appalling atrocities. In Syria, the systematic use of indiscriminate aerial weapons, such as barrel bombs, account for the overwhelming majority of civilian casualties, including children. This cannot be allowed to continue. And during hostilities in Gaza last summer, civilians, including children, bore the brunt of the suffering. At least 540 Palestinian children were killed and hospitals and schools were severely damaged or destroyed, including UN facilities. The scale of the impact on children was unprecedented and unacceptable.

These facts and all other incidents listed in the report are utterly disturbing and raise serious concern about the observance of the rules of international humanitarian law, including the [principle] of ... proportionality.

*Norway, Statement by the permanent representative of Sweden at the UN Security Council Open Debate on Children and Armed Conflict made on behalf of Finland, Iceland, Norway and Sweden, 18 June 2015.*

Pakistan

The Report on the Practice of Pakistan affirms that the practice of Pakistan is consistent with the principle of proportionality.

*Report on the Practice of Pakistan, 1998, Chapter 1.5.*

Poland

At the CDDH, Poland stated:

The rule of proportionality as expressed in the ICRC text would give military commanders the practically unlimited right to decide to launch an attack if they considered that there would be a military advantage. Civilian suffering and military advantage were two values that could not conceivably be compared.

*Poland, Statement at the CDDH, Official Records, Vol. XIV, CDDH/III/SR.8, 19 March 1974, p. 61, § 13.*

Republic of Korea

According to the Report on the Practice of the Republic of Korea, it is the Republic of Korea’s *opinio juris* that the principle of proportionality in attack is a requirement of international law.

*Report on the Practice of the Republic of Korea, 1997, Chapter 1.5.*

Romania

At the CDDH, Romania stated that it had always opposed the “rule of proportionality” and considered that:

It amounted to legal acceptance of the fact that one part of the civilian population was to be deliberately sacrificed to real or assumed military advantages and it gave military commanders the power to weigh their military advantage against the probable losses among the civilian population during an attack against the enemy. Military leaders would tend to consider military advantage to be more important than the incidental loss. The principle of proportionality was therefore a subjective principle which could give rise to serious violations.

*Romania, Statement at the CDDH, Official Records, Vol. XIV, CDDH/III/SR.31, 14 March 1974, p. 305, § 42; see also Statement at the CDDH, Official Records, Vol. XIV, CDDH/III/SR.7, 18 March 1974, p. 57, § 55.*

Russian Federation

The Report on the Practice of the Russian Federation considers the principle of proportionality the “weakest point of IHL” because

IHL itself does not clearly enough define the criteria of respecting the balance between the requirements of humanism and military necessity. This issue is not treated in any of the available documents. It remains the exclusive domain of commanders at the helm of military operations ... Armed conflicts on the territory of the former USSR demonstrate that conflicting parties do not observe in their acts the limitations set forth in IHL. We are sorry to say that we do not know of any occurrence when a party to a conflict complained of the non-respect of the principle of proportionality by the parties. In all probability, this principle is in reality opposed by a practice based on the assumption that the aim to gain military superiority over the enemy can justify any means of warfare, which, in fact, often means the violation of the principle of proportionality. In this connection, we can point out that the large-scale military operations of the federal troops in Chechnya were at the beginning contrary to the principle of proportionality. In the armed forces of the CIS countries there are neither provisions defining the terms of the respect of the principle of proportionality nor provisions envisaging prosecution of individuals who violate this principle.

*Report on the Practice of the Russian Federation, 1997, Chapter 1.5.*

Russian Federation

In 2008, in a statement before the UN Security Council during a meeting on the protection of civilians in armed conflict, the permanent representative of the Russian Federation stated: “We vigorously condemn both deliberate attacks on civilians and their deaths resulting from ... [the] excessive use of force, which is a violation of international humanitarian law.”

*Russian Federation, Statement by the permanent representative of the Russian Federation before the UN Security Council during a meeting on the protection of civilians in armed conflict, 27 May 2008.*

Russian Federation

In 2009, in a statement before the UN Security Council during a meeting on the protection of civilians in armed conflict, the permanent representative of the Russian Federation stated: “We strongly condemn deliberate attacks on and the killing of civilians through the ... disproportionate use of force, which is a gross violation of international humanitarian law.”

*Russian Federation, Statement by the permanent representative of the Russian Federation before the UN Security Council during a meeting on the protection of civilians in armed conflict, 14 January 2009.*

Russian Federation

In 2010, in a statement before the UN Security Council during a meeting on the protection of civilians in armed conflict, the permanent representative of the Russian Federation stated: “We resolutely condemn both wilful attacks against civilians and civilian loss of life as a result of ... disproportionate use of force, which constitute serious violations of international humanitarian law.”

*Russian Federation, Statement by the permanent representative of the Russian Federation before the UN Security Council during a meeting on the protection of civilians in armed conflict, 7 July 2010.*

Russian Federation

In 2011, during the UN Security Council’s consideration of the report by the chief prosecutor of the International Criminal Court on the situation in Libya, the permanent representative of the Russian Federation stated:

We are deeply alarmed by the growing number of civilian casualties and the destruction of civilian facilities as a result of the actions by opposing Libyan parties, in particular as a result of the use of indiscriminate

weapons.

Unfortunately, it must be noted that actions by the NATO-led coalition forces are also resulting in civilian casualties, as was seen in particular during recent bombings in Tripoli. We emphasize once again that any use of force by the coalition in Libya should be carried out in strict compliance with resolution 1973 (2011). Any act going beyond the mandate established by that resolution in any way or any disproportionate use of force is unacceptable.

We support the efforts by the International Criminal Court to carry out a fair and impartial investigation into the actions of all parties to the conflict in Libya and to bring to justice individuals involved in possible crimes against humanity and serious violations of international humanitarian law in Libya.

*Russian Federation, Statement by the permanent representative of the Russian Federation before the UN Security Council during the consideration of the report by the chief prosecutor of the International Criminal Court on the situation in Libya, 4 May 2011, p. 9.*

Russian Federation

In 2011, in a statement before the UN Security Council during a meeting on the protection of civilians in armed conflict, the permanent representative of the Russian Federation stated: “We resolutely condemn ... civilian deaths resulting from ... disproportionate use of force, which is a flagrant violation of international humanitarian law.”

*Russian Federation, Statement by the permanent representative of the Russian Federation before the UN Security Council during a meeting on the protection of civilians in armed conflict, 10 May 2011, p. 9.*

Russian Federation

In 2011, in a statement before the UN Security Council during a meeting on the protection of civilians in armed conflict, the permanent representative of the Russian Federation stated: “We vigorously condemn ... [the] demise [of civilians] as [a] result of the ... disproportionate use of force, which is a gross violation of international humanitarian law.”

*Russian Federation, Statement by the permanent representative of the Russian Federation before the UN Security Council during a meeting on the protection of civilians in armed conflict, 9 November 2011, p. 23.*

Russian Federation

In 2012, in a statement before the UN Security Council during an open debate on children and armed conflict, the deputy permanent representative of the Russian Federation stated: “We ... firmly condemn intentional attacks against civilians, including children, as well as ... disproportionate ... use of force that produces the same result.”

*Russian Federation, Statement by the deputy permanent representative of the Russian Federation before the UN Security Council during an open debate on children and armed conflict, 19 September 2012, p. 15.*

Russian Federation

In 2012, in a statement before the UN Security Council during a meeting on women and peace and security, the deputy permanent representative of the Russian Federation stated:

[W]e believe that equal attention should be paid to all categories of violence, including instances of killing and wounding women and children as a result of the ... excessive use of force. ...

The international community is expecting results in the investigation of the cases of deaths of the civilian population, including women and children, as a result of the NATO operations in Libya. ... We are ... seriously concerned by statistics concerning the so-called collateral damage as a result of the use of new types of weapons, such as drones.

*Russian Federation, Statement by the deputy permanent representative of the Russian Federation before the UN Security Council during a meeting on women and peace and security, 30 November 2012, pp. 14–15.*

Rwanda

On 22 April 1995, between 200 and 300 people died in a camp for internally displaced persons in Kibeho in Rwanda. The Rwandan President stated that these deaths were the result of

the same machetes of those who committed the genocide and the massacres. Others were killed during shootings in self-defence by the governmental armed forces and by MINUAR in response to attacks launched by the *Interahamwe* militia located in the camp of Kibeho.

*Rwanda, Declaration by the President concerning the decision to close the IDP camps of Gikongoro, Kigali, 24 April 1995, p. 2, Report on the Practice of Rwanda, 1997, Chapter 1.5.*

An international commission investigating the events of Kibeho considered that by using automatic guns and heavier weapons, such as grenades and rocket-launchers, against persons who carried guns and traditional weapons, such as machetes and stones, the Rwandan army had acted disproportionately.

*Rapport de la Commission Internationale d’Enquête Indépendante sur les événements de Kibeho, April 1995, pp. 9–10, Report on the Practice of Rwanda, 1997, Chapter 1.5.*

Since no official statement denied this alleged violation of the principle of proportionality in attack, the Report on the Practice of Rwanda concludes that Rwandan practice implicitly confirms the existence of such a norm.

*Report on the Practice of Rwanda, 1997, Chapter 1.5.*

Solomon Islands

In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Solomon Islands stated that “the principles of proportionality and humanity are obviously violated” by the use of nuclear weapons.

*Solomon Islands, Written statement submitted to the ICJ, Nuclear Weapons case, 19 June 1995, § 3.103; see also Written statement submitted to the ICJ, Nuclear Weapons (WHO) case, 9 June 1994, § 3.94.*

Somalia

In 2011, in its report to the Human Rights Council, Somalia stated: “The Government forces are also bound to respect customary IHL rules relating to the prohibited methods and means of warfare including ... the principle of proportionality”.

*Somalia, Report to the Human Rights Council, 11 April 2011, UN Doc. A/HRC/WG.6/11/SOM/1, § 76.*

Somalia

In 2011, during the consideration of Somalia’s report to the Human Rights Council, a statement of the delegation of Somalia was summarized by the Council as follows: “The principle ... of proportionality ... must be respected in the conduct of military operations.”

*Somalia, Statement by the Delegation of Somalia before the Human Rights Council during the consideration of the report of Somalia, published in the Report of the Working Group of the Human Rights Council on the Universal Periodic Review, 11 July 2011, UN Doc. A/HRC/18/6, § 68.*

Somalia

In 2011, in its comments on the concluding observations of the Human Rights Council concerning Somalia’s report, Somalia’s Transitional Federal Government stated:

The Government is committed to issuing clear and public orders and taking all necessary measures to ... ensure compliance with IHL including the core principles of ... proportionality of the use of force to ensure that civilian losses are not disproportionate to [the] direct and concrete military objective anticipated from the attack.

*Somalia, Comments by the Transitional Federal Government of Somalia on the concluding observations of the Human Rights Council concerning the report of Somalia, submitted 21 September 2011, § 98.73.*

South Africa

In 2010, in a statement before the UN Security Council during an open debate on the protection of civilians in armed conflict, South Africa’s Minister of International Relations and Cooperation stated:

The deliberate targeting of civilians and the indiscriminate and excessive use of force, including suicide attacks, have become widespread in certain places, creating an atmosphere of fear aimed at further destabilizing and displacing civilian populations. In other conflict situations, militarily superior parties, including multinational forces, often respond with methods and means of warfare that violate the principles of distinction and proportionality. In such cases it is again civilians who bear the brunt.

We therefore unequivocally condemn both deliberate attacks on civilians and the loss of life as a result of the indiscriminate or disproportionate use of force, which is a gross violation of international humanitarian law. As a signatory of the Geneva Conventions of 1949 and its two Additional Protocols of 1977, South Africa wishes to underline the importance of adhering to the principles contained therein and calls for the full implementation of the commitments made by States parties to those basic tenets of international law.

*South Africa, Statement by the Minister of International Relations and Cooperation before the UN Security Council during an open debate on the protection of civilians in armed conflict, 7 July 2010.*

South Africa

In 2011, in an opening statement at the Eleventh Annual Regional Seminar on the Implementation of International Humanitarian Law in Pretoria, South Africa’s Deputy Minister of International Relations and Cooperation stated:

One of the most important purposes of International Humanitarian Law is to protect civilians during armed conflicts, to minimise casualties. In this regard, South Africa is on record for unequivocally condemning both deliberate attacks on civilians and the loss of life as a result of the indiscriminate or disproportionate use of force, which is a gross violation of international humanitarian law.

*South Africa, Opening Statement by the Deputy Minister of International Relations and Cooperation at the Eleventh Annual Regional Seminar on the Implementation of International Humanitarian Law in Pretoria, 23 August 2011.*

Spain

On the basis of statements by the Spanish Minister of Foreign Affairs and Minister of Defence, the Report on the Practice of Spain states: “The Spanish government has, in general, advocated respect for the principle of proportionality during the conflict in Chechnya, the Turkish attacks on the Kurds in northern Iraq and the conflict in Bosnia and Herzegovina.”

*Report on the Practice of Spain, 1998, Chapter 1.5, referring to Statement by Javier Solana Madariaga, Minister of Foreign Affairs, before the Commission of Foreign Affairs of the House of Representatives, 28 February 1995, Actividades, Textos y Documentos de la Política Exterior Española, Madrid, 1995, p. 353, Statement by Javier Solana Madariaga, Minister of Foreign Affairs, before the Commission of Foreign Affairs of the House of Representatives, 7 June 1995, Actividades, Textos y Documentos de la Política Exterior Española, Madrid, 1995, p. 473 and Statement by García Vargas, Minister of Defence, before the Defence Commission of the House of Representatives, Boletín Oficial de las Cortes Generales – Congreso, V Legislatura, Comisiones, No. 513, 6 June 1995, p. 15649.*

Sweden

In its written statement submitted to the ICJ in the *Nuclear Weapons* case in 1995, Sweden stated: “In the case of an attack on a military target, disproportionately substantial damage may not be inflicted on the civilian population or on civilian property.”

*Sweden, Written statement submitted to the ICJ, Nuclear Weapons case, 20 June 1995, p. 3; see also Written statement submitted to the ICJ, Nuclear Weapons (WHO) case, 2 June 1994, p. 3.*

Sweden

In 2007, in an answer to a question in Parliament, the Swedish Minister for Trade stated: “It is prohibited to carry out attacks against military targets that entail injuries to the civilian population that are disproportionately extensive compared to the military value of the attack.”

*Sweden, Answer by the Minister of Trade to a Parliamentary interpellation on the sale of cluster munitions to the United States, 13 November 2007, Parliamentary Protocol 2007/08:23, § 18, Anf. 124.*

Humanitarian law is based on a number of fundamental principles. They are apparent in current treaties and customary law and express the core of humanitarian law. They concern the principles of distinction,

proportionality and precaution, the prohibition on causing superfluous damage and unnecessary suffering and the principle of non-discrimination as well as the so called Martens Clause.

*Sweden, Government Bill 2013/14:146 on criminal liability for genocide, crimes against humanity and war crimes, 20 February 2014, p. 33.*

The annual report of the Secretary-General paints a gloomy picture of the situation around the world for children in armed conflict. ISIL has been listed as violating all triggers of violence against children, a result of their appalling atrocities. In Syria, the systematic use of indiscriminate aerial weapons, such as barrel bombs, account for the overwhelming majority of civilian casualties, including children. This cannot be allowed to continue. And during hostilities in Gaza last summer, civilians, including children, bore the brunt of the suffering. At least 540 Palestinian children were killed and hospitals and schools were severely damaged or destroyed, including UN facilities. The scale of the impact on children was unprecedented and unacceptable.

These facts and all other incidents listed in the report are utterly disturbing and raise serious concern about the observance of the rules of international humanitarian law, including the [principle] of ... proportionality.

*Sweden, Statement by the permanent representative of Sweden at the UN Security Council Open Debate on Children and Armed Conflict made on behalf of Finland, Iceland, Norway and Sweden, 18 June 2015.*

Switzerland

In 2005, in a report in response to a parliamentary postulate on private security and military companies, Switzerland’s Federal Council stated: “International humanitarian law also limits the conduct of military operations permissible under international law. ... Attacks against military targets are also forbidden if there’s a chance that civilians or civilian objects would be disproportionately affected.”

