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If It Ain't Broke Don't Fix It: The Proportionality Principle and the Changing Face of War

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If It Ain't Broke Don't Fix It: The Proportionality Principle and the Changing Face of War

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I. Introduction

1. The face of war is constantly changing. How do these changes affect the laws that govern military actions? Do the traditional laws need to be expanded to account for these changes? Scholars are divided over these questions. Some claim the laws need to be expanded to adequately account for the effects of military attacks. This article argues that the traditional proportionality analysis allows commanders to account for all possible changes on the warfront. It first explains the traditional laws that govern military attacks, such as the Law of Armed Conflict, the Law of Targeting, and the proportionality principle. Next, it analyzes two major changes in the face of war and how they affect the analysis conducted by commanders when planning an attack. These changes are the urbanization of the battlefield and the use of drone technology. Finally, this article explains why this issue is important for civilians to understand and how the analysis is commonly misapplied.

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2. Gone are the days of old when soldiers line up in a field with their muskets and cannons and charge the enemy on the sounding of a horn. Modern warfare consists of cyber-attacks, unmanned drones constantly flying overhead, adversarial combatants hiding in major cities using human shields, and much more. How do these changes affect the law governing military action? Military action is governed by a combination of military law, specifically the Law of Armed Conflict and humanitarian law. These areas of law are comprised of common law and treaty law. Some of the governing principles within these areas of law, such as the proportionality principle, date back to the early 1900s. The question then arises, even though the face of war has changed so drastically, are the principles of the Law of Armed Conflict, specifically the proportionality principle, still adequate or do they need to be adjusted? This article argues that military commanders must consider factors when conducting the proportionality analysis, the calculation itself is still adequate and does not need to be expanded to account for the recent changes in war.

3. These processes and principles were established without anticipation of the modern style of war, the principles are flexible, and commanders are able to account for any new developments.² Some critics question the applicability of the traditional proportionality analysis in the modern setting.³ However, this article argues that the traditional principles do not need to be altered to adequately account for changes such as the urbanization of the battlefield and the use of drones in military operations.

4. Section II of this article explains the laws and principles which regulate military action. Below the overarching Law of Armed Conflict, is the Law of Targeting that establishes processes military commanders must follow when planning military attacks.⁴ One of these principles, and the focus of this article, is the proportionality principle. The proportionality principle requires military commanders to weigh the anticipated military advantage against the expected collateral damage when planning a military attack in order to ensure that the attack is not excessive or disproportionate. This principle is applied under the “reasonable military commander” standard.⁵

5. Section III of this article delves into two of the recent changes in the face of war and how these changes affect the proportionality analysis. First, how has the urbanization of the battlefield affected the analysis of collateral damage? Do military commanders

2 James A. Burkat, *Deadly Advice: Judge Advocates and Joint Targeting*, [THE ARMY LAW 10](#) (2016); Karoly Vegh, *A Five-Step Legal Assessment in the Joint Targeting Process — An Overview*, [HUNGARIAN Y.B. INT’L & EU. L. 233](#), 233 (2015).

3 Ian Henderson & Kate Reece, *Proportionality under International Humanitarian Law: The “Reasonable Military Commander” Standard and Reverberating Effects*, [51 VAND. J. TRANSNAT’L L. 835](#), 847 (2018).

4 WILLIAM H. BOOTHBY, *THE LAW OF TARGETING* 20 (2012).

5 Ian Henderson & Kate Reece, *Proportionality under International Humanitarian Law: The “Reasonable Military Commander” Standard and Reverberating Effects*, [51 VAND. J. TRANSNAT’L L. 835](#), 839 (2018).

need to expand the scope of collateral damage because more attacks are taking place in areas that are densely populated with civilians? This article argues that requiring military commanders to consider “expected” collateral damage is sufficient and does not need to include more indirect and unanticipated effects. Second, how does the increased use of drones affect this calculation? The use of these precision weapons can minimize collateral damage while also increasing the anticipated military advantage. Drones provide increased surveillance of combat zones, precision targeting from long distances, and can be deployed on missions that would be too dangerous for manned aircraft. The munitions used by drones are also more precise and create a smaller blast radius, thus decreasing surrounding damage. This article argues that the use of drones satisfies the proportionality analysis by increasing the military advantage and decreasing expected collateral attacks.

6. Finally, this article discusses the importance of understanding the meaning of “proportionality” within military law and how many civilians misapply this term.

II. The Law of Armed Conflict

7. The Law of Armed Conflict and International Humanitarian Law work side by side in setting guidelines for militaries around the world. Within the Law of Armed Conflict, military commanders follow the Law of Targeting and its six-phase prescribed cycle to determine, plan, and analyze a military target. In the Law of Targeting, we find the proportionality principle. This section shows how these doctrines and principles create the framework from which militaries and international courts determine the legality of various attacks and operations. Furthermore, this section explains that the application of the proportionality principle is subject to the “reasonable military commander” standard, which must be satisfied to justify a military attack and avoid committing a war crime.⁶

A. The Law of Targeting

8. Once a conflict has started amongst different groups or states, the Law of Targeting “regulates who can be attacked and who shall be spared, what may be destroyed, and what must be protected.”⁷ The Law of Targeting is the process in which a target is selected and analyzed, and the appropriate means and methods are determined to

6 James A. Burkat, *Deadly Advice: Judge Advocates and Joint Targeting*, [THE ARMY LAW 10](#) (2016).

7 WILLIAM H. BOOTHBY, *THE LAW OF TARGETING* 3 (2012).

achieve the military objectives.⁸ Customary law and treaty law are the foundation for the Law of Targeting and together they establish the processes and analysis military commanders must adhere to when picking a military target and planning an operation. Customary law consists of generally accepted international customs conducted by states. Treaty law comes from international agreements between multiple states contained in treaties, conventions, protocols, regulations, declarations, or statutes.⁹