*Switzerland, Report by the Swiss Federal Council on Private Security and Military Companies, 2 December 2005, Section 5.3.1, pp. 45–46.*

Switzerland

Switzerland’s ABC of International Humanitarian Law (2009) states:

*Conduct of hostilities*

Not all *Means and methods of warfare* are allowed in an *Armed conflict*. International humanitarian law stipulates the military operations, tactics and weapons that are permissible. The two generally accepted principles of *Distinction* and *Proportionality* are the basis for a number of specific rules such as the prohibition of direct attacks on the civilian population or on *Civilian objects*, the prohibition of indiscriminate attacks and the obligation to adopt precautionary measures (*Precaution*) so as to avoid or limit casualties among *Civilians* and damage to civilian objects to the greatest possible extent.

...

*Proportionality*

The principle of proportionality applies to every aspect of the conduct of hostilities. It is prohibited for example to carry out attacks against a *Military objective* that would cause a disproportionate amount of harm to the civilian population, and against *Civilian objectives*. Before launching an attack there is an obligation to assess whether or not the impact on the civilian population is excessive in relation to the concrete and direct military advantage anticipated.

*Switzerland, Federal Department of Foreign Affairs, ABC of International Humanitarian Law, 2009, pp. 13–14 and 36. In the French version of this brochure, the sentence “It is prohibited for example to carry out attacks against a Military objective that would cause a disproportionate amount of harm to the civilian population, and against Civilian objectives” reads “Les attaques susceptibles de causer des dommages disproportionnés dans la population civile ou aux biens civils sont ainsi interdites même si elles sont dirigées contre des objectifs militaires” (see ABC du Droit International Humanitaire, 2014, 2nd revised edition, p. 44).*

Switzerland

In 2009, in a statement before the UN Security Council during an open debate on the protection of civilians in armed conflict, the permanent representative of Switzerland stated:

The current situation in Gaza cries out to us the importance of the issue we are discussing today. The main victims of the Israeli-Palestinian conflict are civilians. Switzerland is deeply shocked by the very high number of civilians that have been killed or wounded in this conflict, and in particular the high number of child victims. ...

...

Switzerland therefore reiterates its call for ... strict compliance with international law by all parties to the conflict. This includes in particular the obligation to respect the principles of distinction, proportionality and precaution.

*Switzerland, Statement by the permanent representative of Switzerland before the UN Security Council on the protection of civilians in armed conflict, 14 January 2009, p. 5.*

Switzerland

In 2009, in its Report on Foreign Policy, Switzerland’s Federal Council stated: “The recourse to practices contrary to international law, such as ... non-respect for the principle of proportionality, [is] among the strategies used by the parties in conflict.”

*Switzerland, Federal Council, Report on Foreign Policy 2009, 2 September 2009, Section 3.3.7.2, p. 5807.*

Switzerland

In 2010, in its Report on IHL and Current Armed Conflicts, Switzerland’s Federal Council stated:

*3.2 Increasing technification of war*

...

... The weapon technologies used do not call into question the applicable principles of international humanitarian law. ... Moreover, attacks must not cause incidental loss of human life among the civilian population in relation to the concrete and direct military advantage anticipated, nor lead to excessive suffering. These fundamental principles are always applicable to all types and systems of weapons. ...

...

*3.5 Moving of combat zones towards the civilian population*

... Collateral damage is not prohibited as long as it is not disproportionate. ...

...

4 Possibilities of international humanitarian law development

As the preceding analysis underlines, international humanitarian law maintains its relevance for most of the aspects of current armed conflicts. The fundamental principles such as distinction and proportionality remain valid in guerrilla warfare, which represents today the main form of conducting war. These principles constitute a permanent requirement that cannot be called into question, not even by widespread non-respect by the parties to a conflict.

Switzerland, Federal Council, Report on IHL and Current Armed Conflicts, 17 September 2010, Sections 3.2, 3.5 and 4, pp. 9, 16 and 18–19.

Switzerland

In 2010, in its Report on Foreign Policy, Switzerland’s Federal Council stated: “The recourse to practices contrary to international law, such as ... non-respect for the principle of proportionality, ... [is] among the strategies used by the parties in conflict.”

Switzerland, Federal Council, Report on Foreign Policy 2010, 10 December 2010, Section 4.2.1, p. 1083.

Switzerland

In 2012, Switzerland’s Federal Department of Foreign Affairs issued a press release entitled “Appeal by the Swiss authorities for compliance with international humanitarian law in Syria”, which stated:

Deep concern about the humanitarian situation

...

2. Switzerland expresses its deep concern about the deterioration of the humanitarian situation in Syria. It deplores the high number of civilian casualties caused by violations of international humanitarian law, in particular as a result of the indiscriminate and disproportionate use of force.

...

International humanitarian law is applicable to non-international armed conflict.

4. International humanitarian law is applicable in non-international armed conflicts. All parties to the conflict are therefore obliged to respect its rules in all circumstances, including the rules protecting persons who are [not] or are no [longer] participating in the hostilities, as well as the rules relative to the means and methods of warfare. ...

...

Appeal to respect international rules

...

7. [Switzerland] recalls that in the conduct of military operations, all feasible precautions must be taken with a view to avoid incidental loss of civilian life[,] injury to civilians and damage to civilian objects and collateral damage to civilian property. All parties are subject to the obligation to respect the principles of distinction, proportionality and precaution.

Switzerland, Federal Department of Foreign Affairs, “Appeal by the Swiss authorities for compliance with international humanitarian law in Syria”, Press Release, 15 November 2012.

Switzerland

In 2013, in answer to an interpellation in Parliament regarding the use of drones, Switzerland’s Federal Council stated:

In armed conflicts, strikes carried out with armed drones must respect the rules of the conduct of hostilities as stipulated by international humanitarian law, including the principles of distinction, proportionality and precaution, and must therefore not be directed against civilians or civilian objects. For each strike, it is thus necessary to verify that these principles were respected.

Switzerland, Answer by the Federal Council to interpellation 13.3245 in Parliament regarding the use of drones, 29 May 2013.

Switzerland

In 2013, in a statement at the Meeting of the High Contracting Parties to the 1980 Convention on Certain Conventional Weapons, the permanent representative of Switzerland stated:

The community of States cannot remain indifferent to the human suffering caused by armed conflicts. It was in direct response to this fundamental concern that the CCW [1980 Convention on Certain Conventional Weapons] and its protocols were adopted, with a view to prohibiting or limiting the use of certain specific types of weapons known to inflict superfluous injury or unnecessary suffering, or to strike indiscriminately.

In this regard, Switzerland is deeply concerned by the alleged use of weapons in Syria falling within the ambit of the CCW and its respective protocols, such as the alleged use of anti-personnel mines as well as the alleged use of incendiary weapons in populated areas causing severe human suffering. We call upon all parties to the conflict to comply with their obligations under international law, in particular the principles of distinction, precaution, and proportionality.

Switzerland, Statement by the permanent representative of Switzerland at the Meeting of the High Contracting Parties to the Convention on Certain Conventional Weapons, 14 November 2013.

Syrian Arab Republic

At the CDDH, the Syrian Arab Republic stated that it

could not accept the theory of some kind of “proportionality” between military advantages and losses and destruction of the civilian population and civilian objects, or that the attacking force should pronounce on the matter.

Syrian Arab Republic, Statement at the CDDH, Official Records, Vol. XIV, CDDH/III/SR.6, 15 March 1974, p. 48, § 38.

Syrian Arab Republic

On the basis of a statement by the Syrian Minister of Foreign Affairs before the UN General Assembly in 1997, the Report on the Practice of the Syrian Arab Republic concludes that the Syrian Arab Republic considers Article



51(5)(b) of the 1977 Additional Protocol I to be a norm of customary international law.  
*Report on the Practice of the Syrian Arab Republic, 1997, Chapter 1.5, referring to Statement by the Syrian Minister of Foreign Affairs before the UN General Assembly, 1 October 1997.*

United Kingdom of Great Britain and Northern Ireland

At the CDDH, the United Kingdom stated that the principle of proportionality as defined in Article 51(5)(b) of the 1977 Additional Protocol I was “a useful codification of a concept that was rapidly becoming accepted by all States as an important principle of international law relating to armed conflict”.

*United Kingdom, Statement at the CDDH, Official Records, Vol. VI, CDDH/SR. 41, 26 May 1977, p. 164, § 120.*

United Kingdom of Great Britain and Northern Ireland

In 1991, in reply to a question in the House of Lords concerning the Gulf War, the UK Parliamentary Under-Secretary of State for Defence stated:

The Geneva Conventions contain no provisions expressly regulating targeting in armed conflict. The Hague Regulations of 1907 and customary international law do, however, incorporate the twin principles of distinction between military and civilian objects, and of proportionality so far as the risk of collateral civilian damage from an attack on a military objective is concerned. These principles and associated rules of international law were observed at all times by coalition forces in the planning and execution of attacks against Iraq.

*United Kingdom, House of Lords, Statement by the Parliamentary Under-Secretary of State for Defence, 22 July 1991, Hansard, Vol. 531, Written Answers, col. 43.*

United Kingdom of Great Britain and Northern Ireland

In 1993, the Government of the United Kingdom stated:

The Rules of Engagement under which BRITFOR are operating in Bosnia allow them to return fire in self defence if the source can be identified; in doing so, they must attempt to minimise collateral damage and be mindful of the principle of proportionality.

*United Kingdom, House of Commons, Defence Committee, Sixth Special Report: Government Reply to the Fourth Report from the Defence Committee, Session 1992–1993, p. X.*

United Kingdom of Great Britain and Northern Ireland

In 1993, in reply to questions in the Foreign Affairs Committee of the House of Commons about the launching of “around 40 Cruise missiles by the Americans which resulted in the killing of innocent civilians in places like the Al Rashid Hotel”, the UK Minister of Foreign Affairs stated:

I do not believe the action was disproportionate. You know what it was aimed against; it was aimed against a plant that the Iraqis had themselves admitted was producing material for their nuclear programme ... It seemed to me a proportionate target. It looks and sounds as if ... one of the Cruise missiles went astray and killed innocent civilians in the Al Rashid Hotel. That clearly is to be deplored but I do not think the action as a whole can be regarded as disproportionate.

*United Kingdom, Statement by the Secretary of State, Minutes of Evidence taken before the Foreign Affairs Committee, 28 January 1993, Vol. II, p. 146.*

United Kingdom of Great Britain and Northern Ireland

In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the United Kingdom stated:

The principle of proportionality requires that even a military objective should not be attacked if to do so would cause collateral civilian casualties or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated from the attack.

*United Kingdom, Written statement submitted to the ICJ, Nuclear Weapons case, 16 June 1995, § 3.67.*

United Kingdom of Great Britain and Northern Ireland

In 2003, in reply to a written question in the House of Commons, the UK Minister of State for the Armed Forces, Ministry of Defence, wrote:

Cluster bombs have been used against targets for which they were the most appropriate available weapon and where they could be used in accordance with international law, including with the principles of proportionality and discrimination.

*United Kingdom, House of Commons, Written answer by the Minister of State for the Armed Forces, Ministry of Defence, Hansard, 8 April 2003, Vol. 403, Written Answers, col. 139W.*

United Kingdom of Great Britain and Northern Ireland

In 2003, in reply to a written question in the House of Commons, the UK Secretary of State for Defence wrote:

The military campaign is crafted around the principle of minimum use of force. We attack only military objectives and combatants subject to the constraints of proportionality. If there is any expectation that harm will be caused to civilians, this must not be excessive when set against the direct and concrete military advantage anticipated from the attack.

*United Kingdom, House of Commons, Written answer by the Secretary of State for Defence, Hansard, 9 April 2003, Vol. 403, Written Answers, col. 297W.*

United Kingdom of Great Britain and Northern Ireland

In 2003, in reply to a written question in the House of Commons asking whether he would “make it his policy not to use cluster bombs in urban or populated areas in Iraq”, the UK Secretary of State for Defence wrote:

Cluster bombs are only used strictly in accordance with international law. This includes the principles of distinction and proportionality as well as precautionary measures to be taken in planning and conducting an attack, as contained in the First Additional Protocol of 1977 to the Geneva Conventions of 1949. The targeting

process takes account of these principles in matching the type of weapon used to the target to be attacked. There will be circumstances when it would be considered more appropriate to use other munitions than cluster bombs. These circumstances are more likely to arise in urban or populated areas as cluster bombs engage targets that cover an area.

*United Kingdom, House of Commons, Written answer by the Secretary of State for Defence, Hansard, 14 April 2003, Vol. 403, Written Answers, col. 571W.*

United Kingdom of Great Britain and Northern Ireland

In 2004, in a written answer to a question concerning, *inter alia*, guidance given to UK forces to ensure compliance with the principles of necessity and proportionality, the UK Parliamentary Under-Secretary of State, Ministry of Defence, stated:

All use of force is governed by United Kingdom forces’ rules of engagement (ROE). The ROE take into account the UK’s obligations under national and international law, of which necessity and proportionality are fundamental principles.

*United Kingdom, House of Commons, Written answer by the Parliamentary Under-Secretary of State, Ministry of Defence, Hansard, 9 June 2004, Vol. 422, Written Answers, col. 420W.*

United Kingdom of Great Britain and Northern Ireland

In 2006, in a written answer to a question concerning, *inter alia*, “the implications under the Geneva Conventions of the targeting by Israel of civilian facilities and infrastructure in Gaza”, the UK Minister of State for the Middle East, Foreign and Commonwealth Office, stated:

We are opposed to the targeting of civilian facilities and call upon Israel to respect international law and, in particular, the requirement of proportionality and the duty to take all feasible precautions to avoid civilian casualties.

*United Kingdom, House of Commons, Written answer by the Minister of State for the Middle East, Foreign and Commonwealth Office, Hansard, 10 July 2006, Vol. 448, Written Answers, col. 1522W.*

United Kingdom of Great Britain and Northern Ireland

In 2006, in a reply to a question in the House of Lords concerning “[w]hat representations [the UK Government] have made to the Government of Israel regarding their military response to the kidnapping of one Israel Defense Force soldier”, the UK Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, stated: “Any military steps taken should avoid civilian casualties, abide by international law and observe the principle of proportionality.”

*United Kingdom, House of Lords, Statement by the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, Hansard, 10 July 2006, Vol. 684, Debates, col. WA91.*

United Kingdom of Great Britain and Northern Ireland

In 2006, in a written ministerial statement, the UK Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, stated:

While Israel has the right to defend itself and to secure the release of Corporal Shalit, its actions should be proportionate and in accordance with international law, as we, the G8 and the EU have made clear. We call on Israel to exercise restraint and to do everything possible to avoid civilian casualties.

*United Kingdom, House of Lords, Written statement by the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, Hansard, 11 July 2006, Vol. 684, Written Statements, col. WS39.*

United Kingdom of Great Britain and Northern Ireland

In 2006, during a debate in the House of Lords, a statement by the UK Prime Minister was read by the Lord President of the Council. With regard to military action taken by Israel in Lebanon, the following was stated:

In Lebanon, more than 230 people have been killed, the vast majority of them civilians. Houses, roads, essential infrastructure, factories and Lebanese Army facilities have been damaged. Once again, we have made it clear to Israel that it is essential to take account of the humanitarian situation, and ensure that military action is proportionate.

*United Kingdom, House of Lords, Statement by the Prime Minister of the United Kingdom, Hansard, 18 July 2006, Vol. 648, Debates, col. 1142.*

United Kingdom of Great Britain and Northern Ireland

In 2007, in its response to the Foreign Affairs Committee’s report on the Middle East, in which the question was raised whether the Government considered the use of cluster munitions by Israel in Lebanon proportionate, the UK Government stated:

As the UK made clear during the conflict last year, we were deeply concerned by the deaths of civilians and damage to infrastructure in both Lebanon and Israel. We consistently urged Israel to act proportionately, to conform to international law, and to do more to avoid civilian death and suffering.

The Government recognises the UN statistics that the Committee highlights in its report. It is concerned by the estimate that one million cluster bombs remained unexploded; that 26% of Lebanon’s cultivable land had been contaminated; and that 90% of the cluster bombs dropped on Lebanon occurred in the last 72 hours of the conflict. The Government is concerned by the findings of both the UN Commission of Inquiry’s investigation into the conflict in Lebanon and Human Rights Watch’s September 2007 report, both of which conclude that Israel’s use of force was disproportionate and failed to adequately distinguish between military and civilian targets. However, it should be noted that the UN Commission of Inquiry itself recognises in its Report (para. 20) that the Report cannot constitute a full and final accounting of all alleged violations.

*United Kingdom, Eighth Report of the Foreign Affairs Committee, Session 2006–7. Global Security: The Middle East. Response of the Secretary of State for Foreign and Commonwealth Affairs, Cm 7212, October 2007, p. 17.*

While the core challenges in the protection of civilians identified in the previous reports of the Secretary-General still need our sustained attention, the new report also identifies several protection policy priorities that need to be explored. In particular the following “emerging” issues would benefit from our attention, and the Group of Friends stands ready to act as a platform to advance them. ...

...

... [O]n the issue of lethal autonomous weapons systems (LAWS), the Group is of the view that further discussions are needed and it welcomes the fact that the issue will be examined in Geneva in May 2014, in the framework of the CCW [Convention on Certain Conventional Weapons]. The Group hopes that such discussions will also examine the issue with due consideration to the protection of civilians as part of a comprehensive debate including legal, military operational, technological and ethical perspectives. In time discussion should focus on the relevance of such systems to the protection of civilians, in particular in the context of IHL and with regard to the principles of distinction, precaution and proportionality.

*United Kingdom, Statement by the permanent representative of Switzerland during a UN Security Council open debate on the protection of civilians in armed conflict made on behalf of the Group of Friends on the Protection of Civilians in Armed Conflict, namely Australia, Austria, Belgium, Brazil, Canada, France, Germany, Italy, Japan, Liechtenstein, Norway, Portugal, Switzerland, the United Kingdom and Uruguay, 12 February 2014, p. 2.*

United States of America

In 1972, the General Counsel of the US Department of Defense stated:

I would like to reiterate that it is recognized by all states that they may not lawfully use their weapons against civilian population[s] or civilians as such, but there is no rule of international law that restrains them from using weapons against enemy armed forces or military targets. The correct rule of international law which has applied in the past and continued to apply to the conduct of our military operations in Southeast Asia is that “the loss of life and damage to property must not be out of proportion to the military advantage to be gained”. A review of the operating authorities and rules of engagements for all of our forces in Southeast Asia, in air as well as ground and sea operations, by my office reveals that not only are such operations in conformity with this basic rule, but that in addition, extensive constraints are imposed to avoid if at all possible the infliction of casualties on noncombatants and the destruction of property other than that related to the military operations in carrying out military objectives.

*United States, Letter from J. Fred Buzhardt, General Counsel of the Department of Defense, to Senator Edward Kennedy, Chairman of the Subcommittee on Refugees of the Committee on the Judiciary, 22 September 1972, AJIL, Vol. 67, 1973, p. 124.*

United States of America

In 1974, at the Lucerne Conference of Government Experts on Weapons which may Cause Unnecessary Suffering or have Indiscriminate Effects, the head of the US delegation stated:

The law of war also prohibits attacks which, though directed at lawful military targets, entail a high risk of incidental civilian casualties or damage to civilian objects which is disproportionate to the military advantage sought to be secured by the attack.

*United States, Statement of 25 September 1974 at the Conference of Government Experts on Weapons which may Cause Unnecessary Suffering or have Indiscriminate Effects, Lucerne, 24 September–18 October 1974, reprinted in Arthur W. Rovine, Digest of United States Practice in International Law, 1974, Department of State Publication 8809, Washington, D.C., 1975, p. 713.*

United States of America

In 1987, the Deputy Legal Adviser of the US Department of State affirmed: “We support the principle ... that attacks not be carried out that would clearly result in collateral civilian casualties disproportionate to the expected military advantage.”

*United States, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross–Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, American University Journal of International Law and Policy, Vol. 2, 1987, p. 426.*

United States of America

In 1991, in reaction to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army stated:

The concept of “incidental loss of life excessive in relation to the military advantage anticipated” generally is measured against an overall campaign. While it is difficult to weigh the possibility of collateral civilian casualties on a target-by-target basis, minimization of collateral civilian casualties is a continuing responsibility at all levels of the targeting process. Combat is a give-and-take between attacker and defender, and collateral civilian casualties are likely to occur notwithstanding the best efforts of either party. What is prohibited is wanton disregard for possible collateral civilian casualties.

*United States, Letter from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf region, 11 January 1991, S 8(F), Report on US Practice, 1997, Chapter 1.5.*

United States of America

In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated:

While the prohibition contained in Article 23(g) [of the Hague Regulations] generally refers to intentional destruction or injury, it also precludes collateral damage of civilian objects or injury to noncombatant civilians that is clearly disproportionate to the military advantage gained in the attack of military objectives, as discussed below. As previously indicated, Hague IV was found to be customary international law in the course of war crimes trials following World War II, and continues to be so regarded.

An uncodified but similar provision is the principle of proportionality. It prohibits military action in which the negative effects (such as collateral civilian casualties) clearly outweigh the military gain. This balancing may be done on a target-by-target basis, as frequently was the case during Operation Desert Storm, but also may be weighed in overall terms against campaign objectives. CENTCOM [Central Command] conducted its campaign with a focus on minimizing collateral civilian casualties and damage to civilian objects. Some targets were specifically avoided because the value of destruction of each target was outweighed by the potential risk to nearby civilians or, as in the case of certain archaeological and religious sites, to civilian objects.

*United States, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, ILM, Vol. 31, 1992, p. 622.*

United States of America

In 1992, a legal review by the US Department of the Air Force of the legality of extended range anti-armour munition stated that, while legal as such, this munition “should, however, only be used in concentrations of civilians if the military necessity for such use is great, and the expected collateral civilian casualties would not be excessive in relation to the expected military advantage”.

*United States, Department of the Air Force, The Judge Advocate General, Legal Review: Extended Range Antiarmor Munition (ERAM), 16 April 1992, § 9; see also §§ 4, 5 and 8.*

United States of America

In 1993, in its report to Congress on the protection of natural and cultural resources during times of war, the US Department of Defense stated that cultural property, civilian objects and natural resources are protected from:

collateral damage that is clearly disproportionate to the military advantage to be gained in the attack of military objectives. The law of war acknowledges the unfortunate inevitability of collateral damage when military objectives and civilian objects (including cultural property and natural resources) are commingled.

*United States, Department of Defense, Report to Congress on International Policies and Procedures Regarding the Protection of Natural and Cultural Resources During Times of War, 19 January 1993, p. 202.*

United States of America

In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO)* case in 1994, the United States stated:

It is unlawful to carry out any attack that may reasonably be expected to cause collateral damage or injury to civilians or civilian objects that would be excessive in relation to the military advantage anticipated from the attack. Whether an attack with nuclear weapons would be disproportionate depends entirely on the circumstances, including the importance of destroying the objective, the character, size and likely effects of the device, and the magnitude of the risk to civilians.

*United States, Written statement submitted to the ICJ, Nuclear Weapons (WHO) case, 10 June 1994, p. 27; see also Written statement submitted to the ICJ, Nuclear Weapons case, 20 June 1995, p. 23.*

United States of America

The Report on US Practice states: “United States practice recognizes the principle of proportionality as part of the customary law of non-nuclear war.”

*Report on US Practice, 1997, Chapter 1.5.*

United States of America

In 2005, the US Department of Justice submitted a Statement of Interest of the United States to the US District Court for the Eastern District of New York prior to that Court’s consideration of *Agent Orange Product Liability Litigation (The Vietnam Association for Victims of Agent Orange/Dioxin, et al. v. Dow Chemical Company, et al)*. That statement reiterated the US position that no rule of international law barred the use of chemical herbicides in war generally nor barred the destruction of crops intended for use by enemy forces. With regard to the principle of proportionality in attack, it stated:

There are simply no established international law standards of the specificity required by *Sosa Sosa v. Alvarez-Machain*, US Supreme Court, 2004] for establishing a federal common law cause of action for unnecessary or disproportionate use of military force.

Indeed, the very nature of the principles defy specificity, for they require the balancing of competing considerations and are inherently imprecise. That is, the rules do not proscribe any particular conduct that is readily identifiable. Rather, they require consideration by combatant commanders of a variety of factors – unique to the context of any particular military action – that affect decisions on what means may be available to achieve the military objective and whether the harms that particular military actions might cause would be disproportionate to the advantages attained. In light of the balancing nature of the principles, the very same act that might be deemed both necessary and proportionate in one circumstance, might be deemed unnecessary or disproportionate in another. It is one thing, therefore, to recognize that these principles generally exist in customary international law. It is “harder,” if not impossible, to “say which policies cross [the] line with the certainty afforded by Blackstone’s three common law offenses” 124 S. Ct. at 2769.

A recent report by a Committee established to review the NATO bombing campaign in Yugoslavia provides a good illustration of the imprecise nature of the rule of proportionality:

The main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied. It is relatively simple to state that there must be an acceptable relation between the legitimate destructive effect and undesirable collateral effects. For example, bombing a refugee camp is obviously prohibited if its only military significance is that people in the camp are knitting socks for soldiers. Conversely, an air strike on an ammunition dump should not be prohibited merely because a farmer is plowing a field in the area. Unfortunately, most applications of the principle of proportionality are not quite so clear cut. It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective.

Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia ¶ 48 ...

Because any consensus regarding the necessity and proportionality principles necessarily exists solely “at a high level of generality,” id at 2768 n.27, and because the principles are not “defined with.. .specificity,” id at 2761, and clearly have “less definite content” than the 18th Century offenses discussed in *Sosa*. id. at 2765, the Court should not recognize a federal common law cause of action for alleged violations of the necessity and proportionality principles. See also *Flores*. 343 F.3d at 160–61.

*United States, Department of Justice, Statement of Interest of the United States submitted to the US District Court for the Eastern District of New York, In re: Agent Orange Product Liability Litigation (The Vietnam Association for Victims of Agent Orange/Dioxin, et al. v. Dow Chemical Company, et al.), 12 January 2005,§ II, pp. 34–36.*

United States of America

In March 2010, in a speech given at the Annual Meeting of the American Society of International Law, the US State Department’s Legal Adviser stated:

[T]his Administration has carefully reviewed the rules governing targeting operations to ensure that these operations are conducted consistently with law of war principles, including:

...

- Second, the principle of *proportionality*, which prohibits attacks that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and direct military advantage anticipated.

In U.S. operations against al-Qaeda and its associated forces – including lethal operations conducted with the use of unmanned aerial vehicles – great care is taken to adhere to these principles in both planning and execution, to ensure that ... collateral damage is kept to a minimum.

*United States, “The Obama Administration and International Law”, speech given by the Legal Adviser of the US Department of State, at the Annual Meeting of the American Society of International Law, Washington DC, 25 March 2010.*

[emphasis in original]

While the core challenges in the protection of civilians identified in the previous reports of the Secretary-General still need our sustained attention, the new report also identifies several protection policy priorities that need to be explored. In particular the following “emerging” issues would benefit from our attention, and the Group of Friends stands ready to act as a platform to advance them. ...

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*Uruguay, Statement by the permanent representative of Switzerland during a UN Security Council open debate on the protection of civilians in armed conflict made on behalf of the Group of Friends on the Protection of Civilians in Armed Conflict, namely Australia, Austria, Belgium, Brazil, Canada, France, Germany, Italy, Japan, Liechtenstein, Norway, Portugal, Switzerland, the United Kingdom and Uruguay, 12 February 2014, p. 2.*

Viet Nam

In 2008, in a statement before the UN Security Council on the protection of civilians in armed conflict, the representative of Viet Nam stated that “parties to armed conflict should comply with the [principle] ... of humanitarian law relating to ... proportionality”.

*Viet Nam, Statement by the representative of Viet Nam before the UN Security Council during a debate on the protection of civilians in armed conflict, 27 May 2008, p. 14.*

Yugoslavia, Federal Republic of

According to the Report on the Practice of the Federal Republic of Yugoslavia, no doubt can be raised about the existence of an *opinio juris* in favour of the principle of proportionality. The report alleges that serious violations of the principle of proportionality did occur during the conflict in Croatia, for example, during hostilities in Vukovar and Dubrovnik where artillery was massively used, and notes that the press regularly covered this issue in 1991.

*Report on the Practice of the Federal Republic of Yugoslavia, 1997, Chapter 1.5.*

Zimbabwe

In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Zimbabwe fully shared the analysis of other States that “the threat or use of nuclear weapons violates the principles of humanitarian law prohibiting the use of weapons or methods of warfare that ... are disproportionate”.

*Zimbabwe, Oral pleadings before the ICJ, Nuclear Weapons case, 15 November 1995, Verbatim Record CR 95/35, p. 27.*

Zimbabwe

The Report on the Practice of Zimbabwe considers that the principle of proportionality is a norm of customary international law but states that its application is difficult to gauge under war conditions.

*Report on the Practice of Zimbabwe, 1998, Chapter 1.5.*

VII. United Nations

UN Security Council

In a resolution on Cyprus adopted in 1996, the UN Security Council:

*Deplores* the violent incidents of 11 and 14 August, 8 September and 15 October 1996 [in Cyprus], which resulted in the tragic deaths of three Greek Cypriot civilians and one member of the Turkish Cypriot Security Forces, as well as injuries to civilians and UNFICYP personnel, in particular the unnecessary and disproportionate use of force by the Turkish/Turkish Cypriot side.

*UN Security Council, Res. 1092, 23 December 1996, § 2, voting record: 15–0–0.*

UN Security Council

In a resolution adopted in 1998, the UN Security Council condemned “the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo”.

*UN Security Council, Res. 1160, 31 March 1998, preamble, voting record: 15–0–0.*

Later that year, in another resolution in the same context, the Security Council expressed its grave concern at “the excessive and indiscriminate use of force by Serbian security forces and the Yugoslav Army which have resulted in numerous civilian casualties”.

UN Security Council, Res. 1199, 23 September 1998, preamble, voting record: 14-0-1.

UN Security Council

In a resolution adopted in 2000 on events in Jerusalem and other areas throughout the territories occupied by Israel, the UN Security Council condemned “acts of violence, especially the excessive use of force against Palestinians, resulting in injury and loss of human life”.

UN Security Council, Res. 1322, 7 October 2000, § 2, voting record: 14-0-1.

UN General Assembly

In a resolution adopted in 2004 on the work of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, the UN General Assembly:

Gravely concerned about ... the excessive use of force by the Israeli occupying forces against Palestinian civilians, resulting in thousands of deaths and injuries,

...

4. ... especially condemns the excessive and indiscriminate use of force against the civilian population, including extrajudicial executions, which has resulted in more than 3,400 Palestinian deaths, including those of more than 750 children, and tens of thousands of injuries.

UN General Assembly, Res. 59/121, 10 December 2004, preamble and § 4, voting record: 84-9-80-18.

UN General Assembly

In a resolution adopted in 2004 on Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, the UN General Assembly:

Concerned about the continuing systematic violation of the human rights of the Palestinian people by Israel, the occupying Power, including that arising from the excessive use of force, ...

...

3. Condemns ... the excessive use of force by the Israeli occupying forces against Palestinian civilians, resulting in extensive loss of life, vast numbers of injuries and massive destruction of homes, properties, agricultural lands and vital infrastructure.

UN General Assembly, Res. 59/124, 10 December 2004, preamble and § 3, voting record: 149-7-22-13.

UN General Assembly

In a resolution adopted in 2005 on the work of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, the UN General Assembly:

Gravely concerned about the continuing detrimental impact of the events that have taken place since 28 September 2000, including the excessive use of force by the Israeli occupying forces against Palestinian civilians, resulting in thousands of deaths and injuries, and the widespread destruction of property,

...

4. Expresses grave concern about the critical situation in the Occupied Palestinian Territory, including East Jerusalem, since 28 September 2000, as a result of unlawful Israeli practices and measures, and especially condemns ... the excessive and indiscriminate use of force against the civilian population, including extrajudicial executions.