9. The Law of Targeting outlines the processes a commander must follow when selecting, developing, and planning an attack. All final determinations and decisions are made by the commander.¹⁰ The commander's determinations are accomplished through the employment of the targeting cycle.¹¹ This cycle consists of six phases. First, military objectives are identified. Second, the target is developed and analyzed to ensure that it is valid and legal. Third, the appropriate means and methods for the mission are selected based on the information found in Phase 2 and the objectives established in Phase 1. Fourth, the commander decides if the military objective is warranted and assigns the mission to a unit. Fifth, the assigned unit conducts detailed planning and executes the mission. Finally, the mission is assessed to determine if it was successful in achieving the military objective set by the commander and the cycle begins again.¹²

10. Regardless of whether an attack is dynamic or planned, the targeting cycle begins by picking a valid military objective and target. Militaries do not have unlimited authority to attack any target they deem advantageous. Under the Law of Armed Conflict, only military objectives can be the subject of an attack.¹³ Military objectives include "enemy combatants, members of non-state armed groups, civilians directly participating in hostilities, and 'those which by their nature, location, purpose or use make an effective contribution to military action.'"¹⁴ This definition includes both people and objects. A commander will consider the person or object's contribution to the adversary's fighting

8 James A. Burkat, *Deadly Advice: Judge Advocates and Joint Targeting*, [THE ARMY LAW 10, 11](#) (2016); Karoly Vegh, *A Five-Step Legal Assessment in the Joint Targeting Process — An Overview*, *HUNGARIAN Y.B. INT'L & EU. L.* 233, 233 (2015).

9 WILLIAM H. BOOTHBY, *THE LAW OF TARGETING* 31–32, 35–36 (2012).

10 James A. Burkat, *Deadly Advice: Judge Advocates and Joint Targeting*, [THE ARMY LAW 10, 11](#) (2016).

11 James A. Burkat, *Deadly Advice: Judge Advocates and Joint Targeting*, [THE ARMY LAW 10, 11](#) (2016); see U.S. Armed Forces, Chairman of the Joint Chiefs of Staff, *Joint Publication 3–60, JOINT DOCTRINE FOR TARGETING II–1–8* (2013).

12 James A. Burkat, *Deadly Advice: Judge Advocates and Joint Targeting*, [THE ARMY LAW 10, 11–12](#) (2016); Karoly Vegh, *A Five-Step Legal Assessment in the Joint Targeting Process — An Overview*, *HUNGARIAN Y.B. INT'L & EU. L.* 233, 235 (2015); U.S. Armed Forces, Chairman of the Joint Chiefs of Staff, *Joint Publication 3–60, JOINT DOCTRINE FOR TARGETING II–1–8* (2013)

13 See James A. Burkat, *Deadly Advice: Judge Advocates and Joint Targeting*, [THE ARMY LAW 10, 13](#) (2016).

14 James A. Burkat, *Deadly Advice: Judge Advocates and Joint Targeting*, [THE ARMY LAW 10, 13](#) (2016) (quoting Article 52(2) of Additional Protocol I of 1977); see Karoly Vegh, *A Five-Step Legal Assessment in the Joint Targeting Process — An Overview*, *HUNGARIAN Y.B. INT'L & EU. L.* 233, 241 (2015).

force through its fundamental characteristics, location, and its presumed, intended future use.¹⁵ Otherwise, all persons, places, and objects, not contributing to an adversary's armed groups are protected from possible attacks. This includes "civilians, combatants placed *hors de combat*, medical and religious personnel, medical facilities, and cultural or historical property."¹⁶ This distinction is vital to the targeting cycle because when establishing a military objective it must be shown that the proposed target is valid and not a protected person or object. Once this distinction is made and a valid target has been selected, the commander will begin analyzing the target under the proportionality principle.

B. The Proportionality Principle

11. The proportionality principle is where humanitarian law and military law meet. The legal analysis conducted during the targeting cycle focuses on the balance between achieving the important military advantage and the humanitarian interest in protecting civilians and civilian objects.¹⁷ One of the key principles involved in this balancing act is proportionality.¹⁸ The principle of proportionality protects against a disproportionate attack, which is defined by the First Additional Protocol of 1977 to the Geneva Convention of 1949 as an attack that "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."¹⁹ This definition dominates the entire discussion surrounding the proportionality analysis and targeting cycle. Commanders consider the balance between humanitarian interests and achieving the military objectives throughout each phase of the targeting cycle.²⁰

12. The proportionality analysis compares the anticipated military advantage to be gained by the attack against the expected collateral damage.²¹ Measuring and contrast-

15 Karoly Vegh, *A Five-Step Legal Assessment in the Joint Targeting Process — An Overview*, HUNGARIAN Y.B. INT'L & EU. L. 233, 241–46 (2015).

16 James A. Burkat, *Deadly Advice: Judge Advocates and Joint Targeting*, [THE ARMY LAW 10, 13](#) (2016).

17 James A. Burkat, *Deadly Advice: Judge Advocates and Joint Targeting*, [THE ARMY LAW 10, 12](#) (2016).

18 See generally Emanuela-Chiara Gillard, *Some Reflections on the "Incidental Harm" Side of Proportionality Assessments*, [51 VAND. J. TRANSNT'L L. 827, 828](#) (2018).

19 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 51, ¶ 5(b), art. 57, ¶¶ 2(a)(iii), 2(b), [1125 U.N.T.S. 3](#) (June 8, 1977).