UN General Assembly, Res. 60/104, 8 December 2005, preamble and § 4, voting record: 86-10-74-21.

UN General Assembly

In a resolution adopted in 2005 on Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, the UN General Assembly:

Expressing grave concern about the continuing systematic violation of the human rights of the Palestinian people by Israel, the occupying Power, including that arising from the excessive use of force, ...

...

3. Condemns ... the excessive use of force by the Israeli occupying forces against Palestinian civilians, resulting in extensive loss of life, vast numbers of injuries and massive destruction of homes, properties, agricultural lands and vital infrastructure.

UN General Assembly, Res. 60/107, 8 December 2005, preamble and § 3, voting record: 148-7-17-19.

UN General Assembly

In a resolution adopted in 2006 on the work of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, the UN General Assembly:

Gravely concerned about the continuing detrimental impact of the events that have taken place since 28 September 2000, including the excessive use of force by the Israeli occupying forces against Palestinian civilians, resulting in thousands of deaths and injuries, the widespread destruction of property and vital infrastructure and the internal displacement of civilians,

...

4. Expresses grave concern about the critical situation in the Occupied Palestinian Territory, including East Jerusalem, since 28 September 2000, as a result of unlawful Israeli practices and measures, and especially condemns ... the excessive and indiscriminate use of force against the civilian population, including extrajudicial executions.

UN General Assembly, Res. 61/116, 14 December 2006, preamble and § 4, voting record: 90-9-81-12-12.

UN General Assembly



In a resolution adopted in 2006 on Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, the UN General Assembly:

*Expressing grave concern* about the continuing systematic violation of the human rights of the Palestinian people by Israel, the occupying Power, including that arising from the excessive use of force, ...

*Gravely concerned* about the military actions that have been carried out since 28 September 2000 and that have led to thousands of deaths among Palestinian civilians, including hundreds of children, and tens of thousands of injuries,

...

3. *Condemns* ... the excessive use of force by the Israeli occupying forces against Palestinian civilians, resulting in extensive loss of life and vast numbers of injuries, including among children, massive destruction of homes, properties, agricultural lands and vital infrastructure, and the internal displacement of civilians.

*UN General Assembly, Res. 61/119, 14 December 2006, preamble and § 3, voting record: 157-9-14-12.*

UN General Assembly

In a resolution adopted in 2006 on extrajudicial, summary or arbitrary executions, the UN General Assembly urged all States

(a) To take all necessary and possible measures, in conformity with international human rights law and international humanitarian law, to prevent loss of life, in particular that of children, during public demonstrations, internal and communal violence, civil unrest, public emergencies or armed conflicts, and to ensure that the police, law enforcement agents, armed forces and other agents acting on behalf of or with the consent or acquiescence of the State act with restraint and in conformity with international humanitarian law and international human rights law, including the principles of proportionality and necessity, and in this regard to ensure that police and law enforcement officials are guided by the Code of Conduct for Law Enforcement Officials and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

*UN General Assembly, Res. 61/173, 19 December 2006, § 5(a), voting record: 137-0-43-12.*

UN General Assembly

In a resolution adopted in 2007 on the work of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, the UN General Assembly:

*Gravely concerned* about the continuing detrimental impact of the events that have taken place since 28 September 2000, including the excessive use of force by the Israeli occupying forces against Palestinian civilians, resulting in thousands of deaths and injuries, the widespread destruction of property and vital infrastructure and the internal displacement of civilians,

...

4. *Expresses grave concern* about the critical situation in the Occupied Palestinian Territory, including East Jerusalem, since 28 September 2000, as a result of unlawful Israeli practices and measures, and especially condemns ... the excessive and indiscriminate use of force against the civilian population, including extrajudicial executions.

*UN General Assembly, Res. 62/106, 17 December 2007, preamble and § 4, voting record: 93-8-74-17.*

UN General Assembly

In a resolution adopted in 2007 on Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, the UN General Assembly:

*Expressing grave concern* about the continuing systematic violation of the human rights of the Palestinian people by Israel, the occupying Power, including that arising from the excessive use of force, ...

*Gravely concerned* about the military actions that have been carried out since 28 September 2000 and that have led to thousands of deaths among Palestinian civilians, including hundreds of children, and tens of thousands of injuries,

...

3. *Condemns* ... the excessive use of force by the Israeli occupying forces against Palestinian civilians, which have caused extensive loss of life and vast numbers of injuries, including among children, massive destruction of homes, properties, agricultural lands and vital infrastructure, and internal displacement of civilians.

*UN General Assembly, Res. 62/109, 17 December 2007, preamble and § 3, voting record: 156-7-11-18.*

UN General Assembly

In a resolution adopted in 2007 on the rights of the child, the UN General Assembly:

*Recalls*, in accordance with international humanitarian law, that indiscriminate attacks against civilians, including children, are prohibited and that they shall not be the object of attack, including by way of reprisal or excessive use of force, condemns these practices, and demands that all parties immediately put an end to them.

*UN General Assembly, Res. 62/141, 18 December 2007, § 40, voting record: 183-1-0-8.*

UN Commission on Human Rights

In 1995, following consultations, the Chairman of the UN Commission on Human Rights issued a statement indicating the consensus of the Commission concerning the situation of human rights in Chechnya:

Expressing its deep concern over the disproportionate use of force by the Russian armed forces, [the Commission on Human Rights] deplores the grave violations of human rights, before and after the beginning of the present crisis, as well as of international humanitarian law and the continuation of these violations.

*UN Commission on Human Rights, Statement by the Chairman, 27 February 1995, UN Doc. E/CN.4/1995/176-E/1995/23, 7 July 1995, § 594.*

UN Commission on Human Rights

In a resolution adopted in 2000, the UN Commission on Human Rights expressed its grave concern about “reports indicating disproportionate and indiscriminate use of Russian military force” in Chechnya and underlined “the need to respect the principle of proportionality”.

*UN Commission on Human Rights, Res. 2000/58, 25 April 2000, preamble, voting record: 25–7–19.*

## UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992)

In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), stated:

There have been incidents in the past where substantial civilian casualties have been caused and substantial military advantage gained by a particular military action. In those cases, one might attempt to quantify both military advantage and civilian losses and apply the somewhat subjective rule of proportionality. As a general statement, however, the rule of proportionality is not relevant to the sniping activities of the Bosnia Serb Army forces, and it is of questionable relevance to many of the artillery bombardments. The Bosnian Serb Army forces are deliberately targeting the civilian population of Sarajevo, either as a measure of retaliation or to weaken their political resolve. Attacking the civilian population is a war crime.

*UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, Annex, § 207.*

## VIII. Other International Organizations

### Council of Europe Parliamentary Assembly

In a resolution adopted in 1995 concerning the Russian Federation’s request for membership in the light of the situation in Chechnya, the Council of Europe Parliamentary Assembly unreservedly condemned “the indiscriminate and disproportionate use of force by the Russian military, in particular against the civilian population”.

*Council of Europe, Parliamentary Assembly, Res. 1055, 2 February 1995, § 2.*

### European Community Ministers of Foreign Affairs

In a declaration adopted in 1991, the EC Ministers of Foreign Affairs expressed alarm at “reports that the Yugoslav National Army (JNA), having resorted to a disproportionate and indiscriminate use of force, has shown itself to be no longer a neutral and disciplined institution”.

*EC, Declaration on Yugoslavia, Haarzuilens, 6 October 1991, annexed to Letter dated 7 October 1991 from the Netherlands to the UN Secretary-General, UN Doc. A/46/533, 7 October 1991.*

## IX. International Conferences

No data.

## X. International and Mixed Judicial and Quasi-judicial Bodies

### International Court of Justice

In its advisory opinion in the *Nuclear Weapons case* in 1996, the ICJ held:

States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.

*ICJ, Nuclear Weapons case, Advisory Opinion, 8 July 1996, § 30.*

The Court did not elaborate further on the general principle of proportionality in the conduct of hostilities but rather focused on the application of this principle in the context of the use of force in the framework of the right of self-defence as defined in Article 51 of the UN Charter.

*ICJ, Nuclear Weapons case, Advisory Opinion, 8 July 1996, § 41.*

### International Court of Justice

In her dissenting opinion in the *Nuclear Weapons case* before the ICJ in 1996, Judge Higgins stated: “Even a legitimate military target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack.”

*ICJ, Nuclear Weapons case, Dissenting Opinion of Judge Higgins, 8 July 1996, § 20.*

### International Criminal Court

In its decision on the confirmation of charges in the *Mbarushimana case* in 2011, the ICC Pre-Trial Chamber I stated:

In the view of the Chamber, the war crime of attacking civilians pursuant to article 8(2)(e)(i) of the [1998 ICC] Statute does not presuppose that the civilian population is the sole and exclusive target of the attack. The crime may be perpetrated in any of the two following scenarios: (i) when individual civilians not taking direct part in the hostilities or the civilian population are the sole target of the attack or (ii) when the perpetrator launches the attack with two distinct specific aims: (a) a military objective, within the meaning of articles 51 and 52 of the Protocol Additional to the Geneva Conventions of 12 August 1949 (“the AP I”); *and simultaneously*, (b) the civilian population or individual civilians not taking direct part in the hostilities. The latter scenario must be distinguished from situations where, in violation of the principle of proportionality, a disproportionate attack is intentionally launched with the specific aim of targeting a military objective, with the awareness that incidental loss of life or injury to civilians will or may occur as a result of such an attack. In

such a case, the targeting of the civilian population is not the aim of the attack but only an incidental consequence thereof.  
*ICC, Mbarushimana case, Decision on the Confirmation of Charges, 16 December 2011, § 142.*  
[emphasis in original; footnotes in original omitted]

The charges against Mr Mbarushimana related to alleged war crimes and crimes against humanity. The Pre-Trial Chamber did not confirm the charges.  
*ICC, Mbarushimana case, Decision on the Confirmation of Charges, 16 December 2011, § 340.*  
In its judgment of 30 May 2012, the ICC Appeals Chamber confirmed that decision and dismissed the appeal.  
*ICC, Mbarushimana case, Judgment on Appeal, 30 May 2012.*

International Criminal Tribunal for the former Yugoslavia

In its review of the indictment in the *Martić case* in 1996, the ICTY Trial Chamber referred, among the relevant norms of customary law, to Article 51(5)(b) of the 1977 Additional Protocol I and held that, even when directed against a legitimate military target, “attacks must not cause damage and harm to the civilian population disproportionate in relation to the concrete and direct military advantage anticipated”.

*ICTY, Martić case, Review of the Indictment, 8 March 1996, p. 7, § 18.*

In its judgment in 2007, the Trial Chamber stated:  
The prohibition against targeting the civilian population does not exclude the possibility of legitimate civilian casualties incidental to an attack aimed at military targets. However, such casualties must not be disproportionate to the concrete and direct military advantage anticipated before the attack. In particular, indiscriminate attacks, that is attacks which affect civilians or civilian objects and military objects without distinction, may also be qualified as direct attacks on civilians. In this regard, a direct attack against civilians can be inferred from the indiscriminate character of the weapon used.  
*ICTY, Martić case, Judgment, 12 June 2007, § 69.*

International Criminal Tribunal for the former Yugoslavia

In its judgment in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that the principle of proportionality required that “any incidental (and unintentional) damage to civilians must not be out of proportion to the direct military advantage gained by the military attack”.

*ICTY, Kupreškić case, Judgment, 14 January 2000, § 524.*

International Criminal Tribunal for the former Yugoslavia

In its final report to the ICTY Prosecutor in 2000, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated: “Civilians present within or near military objectives must ... be taken into account in the proportionality equation.”  
*ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 51.*

The Committee suggested:  
The determination of relative values [of military advantage and injury to non-combatants] must be that of the “reasonable military commander”. Although there will be room for argument in close cases, there will be many cases where reasonable military commanders will agree that the injury to non-combatants or the damage to civilian objects was clearly disproportionate to the military advantage gained.  
*ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 50.*

The Committee further stated:  
Attacks which cause disproportionate civilian casualties or civilian property damage may constitute the *actus reus* for the offence of unlawful attack [as a violation of the laws and customs of war]. The *mens rea* for the offence is intention or recklessness, not simple negligence.  
*ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 28.*

International Criminal Tribunal for the former Yugoslavia

In its judgment in the *Galić case* in 2003, the ICTY Trial Chamber stated:  
58. One type of indiscriminate attack violates the principle of proportionality. The practical application of the principle of distinction requires that those who plan or launch an attack take all feasible precautions to verify that the objectives attacked are neither civilians nor civilian objects, so as to spare civilians as much as possible. Once the military character of a target has been ascertained, commanders must consider whether striking this target is “expected to cause incidental loss of life, injury to civilians, damage to civilian objectives or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” If such casualties are expected to result, the attack should not be pursued. The basic obligation to spare civilians and civilian objects as much as possible must guide the attacking party when considering the proportionality of an attack. In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.  
59. To establish the *mens rea* of a disproportionate attack the Prosecution must prove ... that the attack was launched wilfully and in knowledge of circumstances giving rise to the expectation of excessive civilian casualties.  
60. The Trial Chamber considers that certain apparently disproportionate attacks may give rise to the inference that civilians were actually the object of attack. This is to be determined on a case-by-case basis in light of the available evidence.  
*ICTY, Galić case, Judgment, 5 December 2003, §§ 58–60.*

In its judgment in 2006, the ICTY Appeals Chamber affirmed:  
190. One of the fundamental principles of international humanitarian law is that civilians and civilian objects shall be spared as much as possible from the effects of hostilities. This principle stems from the principles of distinction and the principle of protection of the civilian population, “the cardinal principles contained in the

text constituting the fabric of humanitarian law”, constituting “intransgressible principles of international customary law [ICJ, *Nuclear Weapons Case*, § 78; *Kordić and Čerkez* Appeal Judgement, § 54]. According to the principle of distinction, warring parties must at all times distinguish between the civilian population and combatants, between civilian and military objectives, and accordingly direct attacks only against military objectives [*Kordić and Čerkez* Appeal Judgement, § 54]. These principles establish an absolute prohibition on the targeting of civilians in customary international law [*Blaškić* Appeal Judgement, § 109] but do not exclude the possibility of legitimate civilian casualties incidental to the conduct of military operations. However, those casualties must not be disproportionate to the concrete and direct military advantage anticipated before the attack (the principle of proportionality).