20 See generally Emanuela-Chiara Gillard, *Some Reflections on the "Incidental Harm" Side of Proportionality Assessments*, [51 VAND. J. TRANSNT'L L. 827, 828](#) (2018); Karoly Vegh, *A Five-Step Legal Assessment in the Joint Targeting Process — An Overview*, HUNGARIAN Y.B. INT'L & EU. L. 233, 235 (2015).

21 Emanuela-Chiara Gillard, *Some Reflections on the "Incidental Harm" Side of Proportionality Assessments*, [51 VAND. J. TRANSNT'L L. 827, 828](#) (2018); Karoly Vegh, *A Five-Step Legal Assessment in the Joint Targeting Process — An Overview*, HUNGARIAN Y.B. INT'L & EU. L. 233, 249–51 (2015).

ing the military advantage and collateral damage has proven to be tricky and controversial.²² For example, there is much debate regarding what the standard should be for making these proportionality decisions,²³ what effects should be considered in the collateral damage consideration, and how the changing face of war will affect this analysis.²⁴ As the rule stands, commanders must consider the totality of the circumstances based on the information available to them at the time they plan the attack.²⁵ “Those that plan, authorize, and execute attacks must take feasible precautions to minimize incidental damage to civilians and civilian objects, take into account all circumstances at the time, including humanitarian and military considerations.”²⁶

C. The “Reasonable Military Commander” Standard

13. The current standard applied to the targeting process is that of the “reasonable military commander.”²⁷ This standard originated in the *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*.²⁸ This standard has been applied internationally by courts, such as the International Criminal Tribunal for the former Yugoslavia and the Supreme Court of Israel. The International Criminal Tribunal for the former Yugoslavia was clear that the standard is of a “reasonable well-informed person in the circumstances of the actual [military commander].” Applying this standard is important because it is the military commander who is best suited to foresee possible advantages, expected collateral damage, and thus conduct the proportionality analysis. Due to their training, experience, and superior understanding of military operations and the current conflicts within their region, a “reasonable military commander” is the best person to make such important

22 Roni Katzir, *Four Comments on the Application of Proportionality under the Law of Armed Conflict*, 51 VAND. J. TRANSNAT'L L. 857, 859 (2018).

23 Ian Henderson & Kate Reece, *Proportionality under International Humanitarian Law: The “Reasonable Military Commander” Standard and Reverberating Effects*, 51 VAND. J. TRANSNAT'L L. 835, 847 (2018).

24 Emanuela-Chiara Gillard, *Some Reflections on the “Incidental Harm” Side of Proportionality Assessments*, 51 VAND. J. TRANSNAT'L L. 827, 828 (2018).

25 Ian Henderson & Kate Reece, *Proportionality under International Humanitarian Law: The “Reasonable Military Commander” Standard and Reverberating Effects*, 51 VAND. J. TRANSNAT'L L. 835, 847 (2018).

26 U.S. Dep't of Def., LAW OF WAR MANUAL 261 (2016).

27 Ian Henderson & Kate Reece, *Proportionality under International Humanitarian Law: The “Reasonable Military Commander” Standard and Reverberating Effects*, 51 VAND. J. TRANSNAT'L L. 835, 839 (2018).

28 Ian Henderson & Kate Reece, *Proportionality under International Humanitarian Law: The “Reasonable Military Commander” Standard and Reverberating Effects*, 51 VAND. J. TRANSNAT'L L. 835, 840–41 (2018); see Office of the Prosecutor, International Criminal Tribunal for the Former Yugoslavia (ICTY), *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 39 INT'L LEGAL MATERIALS 1257 (2000).

decisions.²⁹ Commentators in support of the “reasonable military commander” standard argue that “the Law of Targeting requires a reasonable military commander to exercise good faith judgement in weighing numerous intangible considerations, with imperfect information in dynamic and chaotic situations.”³⁰

14. However, there is much debate surrounding the use of this standard in the targeting process.³¹ While some commentators support the Law of Armed Conflict’s “reasonable military commander” standard,³² other critics call for a stricter, more definite standard. Some critics of the “reasonable military commander” standard argue that the standard is too vague, is based on uncertain information, and is in the hands of security-focused decision-makers. These critics suggest many changes to the standard such as “restricting targeting decisions and construing a clear and unambiguous interpretation of core concepts,” only allowing attacks on targets who pose future threats, leaving the final decision and massive oversight to political leadership, and enlisting an independent civilian committee to conduct ex-post review.³³ Other critics argue against the “reasonable military commander” standard because it is too vague and the terms “reasonable military commander” include a wide range of people. They argue that the standard is intended to imply that a specific skill set is needed to make these determinations, but many military commanders are no better prepared to make these decisions than a civilian because their training has been in an entirely different area within the military.³⁴

15. Although the standard has been criticized for its vagueness, some vagueness is arguably necessary to give the decision-maker a wide latitude when conducting the proportionality analysis. It is also hard to imagine a bright-line rule that would adequately consider all possible circumstances which would face a decision-maker when planning a targeted attack. Thus, a slightly vague, but flexible and adaptable rule is better than a strict rule which restricts necessary military action. The decision-maker must be able to consider the totality of the circumstances, based on their expertise and training, and plan the most appropriate mission to ensure the least collateral damage while maximizing the military advantage. Commanders must also be able to act quickly

29 Ian Henderson & Kate Reece, *Proportionality under International Humanitarian Law: The “Reasonable Military Commander” Standard and Reverberating Effects*, 51 VAND. J. TRANSNAT’L L. 835, 841–46 (2018).