191. ... [T]he Trial Chamber considered that Article 51(2) of Additional Protocol I “states in a clear language that civilians and the civilian population as such should not be the object of attack”, that this principle “does not mention any exceptions”, and in particular that it “does not contemplate derogating from this rule by invoking military necessity.” It then held that Article 51(2) “explicitly confirms the customary rule that civilians must enjoy general protection against the danger arising from hostilities” and “stems from a fundamental principle of international humanitarian law, the principle of distinction, which obliges warring parties to distinguish *at all times* between the civilian population and combatants and between civilian objects and military objectives and accordingly to direct their operations only against military objectives”. The Trial Chamber also considered that:

[o]nce the military character of a target has been ascertained, commanders must consider whether striking this target is “expected to cause incidental loss of life, injury to civilians, damage to civilian objectives or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

192. The Appeals Chamber is satisfied that the Trial Chamber correctly assessed the legality of the incidents.  
*ICTY, Galić case, Judgment on Appeal, 30 November 2006, §§ 190–192.*  
[emphasis in original]

International Criminal Tribunal for the former Yugoslavia

In its judgment in the *Kordić and Čerkez case* in 2004, the ICTY Appeals Chamber stated:

It is, however, accepted that attacks aimed at military objectives, including objects and combatants, may cause “collateral civilian damage”. International customary law recognises that in the conduct of military operations during armed conflicts a distinction must be drawn at all times between persons actively taking part in the hostilities and civilian population. ... Nevertheless, international customary law recognises that this does not imply that collateral damage is unlawful *per se*.  
*ICTY, Kordić and Čerkez case, Judgment on Appeal, 17 December 2004, § 52.*

International Criminal Tribunal for the former Yugoslavia

In the *Dragomir Milošević case* before the ICTY in 2006, the accused was charged, *inter alia*, with unlawful attacks on civilians as a violation of the laws or customs of war, punishable under Article 51 of Additional Protocol I and Article 13 of Additional Protocol II and under Articles 3, 7(1) and 7(3) of the 1993 ICTY Statute. The Amended Indictment of 18 December 2006 described the campaign conducted by the accused as “disproportionate to the concrete and direct military advantage anticipated”:

From on or about 10 August 1994 to on or about 21 November 1995, Dragomir Milošević, as Commander of Bosnian Serb forces comprising or attached to the Sarajevo Romanija Corps and/or forces affiliated with the VRS, conducted a campaign of artillery and mortar and modified air bomb shelling onto civilian areas of Sarajevo and upon its civilian population. The shelling attacks on Sarajevan civilians were deliberate, indiscriminate, and/or excessive and disproportionate to the concrete and direct military advantage anticipated. In particular ... given the inherent inability of modified airbombs to engage specific targets, their deployment could only have been intended to cause civilian casualties. The campaign of shelling resulted in over a thousand civilians being killed or injured.  
*ICTY, Dragomir Milošević case, Prosecution’s Submission of Amended Indictment Pursuant to Rule 50 and Trial Chamber’s Decision dated 12 December 2006, 18 December 2006, §§ 24–25.*

In its judgment in 2007, the Trial Chamber noted the obligation of parties to an armed conflict “to remove civilians ... from the vicinity of military objectives” and emphasized that “the failure of a party to abide by this obligation does not relieve the attacking side of its duty to abide by the principles of distinction and proportionality when launching an attack”.  
*ICTY, Dragomir Milošević case, Judgment, 12 December 2007, § 949.*

Human Rights Committee

In its concluding observations on the second periodic report of Israel in 2003, the Human Rights Committee stated:

The Committee notes its concern at what the State party calls “targeted killings” of those identified by the State party as suspected terrorists in the Occupied Territories. This practice would appear to be used at least in part as a deterrent or punishment, thus raising issues under article 6 [of the 1966 International Covenant on Civil and Political Rights]. While noting the delegation’s observations about respect for the principle of proportionality in any response to terrorist activities against civilians and its affirmation that only persons taking direct part in hostilities have been targeted, the Committee remains concerned about the nature and extent of the responses by the Israeli Defence Force (IDF) to Palestinian terrorist attacks.  
*The State party should not use “targeted killings” as a deterrent or punishment. The State party should ensure that the utmost consideration is given to the principle of proportionality in all its responses to terrorist threats and activities. State policy in this respect should be spelled out clearly in guidelines to regional military commanders, and complaints about disproportionate use of force should be investigated promptly by an independent body. Before resorting to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted.*  
*Human Rights Committee, Concluding observations on the second periodic report of Israel, UN Doc. CCPR/CO/78/ISR, 21 August 2003, § 15.*  
[emphasis in original]

Eritrea–Ethiopia Claims Commission

In its *Western Front, Aerial Bombardment and Related Claims (Eritrea’s Claim)* partial award in 2005, the Eritrea-Ethiopia Claims Commission, in considering the principle of proportionality in attack, stated:

The provisions of [the 1977 Additional] Geneva Protocol I cited ... express customary international humanitarian law. Those provisions ... prohibit ... attacks that may be expected to produce civilian losses that would be disproportionate to the anticipated military advantage.

*Eritrea-Ethiopia Claims Commission, Western Front, Aerial Bombardment and Related Claims, Eritrea’s Claim, Partial Award, 19 December 2005, § 95.*

(footnote in original omitted)

Inter-American Commission on Human Rights

In a report on Colombia in 1999, the Inter-American Commission on Human Rights noted that the legitimacy of a military target did not provide unlimited license to attack it. According to the report, the rule of proportionality prohibited “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”. The Commission added that the principle of proportionality required that foreseeable injury to civilians and damage to civilian objects should not be disproportionate or excessive to the anticipated concrete and direct military advantage.

*Inter-American Commission on Human Rights, Third report on the human rights situation in Colombia, Doc. OEA/Ser.L/V/II.102 Doc. 9 rev.1, 26 February 1999, §§ 77 and 79.*

XI. International Red Cross and Red Crescent Movement

ICRC

To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

The rule of proportionality shall be respected. An action is proportionate when it does not cause incidental civilian casualties and damage which is excessive in relation to the value of the expected result of the whole military operation. The rule of proportionality cannot be used to justify unlimited destruction or attacks on civilian persons and objects as such.

*Frédéric de Mulinen, Handbook on the Law of War for Armed Forces, ICRC, Geneva, 1987, § 389.*

ICRC delegates teach, furthermore, that an “indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive civilian casualties and damage” constitutes a grave breach of the law of war.

*Frédéric de Mulinen, Handbook on the Law of War for Armed Forces, ICRC, Geneva, 1987, § 778(c).*

ICRC

In an appeal launched in 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and the Syrian Arab Republic) to observe forthwith, in particular, the provisions of, *inter alia*, Article 46(3)(b) of the draft Additional Protocol I which stated: “It is forbidden to launch attacks which may be expected to entail incidental losses among the civilian population and cause the destruction of civilian objects to an extent disproportionate to the direct and substantial military advantage anticipated”. All governments concerned replied favourably.

*ICRC, The International Committee’s Action in the Middle East, IRRC, No. 152, 1973, pp. 584–585.*

ICRC

At the CDDH, the ICRC stated that Article 51(5)(b) the 1977 Additional Protocol I did not contain an exception to the prohibition of attacks against civilians, “but, as the word ‘incidental’ showed, was intended to cover a different situation”.

*ICRC, Statement at the CDDH, Official Records, Vol. XIV, CDDH/III/SR.5, 14 March 1974, p. 37, § 11.*

The ICRC further stated:

Since the First World War there had been many vain attempts at codifying the immunity of the civilian population. The 1922/23 project would have required combatants to abstain from bombing when it might affect the civilian population, but a good text was useless if it went unsigned, unratified and unimplemented. The Red Cross was conscious of the fact that the rule of proportionality contained a subjective element, and was thus liable to abuse. The aim was, however, to avoid or in any case restrict the incidental effects of attacks directed against military objectives.

*ICRC, Statement at the CDDH, Official Records, Vol. XIV, CDDH/III/SR.5, 14 March 1974, p. 37, § 12.*

ICRC

In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated: The following general rules are recognized as binding on any party to an armed conflict: ... attacks that would cause incidental loss of life or damage which would be excessive in relation to the direct military advantage anticipated are prohibited”.

*ICRC, Memorandum on the Applicability of International Humanitarian Law, Geneva, 14 December 1990, § II, IRRC, No. 280, 1991, pp. 24–25.*

ICRC

In a communication to the press in 1993, the ICRC enjoined the parties to the conflict in Somalia “not to launch military operations that may cause incidental civilian casualties or damage to civilian objects disproportionate to the direct military advantage anticipated”.

*ICRC, Communication to the Press No. 93/17, Somalia: ICRC appeals for compliance with international humanitarian law, 17 June 1993.*

ICRC

In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated:



All attacks ... which may be expected to cause incidental loss of civilian life, injury to civilians or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated are prohibited.

*ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § II, IRRC, No. 320, 1997, p. 504.*

ICRC

In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated:

Attacks ... which may be expected to cause incidental losses of human life among the civilian population or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated are prohibited.

*ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § II, reprinted in Marco Sassòli and Antoine A. Bouvier, How Does Law Protect in War?, ICRC, Geneva, 1999, p. 1308.*

ICRC

In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC proposed that the following war crime be subject to the jurisdiction of the Court:

launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, which is excessive in relation to the concrete and direct military advantage anticipated.

*ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 1(b)(ii).*

XII. Other

Oppenheim

According to Oppenheim, civilians “do not enjoy absolute immunity”. He adds:

Their presence will not render military objectives immune from attack for the mere reason that it is impossible to bombard them without causing injury to the non-combatants. But ... it is of the essence that a just balance be maintained between the military advantage and the injury to non-combatants. The restrictions imposed by customary International Law upon the sinking of merchant-vessels are one of the many examples of the principle that noxious, though otherwise lawful, action must be desisted from when its object cannot be obtained without causing disproportionate injury to legally recognised rights.

*Lassa Oppenheim, International Law. A Treatise, Vol. II, Disputes, War and Neutrality, Sixth edition, revised, Hersch Lauterpacht (ed.), Longmans, Green and Co., London/New York/Toronto, 1944, p. 415, § 214ea.*

Bothe, Partsch and Solf

In their commentary on the 1977 Additional Protocols, Bothe, Partsch and Solf state:

The same argument [that the prohibition of indiscriminate is inferentially included in Article 13 of the 1977 Additional Protocol II within the prohibition against making the civilian population the object of attack and that the deletion of this prohibition may be said to be part of the simplification of the text] cannot be made with respect to attacks which may be expected to cause disproportionate civilian losses; Committee III [of the CDDH] had rejected that provision before the simplification process had been manifested. Nevertheless, ... the principle of proportionality is inherent in the principle of humanity which was explicitly made applicable to Protocol II under the fourth clause of the Preamble. Thus, the principle of proportionality cannot be ignored in applying Protocol II.

*Michael Bothe, Karl Joseph Partsch, Waldemar A. Solf (eds.), New Rules for Victims of Armed Conflicts, Martinus Nijhoff, The Hague, 1982, pp. 677–678.*

Americas Watch

In 1986, in a report on the use of landmines in the conflicts in El Salvador and Nicaragua, Americas Watch stated:

The principle of humanity, which both complements and inherently limits the doctrine of military necessity, is defined in the U.S. Air Force’s *Pamphlet on the Conduct of Armed Conflict and Air Operations* as resulting “... in a specific prohibition against unnecessary suffering and a requirement of proportionality ...” ... These customary principles of the laws of war constitute legal obligation[s] for the warring parties to the internal armed conflicts in El Salvador and Nicaragua.

*Americas Watch, Land Mines in El Salvador and Nicaragua: The Civilian Victims, New York, December 1986, pp. 77–78.*

Africa Watch

In 1989, in a report on violations of the laws of war in Angola, Africa Watch stated: “Another fundamental principle of customary humanitarian law is the principle of humanity, which both complements and inherently limits the doctrine of military necessity.” The report cited the US Air Force Pamphlet with approval where the latter provides that “this principle of humanity results in a specific prohibition of unnecessary suffering and a requirement of proportionality”.

*Africa Watch, Angola: Violations of the Laws of War by Both Sides, New York, April 1989, p. 127, citing US, Air Force Pamphlet 110–31, International Law – The Conduct of Armed Conflict and Air Operations, US Department of the Air Force, 1976, § 1–3(a).*

Turku Declaration of Minimum Humanitarian Standards

The Turku Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990 states: “Whenever the use of force is unavoidable, it shall be in proportion to the seriousness of the offence or the objective to be achieved.”



*Turku Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 5(2), IRRRC, No. 282, 1991, p. 332.*

## Human Rights Watch

In 1994, in the context of the conflict in Yemen, Human Rights Watch urged the Government of Yemen to play closest attention to the requirements of the rules of war, in particular ... to the rule of proportionality. Under that rule, even attacks on legitimate military targets such as enemy forces or tanks may be prohibited if such attacks would cause loss of civilian life, injury to civilians, or damage to civilian objects that would be excessive in relation to the concrete and direct military advantage anticipated ... We note that the rules of war apply equally to government and rebel troops.

*Human Rights Watch, Letter to the Government of Yemen, New York, 19 May 1994.*

## Amnesty International

In a report on the NATO bombings in the Federal Republic of Yugoslavia issued in 2000, Amnesty International stated:

In other words, NATO deliberately attacked a civilian object [the Serbian state radio and television headquarters], killing 16 civilians, for the purpose of disrupting Serbian television broadcasts in the middle of the night for approximately three hours. It is hard to see how this can be consistent with the rule of proportionality.

*Amnesty International, NATO/Federal Republic of Yugoslavia: “Collateral Damage” or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force, AI Index EUR 70/18/00, London, June 2000, p. 45.*

# Section B. Determination of the anticipated military advantage

## I. Treaties

### ICC Statute

Article 8(2)(b)(iv) of the 1998 ICC Statute provides that incidental loss of civilian life or injury to civilians must not be clearly excessive “in relation to the concrete and direct *overall* military advantage anticipated”.

*Statute of the International Criminal Court, adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 17 July 1998, UN Doc. A/CONF.183/9, Article 8(2)(b)(iv).*

(emphasis added)

## II. Other Instruments

### ICC Elements of Crimes

An explanatory footnote in the 2000 ICC Elements of Crimes states:

The expression “concrete and direct overall military advantage” refers to a military advantage that is foreseeable by the perpetrator at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack. The fact that this crime admits the possibility of lawful incidental injury and collateral damage does not in any way justify any violation of the law applicable in armed conflict. It does not address justifications for war or other rules related to *jus ad bellum*. It reflects the proportionality requirement inherent in determining the legality of any military activity undertaken in the context of an armed conflict.

*Finalized draft text of the Elements of Crimes, adopted by the 23rd Meeting of the Preparatory Commission for the International Criminal Court, New York, 30 June 2000, Report of the Preparatory Commission for the International Criminal Court, UN Doc. PCNICC/2000/INF/3/Add.2, Addendum, 6 July 2000, as adopted by the Assembly of States Parties, First Session, 3–10 September 2002, Official Records of the Assembly of States Parties to the Rome Statute of the ICC, UN Doc. ICC-ASP/1/3, 25 September 2002, and ICC-ASP/1/3/Corr.1, 31 October 2002, Footnote 36.*

## III. Military Manuals

### Australia

Australia’s Defence Force Manual (1994) refers to the declaration made by Australia upon ratification of the 1977 Additional Protocol I to the effect that references to military advantage in Articles 51(5)(b) and 57 of the Protocol mean “the advantage anticipated from the attack as a whole and not only from isolated or particular parts of the attack” and that “military advantage involves a number of considerations, including the security of the attacking forces”.

*Australia, Manual on Law of Armed Conflict, Australian Defence Force Publication, Operations Series, ADFP 37 – Interim Edition, 1994, §§ 510 and 511.*

### Australia

Australia’s LOAC Manual (2006) states:

5.10 ... In relation to G. P. I [1977 Additional Protocol I], Australia has made a declaration to the effect that the Australian Government’s understanding is that references to military advantage in Articles 51(5)(b) and 57 mean:

the advantage anticipated from the attack as a whole and not only from isolated or particular parts of the attack.

5.11 In addition, the declaration makes it clear that military advantage involves a number of considerations, including the security of attacking forces ...

*Australia, The Manual of the Law of Armed Conflict, Australian Defence Doctrine Publication 06.4, Australian Defence Headquarters, 11 May 2006, §§ 5.10–5.11.*

The LOAC Manual (2006) replaces both the Defence Force Manual (1994) and the Commanders’ Guide (1994).

Belgium

Belgium’s Law of War Manual (1983) states that, when deciding whether or not to launch an attack, “the commander must consider the advantage of the attack as a whole (and not the advantages of specific or separate parts of the attack)”.

*Belgium, Droit Pénal et Disciplinaire Militaire et Droit de la Guerre, Deuxième Partie, Droit de la Guerre, Ecole Royale Militaire, par J. Maes, Chargé de cours, Avocat-général près la Cour Militaire, D/1983/1187/029, 1983, p. 29.*

Canada

Canada’s LOAC Manual (1999) states:

The military advantage at the time of the attack is that advantage anticipated from the military campaign or operation of which the attack is part, considered as a whole, and not only from isolated or particular parts of that campaign or operation. A concrete and direct military advantage exists if the commander has an honest and reasonable expectation that the attack will make a relevant contribution to the success of the overall operation. Military advantage may include a variety of considerations including the security of the attacking forces.

*Canada, The Law of Armed Conflict at the Operational and Tactical Level, Office of the Judge Advocate General, 1999, p. 4-3, §§ 20 and 21; see also p. 2-3, § 16.*

Canada

Canada’s LOAC Manual (2001) states in its chapter on targeting:

1. The military advantage at the time of the attack is that advantage anticipated from the military campaign or operation of which the attack is part, considered as a whole, and not only from isolated or particular parts of that campaign or operation.
2. A concrete and direct military advantage exists if the commander has an honest and reasonable expectation that the attack will make a relevant contribution to the success of the overall operation. Military advantage may include a variety of considerations including the security of the attacking forces.

*Canada, The Law of Armed Conflict at the Operational and Tactical Levels, Office of the Judge Advocate General, 13 August 2001, § 415.1.*

Côte d’Ivoire

Côte d’Ivoire’s Teaching Manual (2007) provides in Book IV (Instruction of heads of division and company commanders):

The military advantage at the moment of attack is the advantage anticipated from the operation or from the military campaign of which the attack is a part, considered as a whole, and not only from isolated or particular parts of that campaign or that operation.

There is a concrete and direct military advantage if the commander reasonably and honestly anticipates that the attack contributes to the success of the operation as a whole.

*Côte d’Ivoire, Droit de la guerre, Manuel d’instruction, Livre IV: Instruction du chef de section et du commandant de compagnie, Manuel de l’élève, Ministère de la Défense, Forces Armées Nationales, November 2007, p. 27.*

Germany

Germany’s Military Manual (1992) states: “The term ‘military advantage’ refers to the advantage which can be expected of an attack as a whole and not only of isolated or specific parts of the attack.”

*Germany, Humanitarian Law in Armed Conflicts – Manual, DSK VV207320067, edited by The Federal Ministry of Defence of the Federal Republic of Germany, VR II 3, August 1992, English translation of ZDv 15/2, Humanitäres Völkerrecht in bewaffneten Konflikten – Handbuch, August 1992, § 444.*

Israel

Israel’s Manual on the Rules of Warfare (2006) states:

Upon attacking a military target that is located at the heart of [a] civilian district, for example, a group of enemy soldiers who are holed up in the heart of a city and surrounded by civilians, they may be attacked, but only if the expected military benefit to one’s side from the offensive exceeds the expected damage that might be caused to civilians. There is no set formula according to which it is possible to weigh the civilian damage against the expected military benefit from the offensive; but it is a question of degree. An offensive would not be considered legitimate if it presented a significant risk to many civilian lives in return for gaining a subordinate military objective.

*Israel, Rules of Warfare on the Battlefield, Military Advocate-General’s Corps Command, IDF School of Military Law, Second Edition, 2006, p. 27.*

The manual further states:

The rules of war have laid down a number of rules of engagement in a theatre of war containing civilians:

...

- Even if it is not possible to isolate civilians from the military target and there is no choice but to attack, the commanding officer is required to refrain from conducting an attack that could be expected to cause the civilian population damage that is disproportionate to the expected military gain.

*Israel, Rules of Warfare on the Battlefield, Military Advocate-General’s Corps Command, IDF School of Military Law, Second Edition, 2006, pp. 27–28.*

The Manual on the Rules of Warfare (2006) is a second edition of the Manual on the Laws of War (1998).

Netherlands

The Military Manual (2005) of the Netherlands states: “The relation between collateral damage and the degree of force used on the one hand, and the expected military advantage on the other hand, must not be disproportionate.”

Netherlands, *Humanitair Oorlogsrecht: Handleiding, Voorschrift No. 27–412, Koninklijke Landmacht, Militair Juridische Dienst, 2005*, p. 34.

## New Zealand

New Zealand’s Military Manual (1992) states:

In deciding whether the principle of proportionality is being respected, the standard of measurement is the contribution to the military purpose of an attack or operation considered as a whole, as compared with other consequences of the action, such as the effect upon civilians or civilian objects.

New Zealand, *Interim Law of Armed Conflict Manual, DM 112, New Zealand Defence Force, Headquarters, Directorate of Legal Services, Wellington, November 1992*, § 207.

## Nigeria

According to Nigeria’s Military Manual (1994), the principle of proportionality requires that “incidental civilian casualties and damage which is excessive in relation to the value of the expected result of the *whole* operation” must be avoided.

Nigeria, *International Humanitarian Law (IHL), Directorate of Legal Services, Nigerian Army, 1994*, p. 42, § 11. (emphasis added)

## South Africa

South Africa’s LOAC Teaching Manual (2008) states:

*Proportionality*

...

– The test here is whether the incidental or collateral damage caused by the force is not excessive in comparison with the military utility of the force. In other words, the standard of measurement is the contribution to the military purpose of an attack or operations considered as a whole, as compared with the other consequences of the action, such as the effect on civilians or civilian objects.

South Africa, *Advanced Law of Armed Conflict Teaching Manual, School of Military Justice, 1 April 2008, as amended to 25 October 2013, Learning Unit 1, p. 45*.

## Spain

Spain’s LOAC Manual (1996) states: “An attack is prohibited if ... the damage to the civilian population and/or to civilian objects which the attack will cause is excessive in relation to the military advantage anticipated from the attack *as a whole*.”

Spain, *Orientaciones. El Derecho de los Conflictos Armados, Publicación OR7–004, 2 Tomos, aprobado por el Estado Mayor del Ejército, Division de Operaciones, 18 March 1996, Vol. I, § 2.5.a; see also § 4.3*.

(emphasis added)

## Spain

Spain’s LOAC Manual (2007) states:

It is prohibited to launch an attack on a military objective when, based on information available in the planning phase, it could be expected to lead to casualties among the civilian population or cause damage to civilian property which would be excessive in relation to the military advantage anticipated from the attack considered as a whole.

Spain, *Orientaciones. El Derecho de los Conflictos Armados, Tomo 1, Publicación OR7–004, (Edición Segunda), Mando de Adiestramiento y Doctrina, Dirección de Doctrina, Orgánica y Materiales, 2 November 2007, § 2.5.a*.

The manual further states that the anticipated military advantage “should be substantial and relatively immediate. An advantage which is hardly perceptible or which would only appear in the long term should be disregarded.”

Spain, *Orientaciones. El Derecho de los Conflictos Armados, Tomo 1, Publicación OR7–004, (Edición Segunda), Mando de Adiestramiento y Doctrina, Dirección de Doctrina, Orgánica y Materiales, 2 November 2007, § 4.3*.

## United Kingdom of Great Britain and Northern Ireland

The UK LOAC Manual (2004) states:

The military advantage anticipated from the attack refers to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack. The point of this is that an attack may involve a number of co-ordinated actions, some of which might cause more incidental damage than others. In assessing whether the proportionality rule has been violated, the effect of the whole attack must be considered.

United Kingdom, *The Manual of the Law of Armed Conflict, Ministry of Defence, 1 July 2004, § 5.33.5*.

## United States of America

The US Naval Handbook (1995) states that the term military advantage “refers to the advantage anticipated from the military operation of which the attack is a part, taken as a whole, and not from isolated or particular parts of that operation”.

United States, *The Commander’s Handbook on the Law of Naval Operations, NWP 1–14M/MCWP 5–2.1/COMDTPUB P5800.7, issued by the Department of the Navy, Office of the Chief of Naval Operations and Headquarters, US Marine Corps, and Department of Transportation, US Coast Guard, October 1995 (formerly NWP 9 (Rev. A)/FMFM 1–10, October 1989), § 8.1.2.1*.

## United States of America

The US Naval Handbook (2007) states: “Military advantage may involve a variety of considerations, including the security of the attacking force.”

*United States, The Commander’s Handbook on the Law of Naval Operations, NWP 1-14M/MCWP 5-12.1/COMDTPUB P5800.7, issued by the Department of the Navy, Office of the Chief of Naval Operations and Headquarters, US Marine Corps, and Department of Homeland Security, US Coast Guard, July 2007, § 8.2.*

IV. National Legislation

No data.

V. National Case-law

Canada

In 2013, in the *Sapkota case*, Canada’s Federal Court dismissed a request for review of a decision denying refugee protection to the applicant on grounds of complicity in crimes against humanity in Nepal between 1991 and 2009. While reviewing the submissions of the respondent, Canada’s Minister of Citizenship and Immigration, the Court stated: “The Respondent notes that the *Rome Statute of the International Criminal Court* ... is endorsed in Canada as a source of customary law.”

*Canada, Federal Court, Sapkota case, Reasons for Judgment and Judgment, 15 July 2013, § 28.*

Germany

In 2010, in the *Fuel Tankers case*, the Federal Prosecutor General at Germany’s Federal Court of Justice investigated whether war crimes or other crimes under domestic law had been committed in the course of an airstrike which was ordered by a colonel (*Oberst*) of the German armed forces against two tankers transporting fuel for the International Security Assistance Force in Afghanistan stolen by the Taliban near Kunduz and which resulted in the deaths of a number of civilians. The Federal Prosecutor General stated:

Pursuant to § 170 para. 2 StPO [Penal Procedure Code], the investigation proceedings which were initiated by the order of 12 March 2010 against Colonel (*Oberst*) Klein and Company Sergeant Major (*Hauptfeldwebel*) Wilhelm due to suspected offences under the VStGB [International Crimes Code] and other offences are to be terminated as a result of the investigations conducted and based on the sources of information set out hereafter and on the reasons given in detail hereafter.

*Germany, Federal Court of Justice, Federal Prosecutor General, Fuel Tankers case, Decision, 16 April 2010, p. 1.*

The Federal Prosecutor General also stated:

Criminal responsibility under § 211 StGB [i.e. for murder under Germany’s Penal Code]

...

b)

Colonel (*Oberst*) Klein’s actions were lawful under international law and therefore justified under domestic criminal law ...

...

cc)

Even considering the fact that the bombing killed civilians to be protected under the international law of armed conflict, the order to attack was lawful under international law.

(1)

... International humanitarian law only prohibits ... attacks ... against a military objective if at the time of the order to attack the anticipated civilian damage is out of proportion (“excessive” see Art. 51 para. 5 sub-para. b AP I [the 1977 Additional Protocol I]) to the anticipated concrete and direct military advantage (see ICRC Customary International Humanitarian Law, 2005 – hereafter ICRC Customary IHL [Study] – p. 46ff). ...

(2)

The standard of prohibiting excess first requires a military advantage of a tactical nature ... , such as the destruction or weakening of hostile troops or their means of combat, or territorial gain ... Collateral damage such as the death of civilians is not out of proportion merely because the military advantage is only a short-term advantage which does not decide the conflict. Thus, the bombarding of a broadcasting centre by NATO in Belgrade with the foreseeable result of numerous civilian deaths was not considered to be out of proportion, even though the anticipated tactical advantage only lay in the interruption of the adversary’s telecommunication for a few hours (Final Report to the Prosecutor by the Committee established to review the NATO Bombing Campaign against the Federal Republic of Yugoslavia, marginal no. 78). In the present case the bombing pursued to military goals, namely the destruction of the fuel tankers robbed by the Taliban and of the fuel as well as the killing of the Taliban, including not least the high-level regional commander of the insurgents. The anticipated military advantage, namely on the one hand the final prevention of using the fuel and the fuel tankers as “driving bombs” or to fuel the insurgents’ militarily used vehicles and on the other hand the at least temporary disruption of the Taliban’s regional command structure fall within the usual, recognized tactical military advantages ... The fact that the goal mentioned in second place was not fully achieved is irrelevant for the legal assessment because the expectations at the time of the military action based on the facts are decisive (“ex ante view”, see ICRC Customary IHL [Study] p. 50 ...) ...

...

(4)

Even if the killing of several dozen civilians would have had to be anticipated (which is assumed here for the sake of the argument), from a tactical-military perspective this would not have been out of proportion to the anticipated military advantages. The literature consistently points out that general criteria are not available for the assessment of specific proportionality because unlike legal goods, values and interests are juxtaposed which cannot be “balanced” ... Therefore, considering the particular pressure at the moment when the decision had to be taken, an infringement is only to be assumed in cases of obvious excess where the commander ignored any considerations of proportionality and refrained from acting “honestly”, “reasonably” and “competently” ... This would apply to the destruction of an entire village with hundreds of civilian inhabitants in order to hit a single enemy fighter, but not if the objective was to destroy artillery positions in the village ... There is no such obvious disproportionality in the present case. Both the destruction of the fuel tankers and the destruction of high-level Taliban had a military importance which is not to be underestimated, not least because of the thereby considerably reduced risk of attacks by the Taliban against own troops and civilians. There is thus no excess.



Israel

In its judgment in the *Public Committee against Torture in Israel* case in 2006, Israel’s High Court of Justice stated:

*Proper Proportion between Benefit and Damage*

45. The proportionality test determines that attack upon innocent civilians is not permitted if the collateral damage caused to them is not proportionate to the military advantage (in protecting combatants and civilians). In other words, attack is proportionate if the benefit stemming from the attainment of the proper military objective is proportionate to the damage caused to innocent civilians harmed by it. That is a values based test. It is based upon a balancing between conflicting values and interests (see *Beit Sourik*, at p. 850; HCJ 7052/03 *Adalah – The Legal Center Arab Minority Rights in Israel* (unpublished, paragraph 74 of my judgment, hereinafter *Adalah*). It is accepted in the national law of various countries. It constitutes a central normative test for examining the activity of the government in general, and of the military specifically, in Israel. In one case I stated:

“Basically, this subtest carries on its shoulders the constitutional view that the ends do not justify the means. It is a manifestation of the idea that there is a barrier of values which democracy cannot surpass, even if the purpose whose attainment is being attempted is worthy” (HCJ 8276/05 *Adalah – The Legal Center for Arab Minority Rights in Israel v. The Minister of Defense* (unpublished, paragraph 30 of my judgment; see also ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* 66 (2002)).

As we have seen, this requirement of proportionality is employed in customary international law regarding protection of civilians (see CASSESE, at p. 418; Kretzmer, at p. 200; Ben-Naftali & Michaeli, at p. 278; see also Gardam; as well as §51(2)(III) of *The First Protocol* [1977 Additional Protocol I], which constitutes customary law). When the damage to innocent civilians is not proportionate to the benefit of the attacking army, the attack is disproportionate and forbidden.

46. That aspect of proportionality is not required regarding harm to a combatant, or to a civilian taking a direct part in the hostilities at such time as the harm is caused. Indeed, a civilian taking part in hostilities is endangering his life, and he might – like a combatant – be the objective of a fatal attack. That killing is permitted. However, that proportionality is required in any case in which an innocent civilian is harmed. Thus, the requirements of proportionality *stricto sensu* must be fulfilled in a case in which the harm to the terrorist carries with it collateral damage caused to nearby innocent civilians. The proportionality rule applies in regards to harm to those innocent civilians (see § 51(5)(b) of *The First Protocol*). The rule is that combatants and terrorists are not to be harmed if the damage expected to be caused to nearby innocent civilians is not proportionate to the military advantage in harming the combatants and terrorists (see HENCKAERTS & DOSWALD-BECK, at p. 49). Performing that balance is difficult. Here as well, one must proceed case by case, while narrowing the area of disagreement. Take the usual case of a combatant, or of a terrorist sniper shooting at soldiers or civilians from his porch. Shooting at him is proportionate even if as a result, an innocent civilian neighbor or passerby is harmed. That is not the case if the building is bombed from the air and scores of its residents and passersby are harmed (*compare* DINSTEIN, at p. 123; GROSS, at p. 621). The hard cases are those which are in the space between the extreme examples. There, a meticulous examination of every case is required; it is required that the military advantage be direct and anticipated (see §57(2)(iii) of *The First Protocol*). Indeed, in international law, as in internal law, the ends do not justify the means. The state’s power is not unlimited. Not all of the means are permitted. The Inter-American Court of Human Rights pointed that out, stating:

“[R]egardless of the seriousness of certain actions and the culpability of the perpetrators of certain crimes, the power of the state is not unlimited, nor may the state resort to any means to attain its ends” (*Velasquez Rodriguez v. Honduras*, I/A Court H.R. (Ser. C.), No 4, 1, para. 154 (1988)).

However, when hostilities occur, losses are caused. The state’s duty to protect the lives of its soldiers and civilians must be balanced against its duty to protect the lives of innocent civilians harmed during attacks on terrorists. That balancing is difficult when it regards human life. It raises moral and ethical problems (see Asa Kasher & Amos Yadlin, *Assassination and Preventative Killing*, 25 SAIS REVIEW 41 (2005). Despite the difficulty of that balancing, there’s no choice but to perform it.