30 James A. Burkat, *Deadly Advice: Judge Advocates and Joint Targeting*, THE ARMY LAW 10, 15 (2016).

31 Ian Henderson & Kate Reece, *Proportionality under International Humanitarian Law: The “Reasonable Military Commander” Standard and Reverberating Effects*, 51 VAND. J. TRANSNAT’L L. 835, 844–45 (2018); Shiri Krebs, *Rethinking Targeted Killing Policy: Reducing Uncertainty, Protecting Civilians from the Ravages of both Terrorism and Counterterrorism*, 44 FLA. ST. U. L. REV. 943, 990–92 (2017).

32 James A. Burkat, *Deadly Advice: Judge Advocates and Joint Targeting*, THE ARMY LAW 10, 15 (2016).

33 Shiri Krebs, *Rethinking Targeted Killing Policy: Reducing Uncertainty, Protecting Civilians from the Ravages of both Terrorism and Counterterrorism*, 44 FLA. ST. U. L. REV. 943, 990–92 (2017).

34 Roni Katzir, *Four Comments on the Application of Proportionality under the Law of Armed Conflict*, 51 VAND. J. TRANSNAT’L L. 857, 859 (2018).

as opportunities arise and information develops. Some critics have suggested enlisting civilian approval before conducting an attack,³⁵ but there are many reasons this would not work. For example, in the case of a dynamic attack there may not be enough time to bring someone up to speed and get outside approval before the opportunity is lost. This would also require exposing protected information to civilians who may or may not have the required security clearance. As it stands, there are checks and balances in place within the military and international courts to ensure commanders act reasonably. The current structure is sufficient to protect humanitarian interests and should not be changed to further limit military commanders.

III. The Changing Face of War

16. Both sides of the proportionality analysis have spurred heated discussion³⁶ and, as the face of war continues to evolve, new issues arise and the proportionality analysis is put to the test once more. A new development affecting the calculation of collateral damage is the urbanization of the battlefield.³⁷ Instead of fighting face-to-face in secluded fields and forests, modern adversaries are most often hidden in cities, surrounded by innocent civilians. Another new development affecting the calculation of collateral damage is the use of modern technologies and weapons systems, such as drones. These technologies and systems have affected the military advantage analysis by allowing greater precision, while also decreasing the risk of collateral damage. Thus, a targeted attack in the modern setting looks very different than traditional military attacks.

17. The question is: is the principle of proportionality still relevant or does the test need to be changed in order to achieve the balance between humanitarian and military interests based on these recent developments? This article argues that “if it ain’t broke don’t fix it.” The traditional proportionality analysis remains sufficient for analyzing new factors facing militaries. Even though the fight has migrated to cities and populated areas, the military commander should still only consider foreseeable or expected effects when calculating collateral damage. Furthermore, drone weapon systems generally satisfy the proportionality analysis by increasing the possible military advantage while decreasing collateral damage.³⁸

35 Shiri Krebs, *Rethinking Targeted Killing Policy: Reducing Uncertainty, Protecting Civilians from the Ravages of both Terrorism and Counterterrorism*, 44 *FLA. ST. U. L. REV.* 943, 990–92 (2017).

36 Roni Katzir, *Four Comments on the Application of Proportionality under the Law of Armed Conflict*, 51 *VAND. J. TRANSNAT’L L.* 857, 859 (2018).

37 Ian Henderson & Kate Reece, *Proportionality under International Humanitarian Law: The “Reasonable Military Commander” Standard and Reverberating Effects*, 51 *VAND. J. TRANSNAT’L L.* 835, 847 (2018).

38 Ian Henderson & Kate Reece, *Proportionality under International Humanitarian Law: The “Reasonable Military Commander” Standard and Reverberating Effects*, 51 *VAND. J. TRANSNAT’L L.* 835, 847 (2018).

A. Urbanization of the Battlefield

18. Current wars consist of unmarked combatants hiding in cities, surrounded by civilians, and civilian infrastructure.³⁹ This illustrates a major change in the face of war: urbanization of the battlefield. The urbanization of the battlefield potentially affects the principle of proportionality because attacks in densely populated areas increase the chances of collateral damage to civilians and civilian objects. Also, the presence of civilians and civilian objects creates more factors for commanders to consider when planning a military operation. How should commanders interpret the ill-defined terms within the proportionality principle of the new urbanized battlefield? Specifically, what scope of collateral damage should military commanders consider?

19. It is generally agreed that military commanders should consider expected collateral effects,⁴⁰ but the application of this principle is still up for debate amongst scholars and practitioners.⁴¹ Some scholars argue that if the analysis was to be limited to only direct effects the rule would include the word “direct.” However, since the rule does not explicitly limit the analysis to only direct effects, the prevailing view is that indirect collateral effects must also be considered. If indirect and direct effects are to be considered by the military commander, where must the line be drawn regarding indirect effects that are too remote and should not be included in the calculation?⁴²

20. This article argues that commanders must consider the expected effects of an attack, however, this rule has its limits. Mere speculation and intangible effects on the civilian population should not be considered in the calculation. This would exclude incidental effects of the harm that can be cured by reasonable remedial measures. Also, psychological and emotional harm to civilians must be excluded from the calculation.⁴³

21. Under the “reasonable military commander” standard, the considerations are limited to the foresight of a reasonable military commander with the knowledge and expertise expected of a person with such training. Thus, the collateral damage must be assessed from the commander’s perspective based on what they knew or should have

39 Ian Henderson & Kate Reece, *Proportionality under International Humanitarian Law: The “Reasonable Military Commander” Standard and Reverberating Effects*, 51 VAND. J. TRANSNAT’L L. 835, 848 (2018).

40 Ian Henderson & Kate Reece, *Proportionality under International Humanitarian Law: The “Reasonable Military Commander” Standard and Reverberating Effects*, 51 VAND. J. TRANSNAT’L L. 835, 838 (2018).

41 See *Prosecutor v. Prlić*, Case No. IT-04-74-T, Judgment Vol. 2, ¶ 1284 (Int’l Crim. Trib. for the Former Yugoslavia May 29, 2013).