*Israel, High Court of Justice, Public Committee against Torture in Israel case, Judgment, 14 December 2006, §§ 45–46.*

VI. Other National Practice

Australia

Upon ratification of the 1977 Additional Protocol I, Australia stated that references to “military advantage” were intended to mean “the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of that attack” and maintained that the term “military advantage” involved a number of considerations, including the security of the attacking forces. Australia also stated that the expression “concrete and direct military advantage anticipated” meant “a *bona fide* expectation that the attack will make a relevant and proportional contribution to the objective of the military attack involved”.

*Australia, Declarations made upon ratification of the 1977 Additional Protocol I, 21 June 1991, § 4.*

Belgium

In an explanatory memorandum submitted to the Belgian Parliament in 1985 in the context of the ratification procedure of the 1977 Additional Protocols, the Belgian Government stated: “The military advantage must be assessed in the light of the attack considered as a whole.”

*Belgium, House of Representatives, Explanatory memorandum on a draft bill for the approval of the Additional Protocols, 1984–1985 Session, Doc. 1096–1, 9 January 1985, p. 11.*

Belgium

Upon ratification of the 1977 Additional Protocol I, Belgium stated that the term “military advantage” as used in the proportionality test of Articles 51 and 57 of the Protocol was understood to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.

*Belgium, Interpretative declarations made upon ratification of the 1977 Additional Protocol I, 20 May 1986, § 5.*

Canada

At the CDDH, Canada stated that in its view the expression “military advantage anticipated” was intended to refer to “the advantage anticipated from the attack considered as a whole, and not only from isolated or particular parts of that attack”.

*Canada, Statement at the CDDH, Official Records, Vol. VI, CDDH/SR.41, 26 May 1977, p. 179.*

Canada

Upon ratification of the 1977 Additional Protocol I, Canada stated that the term “military advantage” as used in the proportionality test of Articles 51 and 57 of the Protocol was understood to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.

*Canada, Reservations and statements of understanding made upon ratification of the 1977 Additional Protocol I, 20 November 1990, § 10.*

Egypt

Upon signature of the 1998 ICC Statute, Egypt declared:

The term “the concrete and direct overall military advantage anticipated” used in article 8, paragraph 2 (b) (iv), must be interpreted in the light of the relevant provisions of [the 1977 Additional Protocol I]. The term must also be interpreted as referring to the advantage anticipated by the perpetrator at the time when the crime was committed. No justification may be adduced for the nature of any crime which may cause incidental damage in violation of the law applicable in armed conflicts. The overall military advantage must not be used as a basis on which to justify the ultimate goal of the war or any other strategic goals. The advantage anticipated must be proportionate to the damage inflicted.

*Egypt, Declarations made upon signature of the 1998 ICC Statute, 26 December 2000, § 4(c).*

France

Upon ratification of the 1977 Additional Protocol I, France stated that the term “military advantage” as used in the proportionality test of Articles 51 and 57 of the Protocol was understood to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.

*France, Reservations and declarations made upon ratification of the 1977 Additional Protocol I, 11 April 2001, § 10.*

France

Upon ratification of the 1998 ICC Statute, France declared that “the term ‘military advantage’ in article 8, paragraph 2 (b) (iv), refers to the advantage anticipated from the attack as a whole and not from isolated or specific elements thereof”.

*France, Interpretative declarations made upon ratification of the 1998 ICC Statute, 9 June 2000, § 5.*

Germany, Federal Republic of

At the CDDH, the Federal Republic of Germany stated that in its view the expression “military advantage anticipated” was intended to refer to “the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of that attack”.

*Germany, Federal Republic of, Statement at the CDDH, Official Records, Vol. VI, CDDH/SR.41, 26 May 1977, p. 188; Statement at the CDDH, Official Records, Vol. VI, CDDH/SR.42, 27 May 1977, p. 226.*

Germany

Upon ratification of the 1977 Additional Protocol I, Germany stated that the term “military advantage” as used in the proportionality test of Articles 51 and 57 of the Protocol was understood to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.

*Germany, Declarations made upon ratification of the 1977 Additional Protocol I, 14 February 1992, § 5.*

Israel

In 2006, Israel’s Ministry of Foreign Affairs stated:

In practice, [the principle of proportionality] requires that the IDF [Israel Defense Forces] and the commander in the field assess both the expected military gain, and the potential of collateral injury to Lebanese civilians. With regard to the expected military gain, it should be noted that the relevant advantage is not that of that specific attack but of the military operation as a whole. As the German Military Manual points out:

The term “military advantage” refers to the advantage which can be expected of an attack as a whole and not only of isolated or specific parts of the attack.

It should also be recalled that, as noted above, the relevant consideration to gauge the legitimacy of a response to an act of aggression is not the attacks which have already been committed, but the “overall objective of ending the aggression”. In Israel’s case this means that its response has to be measured not only in respect of the initial Hizbullah cross-border attack, or even the missiles which have already been fired at Israel’s northern towns and villages (some 2,500 at time of writing), but also against the threat of the estimated 13,000 missiles which Hezbollah still has and threatens to use against Israel.

*Israel, Responding to Hizbullah Attacks from Lebanon: Issues of Proportionality, Legal Background, Ministry of Foreign Affairs of Israel, 25 July 2006, § 4.*

Israel

In 2007, Israel’s Ministry of Foreign Affairs stated in a diplomatic note:

In practice, [the principle of proportionality] requires that the IDF [Israel Defense Forces] and the commander in the field assess both the expected military gain, and the potential of collateral injury to Lebanese civilians. With regard to the expected military gain, it should be noted that the relevant advantage is not that of that specific attack but of the military operation as a whole. As the German Military Manual points out:



The term “military advantage” refers to the advantage which can be expected of an attack as a whole and not only of isolated or specific parts of the attack.  
*Israel, Israel’s War with Hizbullah. Preserving Humanitarian Principles While Combating Terrorism, Diplomatic Notes No. 1, Ministry of Foreign Affairs of Israel, April 2007, pp. 13–14.*

Israel

In 2009, in a report on Israeli operations in Gaza between 27 December 2008 and 18 January 2009 (the “Gaza Operation”, also known as “Operation Cast Lead”), Israel’s Ministry of Foreign Affairs stated:

123. ... [I]nternational law confirms the need to assess proportionality from the standpoint of a “reasonable military commander,” possessed of such information as was available at the time of the targeting decision and considering the military advantage of the attack as a whole. Moreover, the balancing may not be second-guessed in hindsight, based on new information that has come to light; it is a forward-looking test based on expectations and information at the time the decision was made. This perspective is confirmed by the use of the word “anticipated” within the text of the rule itself, as well as in the explanations provided by numerous States in ratifying [the 1977] Additional Protocol I.

...

126. The same criteria for assessing “military advantage” apply in the proportionality context, namely that the “military advantage anticipated” from a particular targeting decision must be considered from the standpoint of the overall objective of the mission. In addition, it may legitimately include not only the need to neutralise the adversary’s weapons and ammunition and dismantle military or terrorist infrastructure, but also – as a relevant but not overriding consideration – protecting the security of the commander’s own forces.

127. The standard does not penalise commanders for making close calls. Rather, it is intended to prohibit “[manifestly disproportionate collateral damage inflicted in order to achieve operational objectives,” because this results in the action essentially being a “form of indiscriminate warfare.”

*Israel, Ministry of Foreign Affairs, The Operation in Gaza 27 December 2008–18 January 2009: Factual and Legal Aspects, 29 July 2009, §§ 123 and 126–127.*

[emphasis in original; footnotes in original omitted]

Italy

At the CDDH, Italy stated: “As to the evaluation of the military advantage expected from an attack ... that expected advantage should be seen in relation to the attack as a whole, and not in relation to each action regarded separately.”

*Italy, Statement at the CDDH, Official Records, Vol. VI, CDDH/SR.42, 27 May 1977, p. 231.*

Italy

Upon ratification of the 1977 Additional Protocol I, Italy stated that the term “military advantage” as used in the proportionality test of Articles 51 and 57 of the Protocol was understood to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.

*Italy, Declarations made upon ratification of the 1977 Additional Protocol I, 27 February 1986, § 6.*

Netherlands

At the CDDH, the Netherlands stated that in its view the expression “military advantage anticipated” was intended to refer to “the advantage anticipated from the attack considered as a whole and not only from isolated or particular phases of that attack”.

*Netherlands, Statement at the CDDH, Official Records, Vol. VI, CDDH/SR.41, 26 May 1977, p. 168, § 141 and p. 195.*

Netherlands

Upon ratification of the 1977 Additional Protocol I, Netherlands stated that the term “military advantage” as used in the proportionality test of Articles 51 and 57 of the Protocol was understood to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.

*Netherlands, Declarations made upon ratification of the 1977 Additional Protocol I, 26 June 1987, § 5.*

New Zealand

Upon ratification of the 1977 Additional Protocol I, New Zealand stated that references to the “military advantage” were intended to mean “the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of that attack” and maintained that the term “military advantage” involved a number of considerations, including the security of the attacking forces. New Zealand further stated that the expression “concrete and direct military advantage anticipated” meant “a *bona fide* expectation that the attack will make a relevant and proportional contribution to the objective of the military attack involved”.

*New Zealand, Declarations made upon ratification of the 1977 Additional Protocol I, 8 February 1988, § 3.*

Spain

Upon ratification of the 1977 Additional Protocol I, Spain stated that the term “military advantage” as used in the proportionality test of Articles 51 and 57 of the Protocol was understood to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.

*Spain, Interpretative declarations made upon ratification of the 1977 Additional Protocol I, 21 April 1989, § 6.*

United Kingdom of Great Britain and Northern Ireland

At the CDDH, the United Kingdom stated that in its view the expression “military advantage anticipated” was intended to refer to “the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack”.

*United Kingdom, Statement at the CDDH, Official Records, Vol. VI, CDDH/SR.41, 26 May 1977, p. 164, § 120.*

## United Kingdom of Great Britain and Northern Ireland

Upon ratification of the 1977 Additional Protocol I, the United Kingdom stated that the term “military advantage” as used in the proportionality test of Articles 51 and 57 of the Protocol was understood to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.

*United Kingdom, Reservations and declarations made upon ratification of the 1977 Additional Protocol I, 28 January 1998, § i; see also United Kingdom, Declarations made upon signature of the 1977 Additional Protocol I, 12 December 1977, § e and Declarations made upon ratification of the 1996 Amended Protocol II to the Convention on Certain Conventional Weapons, 13 February 1995.*

## United States of America

At the CDDH, the United States stated that in its view the expression “military advantage anticipated” was intended to refer to “the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack”.

*United States, Statement at the CDDH, Official Records, Vol. VI, CDDH/SR.42, 27 May 1977, p. 241.*

## United States of America

In 1991, in reaction to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army pointed out:

The concept of “incidental loss of life excessive in relation to the military advantage anticipated” generally is measured against an overall campaign. While it is difficult to weigh the possibility of collateral civilian casualties on a target-by-target basis, minimization of collateral civilian casualties is a continuing responsibility at all levels of the targeting process.

*United States, Letter from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf region, 11 January 1991, § 8(F).*

## United States of America

In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that the balancing of collateral damage against military gain “may be done on a target-by-target basis, as frequently was the case during Operation Desert Storm, but also may be weighed in overall terms against campaign objectives”.

*United States, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, ILM, Vol. 31, 1992, p. 622.*

## United States of America

The Report on US Practice states:

United States practice recognizes the principle of proportionality as part of the customary law of non-nuclear war. In applying this principle, it is necessary to consider military advantage not only on an immediate or target-by-target basis, but also in light of the military objectives of an entire campaign or operation.

*Report on US Practice, 1997, Chapter 1.5.*

## VII. United Nations

No data.

## VIII. Other International Organizations

No data.

## IX. International Conferences

No data.

## X. International and Mixed Judicial and Quasi-judicial Bodies

No data.

## XI. International Red Cross and Red Crescent Movement

### ICRC

The ICRC Commentary on the 1977 Additional Protocols states:

The expression “concrete and direct” was intended to show that the advantage concerned should be substantial and relatively close, and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded.

*Yves Sandoz et al. (eds.), Commentary on the Additional Protocols, ICRC, Geneva, 1987, § 2209.*

### ICRC

In 1999, in a paper relating to the crimes listed in Article 8(2)(b) of the 1998 ICC Statute, and submitted to the Working Group on Elements of Crimes of the Preparatory Commission for the ICC, the ICRC reiterated its position that:

The addition of the words “clearly” and “overall” in the definition of collateral damage [in Article 8(2)(b)(iv) of the 1998 ICC Statute] is not reflected in any existing legal source. Therefore, the addition must be

understood as not changing existing law.  
*ICRC, Paper relating to the crimes listed in article 8, paragraph 2 (b) (i), (ii), (iii), (iv), (v), (vi), (ix), (xi) and (xii) of the Statute of the ICC, annexed to UN Doc. PCNICC/1999/WGEC/INF.2/Add.1, 30 July 1999, p. 29.*

ICRC

At the Rome Conference on the Establishment of an International Criminal Court in 1998, the ICRC stated:

The addition of the words “clearly” and “overall” in [the] provision relating to proportionality in attacks must be understood as not changing existing law. The word “overall” could give the impression that an extra unspecified element has been added to a formulation that was carefully negotiated during the 1974–1977 Diplomatic Conference that led to [Additional Protocol I] and this formulation is generally recognized as reflecting customary law. The intention of this additional word appears to be to indicate that a particular target can have an important military advantage that can be felt over a lengthy period of time and affect military action in areas other than the vicinity of the target itself. As this meaning is included in the existing wording of the 1977 Additional Protocol I, the inclusion of the word “overall” is redundant.

*ICRC, Statement at the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 8 July 1998, UN Doc. A/CONF.183/INF/10, 13 July 1998, p. 1, § 2.*

XII. Other

No data.

Section C. Information required for judging proportionality in attack

I. Treaties

No data.

II. Other Instruments

No data.

III. Military Manuals

Australia

Australia’s Defence Force Manual (1994) refers to the declaration made by Australia upon ratification of the 1977 Additional Protocol I to the effect that “ADF [Australian Defence Force] commanders will, by necessity, have to reach decisions on the basis of their assessment of the information available to them at the relevant time”.

*Australia, Manual on Law of Armed Conflict, Australian Defence Force Publication, Operations Series, ADFP 37 – Interim Edition, 1994, § 511.*

Australia

Australia’s LOAC Manual (2006) refers to the declaration made by Australia upon ratification of the 1977 Additional Protocol I to the effect that “ADF [Australian Defence Force] commanders will, by necessity, have to reach decisions on the basis of their assessment of the information available to them at the relevant time”.

*Australia, The Manual of the Law of Armed Conflict, Australian Defence Doctrine Publication 06.4, Australian Defence Headquarters, 11 May 2006, §5.11.*

The LOAC Manual (2006) replaces both the Defence Force Manual (1994) and the Commanders’ Guide (1994).

Belgium

Belgium’s Law of War Manual (1983) states:

It will not always be easy for a commander to evaluate this situation [whether an attack will be disproportionate] with precision. On the one hand, he must take into account the elements *which are available to him*, related to the military necessity necessary to justify an attack, and on the other hand, he must take into account the elements *which are available to him*, related to the possible loss of human life and damage to civilian objects.

*Belgium, Droit Pénal et Disciplinaire Militaire et Droit de la Guerre, Deuxième Partie, Droit de la Guerre, Ecole Royale Militaire, par J. Maes, Chargé de cours, Avocat-général près la Cour Militaire, D/1983/1187/029, 1983, p. 29.*

[emphasis in original]

Canada

Canada’s LOAC Manual (1999) notes that decisions must be based on an honest and reasonable expectation made by the responsible commanders “that the attack will make a relevant contribution to the success of the overall operation”, based on the information reasonably available to them at the relevant time, and taking fully into account the urgent and difficult circumstances under which such decisions must usually be made.