42 International Law Association Study Group on the Conduct of Hostilities in the 21st Century, *The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare*, 93 INT’L L. STUD. 322, 352 (2017).

43 U.S. Dep’t of Def., LAW OF WAR MANUAL 261 (2016).

known, at the time the attack was planned.⁴⁴ However, a commander should not be held accountable for unforeseeable consequences when he followed protocol and used a good-faith effort to consider expected collateral damage. For example, if a commander approves an attack on a water treatment facility, he can expect that the water shortage will lead to dehydration and possibly affect farms and food supply. But the commander should not be accountable for an unexpected outbreak of the plague, caused by the lack of clean water, in a country that has never had such an outbreak. Using the “reasonable military commander” standard, a commander is to use his experience, training, and knowledge to evaluate possible effects and consider only the collateral damage that can be expected.

22. The proportionality principle requires the military commander to consider the collateral damage of an attack. However, the First Additional Protocol of 1977 fails to define its key terms and explain the scope of the damage that must be included in the proportionality analysis.⁴⁵ Treaty law does not help clarify this requirement; “[it] is silent on the time span and the geographical space over which damage from attacks must be estimated and factored into a proportionality assessment.”⁴⁶ One study group found that further clarification was needed regarding certain aspects of the proportionality analysis such as what kind of expected collateral damage must be considered and whether the application of the proportionality analysis should differ depending on the particular situation.⁴⁷ Because of these ill-defined terms, critics are left to debate what damage must be considered in the proportionality calculation:

One expert suggested using the term reasonable casualty. The destruction of a water pumping station, for instance, would make an increase in civilian deaths not only possible but likely, in which case the connection would be quite close. Other experts agreed that a close nexus would be required for affects to be factored into the proportionality analysis. Most experts seemed to agree that the proportionality analysis did not only take into account

44 International Law Association Study Group on the Conduct of Hostilities in the 21st Century, *The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare*, 93 *INT’L L. STUD.* 322, 352 (2017).

45 Ian Henderson & Kate Reece, *Proportionality under International Humanitarian Law: The “Reasonable Military Commander” Standard and Reverberating Effects*, 51 *VAND. J. TRANSNAT’L L.* 835, 837 (2018); see generally Ben Clarke, *Proportionality in Armed Conflicts: A Principle in Need of Clarification*, 3 *J. INT’L HUMAN. LEGAL STUD.* 73 (2012) (discussing the many holes within the API and suggesting a guidance document to clarify many important issues like environmental considerations, assessing the value of property, the exclusion of *hors de combat* individuals, and the many issues with media coverage).

46 Ben Clarke, *Proportionality in Armed Conflicts: A Principle in Need of Clarification*, 3 *J. INT’L HUMAN. LEGAL STUD.* 73, 103 (2012).

47 International Law Association Study Group on the Conduct of Hostilities in the 21st Century, *The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare*, 93 *INT’L L. STUD.* 322, 351 (2017).

civilian deaths and injuries as an immediate consequence of the attack, but also civilians dying of thirst, if there was a reasonable expectation of casualty, or if thirst and certain diseases were likely or foreseeable consequences of the attack.⁴⁸

23. The interconnectedness between military operations and effects on civilian infrastructure, gives rise to what have been termed “reverberating,” “indirect,” or “knock-on” effects. “Indirect effects are those effects that do not immediately materialize from the kinetic/non-kinetic force of an attack.” Indirect effects are usually separated by space or time from the actual attack. It can be expected that attacks will disrupt daily life in any society. However, only expected tangible effects must be considered by the military commander when planning an attack.⁴⁹

24. When considering the scope of harms that must be in the proportionality analysis, the question is not of time or space but the degree to which harm was expected at the time the military commander planned the attack. The *International Law Studies* published by the U.S. Naval War College, holds that the relevant criterion is the foreseeability of collateral effect. “[A]ccordingly there is an obligation to take into account all indirect harm that can reasonably be foreseen by a reasonably well-informed person.” This is not a question of timeframe. If long term effects are foreseeable and expected to result from an attack they must be considered.

25. The commander may also consider mitigating factors when calculating the expected harm.⁵⁰ If the effects of this attack could be mitigated by remedial actions or if other resources were available, the military commander may consider these factors as lessening the expected harm on civilians. For example, if a road used by the opposing military for transporting weapons is the target of an attack, then the commander can consider the presence of other roads that are available to civilians as a mitigating factor in their analysis.

26. Although it is commonly accepted that commanders should consider expected collateral damage when conducting the proportionality analysis, the point of disagreement seems to be the application of this principle.⁵¹ A key example of this is a court’s con-

48 Ben Clarke, *Proportionality in Armed Conflicts: A Principle in Need of Clarification*, 3 J. INT’L HUMAN. LEGAL STUD. 73, 105 (2012).

49 Ian Henderson & Kate Reece, *Proportionality under International Humanitarian Law: The “Reasonable Military Commander” Standard and Reverberating Effects*, 51 VAND. J. TRANSNAT’L L. 835, 847–48 (2018).

50 International Law Association Study Group on the Conduct of Hostilities in the 21st Century, *The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare*, 93 INT’L L. STUD. 322, 352 (2017).

51 International Law Association Study Group on the Conduct of Hostilities in the 21st Century, *The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare*, 93 INT’L L. STUD. 322, 352 (2017).

viction of Croatian commanders after an attack on Old Bridge on 8 November 1993. In *Prosecutor v. Prlić*, the Trial Chamber of the United Nations convicted six Croatian commanders of various war crimes, one of which was the destruction of the Stari Most, the Old Bridge.⁵² However, this decision does not represent the analysis military commanders should conduct and should not be used to expand the scope of collateral effects considered in determining the proportionality of a military attack. This case is an example of a court deviating from the proportionality analysis set forth by the Law of Armed Conflict by considering outside humanitarian factors.

27. During the conflict between Croatian and Bosnian forces, the Trial Court of the United Nations found the attack on the Old Mostar Bridge excessive and disproportionate due to the effects on the civilians in Mostar and the symbolic importance of the bridge. The court found this bridge had a dual-use for both the military and civilians as a traveling and supply route. “[The defense] argued, notably, that the Old Bridge was regularly used by the [Bosnian military] to transport weapons, ammunition, and military material.” However, Old Bridge was one of the last structures which crossed the Neretva. Other crossings were of “makeshift construction” and were controlled by the Bosnian military. Thus, this was the main route for civilians to enter and exit the eastern part of the city. In this case, the court found the military advantage gained from cutting off this military supply route was disproportionate to the isolation of the civilians in the city.⁵³

28. If the court only considered the expected effect of isolating the civilians against the anticipated military advantage gained by the attack on the Old Bridge, the application of the analysis would coincide with the proportionality principle. Since the bridge served a dual use to both civilians and military forces, the foreseeable effects on the civilian population must be taken into account.⁵⁴ But, in their decision, the court also considered the psychological effects of this attack on the civilians. The court considered that the Old Bridge was about 500 years old and was of significant religious and cultural importance. Also, it appears that the court’s condemnation of this attack was influenced by other attacks alleged in the trial by the Croatian military on civilian mosques.⁵⁵ The court erred in considering the psychological effects on civilians in their proportional-

52 *Prosecutor v. Prlić*, Case No. IT-04-74-T, Judgment Vol. 2, ¶ 1284 (Int’l Crim. Trib. for the Former Yugoslavia May 29, 2013).

53 *Prosecutor v. Prlić*, Case No. IT-04-74-T, Judgment Vol. 2, ¶ 1284-88 (Int’l Crim. Trib. for the Former Yugoslavia May 29, 2013).

54 International Law Association Study Group on the Conduct of Hostilities in the 21st Century, *The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare*, 93 INT’L L. STUD. 322, 356 (2017).

55 *Prosecutor v. Prlić*, Case No. IT-04-74-T, Judgment Vol. 2, ¶ 1284-85 (Int’l Crim. Trib. for the Former Yugoslavia May 29, 2013).

ity analysis,⁵⁶ and in letting their decision be influenced by other attacks made by the Croatian military during the conflict.⁵⁷

29. The test for proportionality requires consideration of expected collateral damage to civilians and civilian objects at the time the commander plans the attack. “Other intangible effects on the civilian population, such as inconvenience, irritation, stress, or fear are not factored into collateral damage.”⁵⁸ Thus, the court should have only considered the effects on civilian lives and civilian objects, such as the isolation of civilians in Mostar, but not the psychological or emotional effects of the attack.

30. The attack on the Old Bridge is an important case because it shows the distinction between the principle of proportionality per the Law of Armed Conflict and how courts have evaluated previous military attacks. Seldom are military operations clear cut. But commanders are to consider only the expected effects of these operations in the proportionality analysis. The urbanization of the battlefield presents the commander with more collateral damage to consider but the analysis need not change. As the rule is written, it is broad enough to encompass all expected damage. An attack in a densely populated area has the potential to hurt more civilians and civilian objects than traditional attacks in isolated areas. However, the commander is equipped to consider the surrounding buildings and infrastructure, as well as civilians in the area. The urbanization of the battlefield may require more reconnaissance and information building before an attack is approved, and it may require the use of more precise weaponry when conducting the attack, but the current rule encompasses all expected collateral damage and does not need to be expanded.

B. Drones and Precision Weapons

31. Another change in the face of war is the use of drones on the battlefield. This recent technological advancement has sparked debate amongst scholars. Proponents of the use of drones in military attacks have highlighted the many advantages of these precision weapons.⁵⁹ Whereas, those opposed to the use of drones have discussed the various

56 Ian Henderson & Kate Reece, *Proportionality under International Humanitarian Law: The “Reasonable Military Commander” Standard and Reverberating Effects*, 51 VAND. J. TRANSNAT’L L. 835, 837 (2018).

57 *Prosecutor v. Prlić*, Case No. IT-04-74-T, Judgment Vol. 2, ¶ 1284 (Int’l Crim. Trib. for the Former Yugoslavia May 29, 2013).

58 See U.S. Dep’t of Def., LAW OF WAR MANUAL 261 (2016) (“Mere inconveniences or temporary disruptions to civilian life need not be considered in applying this rule”).

59 Megan Braun & Daniel R. Brunstetter, *Rethinking the Criterion for Assessing Cia-targeted Killings: Drones, Proportionality and Jus Ad Vim*, 12 J. MIL. ETHICS 304, 307 (2013); Sarah Kreps & John Kaag, *The Use of Unmanned Aerial Vehicles in Contemporary Conflict: A Legal and Ethical Analysis*, 44 POLITY 260, 263 (2012).

issues surrounding the use of drones,⁶⁰ the application of the proportionality analysis to the drone missions,⁶¹ the actual military advantage gained by these missions, and the number of civilians killed due to drone attacks.⁶² This article argues that the principle of proportionality is adequate to regulate the use of drone technology as long as the proportionality analysis is not neglected due to a reliance on precision.

32. This section first discusses drones and some of the advantages of using drones in military missions. Next, this section outlines two major debates regarding the use of drones: whether attacks are proportional, and if the use of these precision weapons has led to a relaxed moral standard when planning missions.