*Canada, The Law of Armed Conflict at the Operational and Tactical Level, Office of the Judge Advocate General, 1999, pp. 4-2/4-3.*

Canada

Canada’s LOAC Manual (2001) states in its chapter on targeting:

418. *Standard of care*

1. Commanders, planners and staff officers will not be held to a standard of perfection in reaching their decisions.
2. Commanders, planners and staff officers are required to take all “feasible” steps to verify that potential targets are legitimate targets. However, such decisions will be based on the “circumstances ruling at the time”. Consideration must be paid to the honest judgement of responsible commanders, based on the information reasonably available to them at the relevant time, taking fully into account the urgent and difficult circumstances under which such judgements are usually made.
3. The test for determining whether the required standard of care has been met is an objective one: Did the commander, planner or staff officer do what a reasonable person would have done in the circumstances?

*Canada, The Law of Armed Conflict at the Operational and Tactical Levels, Office of the Judge Advocate General, 13 August 2001, § 418.1–418.3.*

Ecuador

Ecuador’s Naval Manual (1989) states: “The commander must determine whether incidental injuries and collateral damage would be excessive, on the basis of an objective and reasonable estimate of the available information.”

*Ecuador, Aspectos Importantes del Derecho Internacional Marítimo que Deben Tener Presente los Comandantes de los Buques, Academia de Guerra Naval, 1989, § 8.1.2.1.*

Netherlands

The Military Manual (2005) of the Netherlands states:

0511. The circumstances of the time are decisive to whether an object constitutes a military objective. The definition leaves the necessary discretion to the commanding officer. The Dutch Government, in ratifying AP I [1977 Additional Protocol I], has declared in this connection that military commanders who are responsible for carrying out attacks must base their decisions on their evaluation of the information available to them at the time ...

...

0543. *When not to attack*

An attack should not proceed when an obvious lack of proportion appears to exist between the expected military advantage and the expected collateral damage. The decisive factor is whether a normally alert attacker, in receipt of and acting on due information, could have expected the excessive damage among the civilian population and civilian objects.

*Netherlands, Humanitair Oorlogsrecht: Handleiding, Voorschrift No. 27–412, Koninklijke Landmacht, Militair Juridische Dienst, 2005, §§ 0511 and 0543.*

South Africa

South Africa’s LOAC Teaching Manual (2008) states:

*Targeting Considerations*

...

*How to Determine Proper Targets*

...

Once the target is confirmed as a military objective, it must be asked whether the destruction of the objective might result in incidental death of or injury to non-combatants, or collateral damage to protected property that is excessive to the direct and concrete military advantage to be gained.

All the facts, as well as surrounding circumstances, must be considered thoroughly. The standard by which military commanders must take these targeting decisions is based on their assessment of the information *reasonably available* to them at the time, rather than what is determined in hindsight.

The following pieces of intelligence are needed by commanders to ensure respect for the LOAC [law of armed conflict]:

- Concentrations of civilians.
- Civilian surroundings of military objectives.
- Nature of built up areas.
- Existence and nature of important and protected civilian objects.
- Nature of the natural environment.

*South Africa, Advanced Law of Armed Conflict Teaching Manual, School of Military Justice, 1 April 2008, as amended to 25 October 2013, Learning Unit 3, pp. 181–182.*

[emphasis in original]

United States of America

The US Naval Handbook (1995) states: “The commander must determine whether incidental injuries and collateral damage would be excessive, on the basis of an honest and reasonable estimate of the facts available to him.”

*United States, The Commander’s Handbook on the Law of Naval Operations, NWP 1–14M/MCWP 5–2.1/COMDTPUB P5800.7, issued by the Department of the Navy, Office of the Chief of Naval Operations and Headquarters, US Marine Corps, and Department of Transportation, US Coast Guard, October 1995 (formerly NWP 9 (Rev. A)/FMFM 1–10, October 1989), § 8.1.2.1.*

United States of America

The US Naval Handbook (2007) states that “the commander must determine whether the anticipated incidental injuries and collateral damage would be excessive, on the basis of an honest and reasonable estimate of the facts available to him”.

*United States, The Commander’s Handbook on the Law of Naval Operations, NWP 1–14M/MCWP 5–12.1/COMDTPUB P5800.7, issued by the Department of the Navy, Office of the Chief of Naval Operations and Headquarters, US Marine Corps, and Department of Homeland Security, US Coast Guard, July 2007, § 8.3.1.*

IV. National Legislation



No data.

V. National Case-law

Germany

In 2010, in the *Fuel Tankers case*, the Federal Prosecutor General at Germany’s Federal Court of Justice investigated whether war crimes or other crimes under domestic law had been committed in the course of an airstrike which was ordered by a colonel (*Oberst*) of the German armed forces against two tankers transporting fuel for the International Security Assistance Force in Afghanistan stolen by the Taliban near Kunduz and which resulted in the deaths of a number of civilians. The Federal Prosecutor General stated:

Pursuant to § 170 para. 2 StPO [Penal Procedure Code], the investigation proceedings which were initiated by the order of 12 March 2010 against Colonel (*Oberst*) Klein and Company Sergeant Major (*Hauptfeldwebel*) Wilhelm due to suspected offences under the VStGB [International Crimes Code] and other offences are to be terminated as a result of the investigations conducted and based on the sources of information set out hereafter and on the reasons given in detail hereafter.

*Germany, Federal Court of Justice, Federal Prosecutor General, Fuel Tankers case, Decision, 16 April 2010, p. 1.*

The Federal Prosecutor General also stated:

Criminal responsibility under § 211 StGB [i.e. for murder under Germany’s Penal Code]

...

b)

Colonel (*Oberst*) Klein’s actions were lawful under international law and therefore justified under domestic criminal law ...

...

cc)

Even considering the fact that the bombing killed civilians to be protected under the international law of armed conflict, the order to attack was lawful under international law.

(1)

... International humanitarian law ... prohibits ... attacks ... against a military objective if at the time of the order to attack the anticipated civilian damage is out of proportion (“excessive” see Art. 51 para. 5 sub-para. b AP [1977 Additional Protocol I] to the anticipated concrete and direct military advantage (see ICRC Customary International Humanitarian Law, 2005 – hereafter ICRC Customary IHL [Study] – p. 46ff). ...

...

(3)

The anticipated civilian collateral damages are also to be assessed from the perspective of the attacker at the time of the attack, rather than with hindsight according to the actual unfolding of events (see also the wording of Art. 51 para. 5 sub-para. b AP I ... “may be expected” ; ICRC Customary IHL [Study] p. 50 ...). The Federal Republic of Germany has, like a number of other States ..., particularly emphasized this fact when it ratified the [1977] Additional Protocols to the Geneva Conventions by making a declaration ... Only if a commander refrained from taking feasible precautions in violation of international law (“feasible precaution“; see. Art. 57 para. 2 sub-para. a AP I; ICRC Customary IHL [Study] p. 51 ff.) and such precautions would have led to the anticipation of greater civilian collateral damage which then in fact materialized is this relevant for an analysis of the proportionality of an attack. ... In view of the circumstances known to Colonel (*Oberst*) Klein (distance to inhabited settlements, night time, presence of armed Taliban) and the informant’s statements, he considered the presence of protected civilians unlikely ... Further feasible reconnaissance and precautionary measures (“feasible precautions”) were not promptly available in the concrete situation. Colonel (*Oberst*) Klein did not have to accept the danger of the fuel tankers or the fuel being retrieved by the Taliban ... The international law of armed conflict requires that in case of doubt a person is to be considered a civilian (see Art. 50 para. 1 sentence 2 AP I). However, there is no such case of doubt if – as is the case here – there are sufficient indications, considering the concrete circumstances, that the persons concerned are a legitimate objective of a military attack; absolute certainty is not necessary.

*Germany, Federal Court of Justice, Federal Prosecutor General, Fuel Tankers case, Decision, 16 April 2010, pp. 63–66.*

VI. Other National Practice

Algeria

Upon accession to the 1977 Additional Protocol I, Algeria stated: “To judge any decision, the circumstances, the means and the information available at the time the decision was made are determinant factors and elements in assessing the nature of the said decision.”

*Algeria, Interpretative declarations made upon accession to the 1977 Additional Protocol I, 16 August 1989, § 2.*

Australia

Upon ratification of the 1977 Additional Protocol I, Australia stated:

In relation to Articles 51 to 58 inclusive it is the understanding of Australia that military commanders and others responsible for planning, deciding upon, or executing attacks, necessarily have to reach their decisions on the basis of their assessment of the information from all sources, which is available to them at the relevant time.

*Australia, Declarations made upon ratification of the 1977 Additional Protocol I, 21 June 1991, § 3.*

Austria

Upon ratification of the 1977 Additional Protocol I, Austria stated: “Article 57, paragraph 2, of Protocol I will be applied on the understanding that, with respect to any decision taken by a military commander, the information actually available at the time of the decision is determinative.”

*Austria, Reservations made upon ratification of the 1977 Additional Protocol I, 13 August 1982, § 1.*

Austria further stated:

For the purposes of judging any decision taken by a military commander, Articles 85 and 86 of Protocol I will be applied on the understanding that military imperatives, the reasonable possibility of recognizing them and the information actually available at the time that decision was taken, are determinative.

*Austria, Reservations made upon ratification of the 1977 Additional Protocol I, 13 August 1982, § 4.*

Belgium

In an explanatory memorandum submitted to the Belgian Parliament in 1985 in the context of the ratification procedure of the 1977 Additional Protocols, the Belgian Government stated: “The military advantage must be assessed ... in the light of what a military commander can foresee on the basis of the available and relevant information which is available at the time of the assessment.”

*Belgium, House of Representatives, Explanatory memorandum on a draft bill for the approval of the Additional Protocols, 1984–1985 Session, Doc. 1096–1, 9 January 1985, p. 11.*

Belgium

Upon ratification of the 1977 Additional Protocol I, Belgium stated:

With respect to Part IV, Section I, of the Protocol, the Belgian Government wishes to emphasize that, whenever a military commander is required to take a decision affecting the protection of civilians or civilian objects or objects assimilated therewith, the only information on which that decision can possibly be taken is such relevant information as is then available and that it has been feasible for him to obtain for that purpose.

*Belgium, Interpretative declarations made upon ratification of the 1977 Additional Protocol I, 20 May 1986, § 3.*

Canada

At the CDDH, Canada stated:

Commanders and others responsible for planning, deciding upon or executing necessary attacks, have to reach decisions on the basis of their assessment of whatever information from all sources may be available to them at the relevant time.

*Canada, Statement at the CDDH, Official Records, Vol. VI, CDDH/SR.41, 26 May 1977, p. 178.*

Canada

Upon ratification of the 1977 Additional Protocol I, Canada stated:

It is the understanding of the Government of Canada that, in relation to Articles 48, 51 to 60 inclusive, 62 and 67, military commanders and others responsible for planning, deciding upon or executing attacks have to reach decisions on the basis of their assessment of the information reasonably available to them at the relevant time and that such decisions cannot be judged on the basis of information which has subsequently come to light.

*Canada, Reservations and statements of understanding made upon ratification of the 1977 Additional Protocol I, 20 November 1990, § 7.*

Egypt

Upon ratification of the 1977 Additional Protocol I, Egypt stated: “Military commanders planning or executing attacks make their decisions on the basis of their assessment of all kinds of information available to them at the time of the military operations.”

*Egypt, Declaration made upon ratification of the 1977 Additional Protocol I, 9 October 1992.*

Germany, Federal Republic of

At the CDDH, the Federal Republic of Germany stated:

Commanders and others responsible for planning, deciding upon or executing an attack necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time.

*Germany, Federal Republic of, Statement at the CDDH, Official Records, Vol. VI, CDDH/SR.42, 27 May 1977, Vol. VI, p. 226.*

Germany

Upon ratification of the 1977 Additional Protocol I, Germany stated:

It is the understanding of the Federal Republic of Germany that in the application of the provisions of Part IV, Section I, of Additional Protocol I, to military commanders and others responsible for planning, deciding upon or executing attacks, the decision taken by the person responsible has to be judged on the basis of all information available to him at the relevant time, and not on the basis of hindsight.

*Germany, Declarations made upon ratification of the 1977 Additional Protocol I, 14 February 1991, § 4.*

Ireland

Upon ratification of the 1977 Additional Protocol I, Ireland stated:

In relation to Article 51 to 58 inclusive, it is the understanding of Ireland that military commanders and others responsible for planning, deciding upon, or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time.

*Ireland, Declarations and reservations made upon ratification of the 1977 Additional Protocol I, 19 May 1999, § 9.*

Israel

In 2009, in a report on Israeli operations in Gaza between 27 December 2008 and 18 January 2009 (the “Gaza Operation”, also known as “Operation Cast Lead”), Israel’s Ministry of Foreign Affairs stated that “the core question, in assessing a commander’s decision to attack, will be (a) whether he or she made the determination



on the basis of the best information available, given the circumstances, and (b) whether a reasonable commander could have reached a similar conclusion”.

*Israel, Ministry of Foreign Affairs, The Operation in Gaza 27 December 2008–18 January 2009: Factual and Legal Aspects, 29 July 2009, § 125.*

Italy

Upon ratification of the 1977 Additional Protocol I, Italy declared:

In relation to Articles 51 to 58 inclusive, the Italian Government understands that military commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time.

*Italy, Declarations made upon ratification of the 1977 Additional Protocol I, 27 February 1986, § 5.*

Netherlands

At the CDDH, the Netherlands stated:

Commanders and others responsible for planning, deciding upon or executing attacks necessarily had to reach decisions on the basis of their assessment of the information from all sources which was available to them at the relevant time.

*Netherlands, Statement at the CDDH, Official Records, Vol. VI, CDDH/SR.42, 27 May 1977, p. 205, § 1.*

Netherlands

Upon ratification of the 1977 Additional Protocol I, the Netherlands declared with regard to Articles 51 to 58 inclusive:

It is the understanding of the Government of the Kingdom of the Netherlands that military commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time.

*Netherlands, Declarations made upon ratification of the 1977 Additional Protocol I, 26 June 1987, § 6.*

New Zealand

Upon ratification of the 1977 Additional Protocol I, New Zealand stated:

In relation to Article 51 to 58 inclusive, it the understanding of the Government of New Zealand that military commanders and others responsible for planning, deciding upon, or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time.

*New Zealand, Declarations made upon ratification of the 1977 Additional Protocol I, 8 February 1988, § 2.*

Spain

Upon ratification of the 1977 Additional Protocol I, Spain declared with regard to Articles 51 to 58 inclusive:

It is the understanding [of the Spanish Government] that the decision made by military commanders, or others with the legal capacity to plan or execute attacks which may have repercussions on civilians or civilian objects or similar objects, shall not necessarily be based on anything more than the relevant information available at the relevant time and which it has been possible to obtain to that effect.

*Spain, Interpretative declarations made upon ratification of the 1977 Additional Protocol I, 21 April 1989, § 5.*

United Kingdom of Great Britain and Northern Ireland

At the CDDH, the United Kingdom stated:

Military commanders and others responsible for planning, initiating or executing attacks necessarily had to reach decisions on the basis of their assessment of the information from all sources which was available to them at the relevant time.

*United Kingdom, Statement at the CDDH, Official Records, Vol. VI, CDDH/SR.41, 26 May 1977, p. 164, § 121.*

United Kingdom of Great Britain and Northern Ireland

Upon signature of the 1977 Additional Protocol I, the United Kingdom stated:

Military commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time.

*United Kingdom, Declarations made upon signature of the 1977 Additional Protocol I, 12 December 1977, § d.*

The United Kingdom repeated this statement upon ratification of the Protocol.

*United Kingdom, Reservations and declarations made upon ratification of the 1977 Additional Protocol I, 28 January 1998, § c.*

United States of America

At the CDDH, the United States stated:

Commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time.

*United States, Statement at the CDDH, Official Records, Vol. VI, CDDH/SR.42, 27 May 1977, p. 241.*

VII. United Nations

No data.

**VIII. Other International Organizations**

No data.

**IX. International Conferences**

No data.

**X. International and Mixed Judicial and Quasi-judicial Bodies**

**International Criminal Tribunal for the former Yugoslavia**

In its judgment in the *Galić case* in 2003, the ICTY Trial Chamber stated, *inter alia*:

In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.

*ICTY, Galić case, Judgment, 5 December 2003, § 58.*

**XI. International Red Cross and Red Crescent Movement**

No data.

**XII. Other**

No data.