33. Drones, known to the military as “UAVs (Unmanned Aerial Vehicles) or RPAS (Remotely Piloted Aerial Systems),”⁶³ are unmanned “aerial weapon systems that can be remotely controlled for short- or long-range use for various purposes.” Drones are used for surveillance and targeting missions generally described as dull, dirty, or dangerous operations (referred to as the “Triple D’s”).⁶⁴ The U.S. military has increased its use of drones and other UAVs over the last decade.⁶⁵ For example, the Obama Administration approved three major drone programs in the Middle East.⁶⁶

34. Former CIA Director and [former] Defense Secretary Leon Panetta once referred to UAVs as ‘the only game in town’ in terms of confronting or trying to disrupt the Al-Qaeda leadership [because] they are considered to be “very precise and very limited in terms of collateral damage.”⁶⁷

35. The use of drones offers many advantages such as a high level of precision,⁶⁸ increased information-gathering capabilities, deterrence of opposition activity,⁶⁹ and

60 Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 *DENV. J. INT’L L. & POL’Y* 101, 104 (2010).

61 Sarah Kreps & John Kaag, *The Use of Unmanned Aerial Vehicles in Contemporary Conflict: A Legal and Ethical Analysis*, 44 *POLITY* 260, 269 (2012).

62 Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 *DENV. J. INT’L L. & POL’Y* 101, 126 (2010).

63 BBC, *Drones: What Are They and How Do They Work?*, *BBC NEWS*, Jan. 31, 2012.

64 U.C. Jha, *Drones and Targeted Killings: Assessment of Applicable Principles and Laws*, *ISIL Y. B. INT’L HUMAN. & REFUGEE L.* 67, 68–69 (2014–2015).

65 Oren Gross, *The New Way of War: Is There a Duty to Use Drones?*, 67 *FLA. L. REV.* 1, 2 (2015); Shashank Bengali & David S. Cloud, *US Drone strikes up sharply in Afghanistan*, *L.A. TIMES* (Feb. 21, 2013).

66 Oren Gross, *The New Way of War: Is There a Duty to Use Drones?*, 67 *FLA. L. REV.* 1, 2-3 (2015).

67 Sarah Kreps & John Kaag, *The Use of Unmanned Aerial Vehicles in Contemporary Conflict: A Legal and Ethical Analysis*, 44 *POLITY* 260, 263 (2012).

68 Megan Braun & Daniel R. Brunstetter, *Rethinking the Criterion for Assessing Cia-targeted Killings: Drones, Proportionality and Jus Ad Vim*, 12 *J. MIL. ETHICS* 304, 307 (2013).

69 Sarah Kreps & John Kaag, *The Use of Unmanned Aerial Vehicles in Contemporary Conflict: A Legal and Ethical Analysis*, 44 *POLITY* 260, 263 (2012).

protection of pilots. The “predator is so precise it can shoot a hellfire missile straight through a window or take out a lone enemy combatant from miles away.” The ammunition used by drones is also substantially smaller than other aerial weapon systems, creating a much smaller impact, further increasing the precision of each attack and decreasing the damage to the surrounding area. Proponents of drone use argue that because they are so precise, the chances of collateral damage are significantly lowered, and fewer civilian lives are put in danger.⁷⁰

36. These weapons systems also offer the benefit of constant patrol and surveillance. This acts as a scare tactic, as well as aids with information building. The fact that these drones are constantly circling overhead has the potential to deter activities by opposing forces. This would, in turn, increase the military advantage gained by each mission. By increasing the military advantage gained, the use of drones becomes even more likely to pass the proportionality analysis.⁷¹

37. Drones also offer the benefit of decreasing the chance of lost pilot lives because they are unmanned and controlled remotely. This allows them to be deployed in adversarial environments which would be too dangerous for pilots to enter. Since drones are designed to be expendable,⁷² and do not require a pilot to put their lives in danger, the possible collateral damage for any military is seriously decreased. The many advantages of using drones in military attacks are considered in the proportionality analysis when a commander is planning a mission.

Although there are many advantages to using drones in missions, these weapons systems have stirred up a debate amongst scholars. However, drones are not the first technological advancement to raise debate amongst scholars. Developments such as the crossbow, gunpowder, machine guns, tanks, airplanes, noxious gasses, nuclear bombs, and a number of other deadly innovations, irreversibly changed the landscape of warfare and require groups and states to reassess the laws governing armed conflict.⁷³ Similarly, scholars debated the use of nuclear weapons during the 1960s.⁷⁴ Thus, the de-

70 Megan Braun & Daniel R. Brunstetter, *Rethinking the Criterion for Assessing Cia-targeted Killings: Drones, Proportionality and Jus Ad Vim*, 12 *J. MIL. ETHICS* 304, 307–08 (2013).

71 Sarah Kreps & John Kaag, *The Use of Unmanned Aerial Vehicles in Contemporary Conflict: A Legal and Ethical Analysis*, 44 *POLITY* 260, 263 (2012).

72 Sarah Kreps & John Kaag, *The Use of Unmanned Aerial Vehicles in Contemporary Conflict: A Legal and Ethical Analysis*, 44 *POLITY* 260, 263 (2012).

73 Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 *DENV. J. INT’L L. & POL’Y* 101, 102 (2010).

74 See generally Peter J. Fliess, *The Legality of Atmospheric Nuclear Tests — a Critical View of International Law in the Cold War*, 15 *U. FLA. L. REV.* 21 (1962) (discussing the implications and justifications for the use of nuclear weapons during the Cold War).

bate surrounding the development of drones should not be surprising.⁷⁵ Current issues like the use of double-tapping drone attacks⁷⁶ and the use of private militaries⁷⁷ will be sure to raise discussion in the future.

38. This article discusses two major issues raised by those who oppose the use of drones in military attacks. First, scholars argue that drone missions are not truly proportional. Second, some argue that even though drones are better able to satisfy the proportionality analysis, because they potentially cause less collateral damage, they lead to relaxed moral standards and an expansion of military objectives.⁷⁸

39. Do drone attacks satisfy the proportionality analysis? As noted by Megan Braun and Daniel Brunstetter:

[T]he issue in the debate about drone proportionality is not the meaning of the principle, but how it is to be assessed. Despite challenges in defining and measuring key terms such as “civilian”, “military advantage” and “excessive”, it remains imperative to attempt to assess the proportionality of drone strikes.⁷⁹

40. Ryan Vogel claimed that it is worth noting that the use of drones is not *per se* disproportionate, and therefore excessive, simply because drones are a superior tool as compared to the enemy’s technological capabilities. The law of war requires parties to have equal respect for the rules of war but does not require that each party fight with equal strength or ability. Just because the enemy has less advanced weapons does not mean they are any less competent and capable of causing damage and death.⁸⁰ Thus, the use of drones and other advanced technology does not automatically deem their use excess and disproportionate.

41. Proponents of the use of drones point to previous successful missions and casualty statistics to show that these missions satisfy the proportionality analysis.

75 Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 *DENV. J. INT’L L. & POL’Y* 101, 102 (2010).

76 See generally Samuel Alexander, *Double-Tap Warfare: Should President Obama Be Investigated for War Crimes*, 69 *FLA. L. REV.* 261 (2017) (discussing the possibility of war crimes committed under the Obama Administration when calling for double-tapping drone attacks).

77 See generally Andres Healy, *The Constitutionality of Amended 10 U.S.C. Section 802(A)(10): Does the Military Need a Formal Invitation to Reign in “Cowboy” Civilian Contractors?*, 62 *FLA. L. REV.* 519 (2010) (discussing the legality of private contractors and militias in the conflict in the Middle East).

78 Megan Braun & Daniel R. Brunstetter, *Rethinking the Criterion for Assessing Cia-targeted Killings: Drones, Proportionality and Jus Ad Vim*, 12 *J. MIL. ETHICS* 304, 304 (2013).

79 Megan Braun & Daniel R. Brunstetter, *Rethinking the Criterion for Assessing Cia-targeted Killings: Drones, Proportionality and Jus Ad Vim*, 12 *J. MIL. ETHICS* 304, 304, 310 (2013).

80 Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 *DENV. J. INT’L L. & POL’Y* 101, 127 (2010).

Brennan [former White House counterterrorism adviser and director of the CIA] lauded the ability of drones to conform to the principle of proportionality, the notion that the anticipated collateral damage of an action cannot be excessive in relation to the anticipated military advantage. According to his reading of proportionality, drones succeed in killing terrorists while minimizing the risk to noncombatants, thus suggesting that the US government was taking all possible measures to fight Al-Qaeda while protecting foreign civilians.⁸¹

42. “Numbers, of course, do not tell the whole story, as there may be reasons why such strikes could be proportional even though they killed civilians/unknowns.” Statistics provide proof of lower collateral damage due to the precision of drone attacks, and show that less than one percent of military drone attacks kill civilians. In fact, the military has a ten percent rule which states that there must be a ten percent chance, or less, that civilians will be killed in the attack in order for the mission to be approved. The average number of civilian deaths during drone attacks against low level targets is two. Whereas the average number of civilian deaths during targeted attacks against people in leadership roles is roughly eight.⁸² This distinction between various levels of approved targeted attacks is due to the fact that within the proportionality analysis a higher valued target may warrant a higher civilian casualty rate. Since the higher target will create a larger military advantage, the proportionality analysis will allow more collateral damage.

43. Some critics argue that the statistics regarding civilian casualties show that these weapons are not as precise as the military purports. However, the technology may not be an issue.⁸³ Although drones are unmanned aircraft, they are still controlled by a human, and human error is always a factor considered by commanders when planning a mission. “Increasing technology does not mean increasingly sophisticated individual judgment.”⁸⁴ “The precision, accuracy and legality of a drone strike depends on human intelligence upon which the targeting decision is based.”⁸⁵ Since smart bombs are not actually smart, advanced technology cannot make judgment calls and it is imperative

81 Megan Braun & Daniel R. Brunstetter, *Rethinking the Criterion for Assessing Cia-targeted Killings: Drones, Proportionality and Jus Ad Vim*, 12 J. MIL. ETHICS 304, 304 (2013).

82 Megan Braun & Daniel R. Brunstetter, *Rethinking the Criterion for Assessing Cia-targeted Killings: Drones, Proportionality and Jus Ad Vim*, 12 J. MIL. ETHICS 304, 310–12 (2013).

83 Megan Braun & Daniel R. Brunstetter, *Rethinking the Criterion for Assessing Cia-targeted Killings: Drones, Proportionality and Jus Ad Vim*, 12 J. MIL. ETHICS 304, 311, 314 (2013).

84 Sarah Kreps & John Kaag, *The Use of Unmanned Aerial Vehicles in Contemporary Conflict: A Legal and Ethical Analysis*, 44 POLITY 260, 261 (2012).

85 U.C. Jha, *Drones and Targeted Killings: Assessment of Applicable Principles and Laws*, ISIL Y. B. INT’L HUMAN. & REFUGEE L. 67, 71 (2014–2015).

that each mission pass the proportionality analysis.⁸⁶ The many benefits of using drones, such as the increased military advantage and decreased collateral damage, and statistics regarding the low levels of collateral damage caused by drone attacks, show that the use of drones in military attacks satisfies the proportionality principle.

44. Does the use of drones lead to relaxed moral standards? Some critics are concerned with the alleged relaxed moral standards caused by the military's heavy reliance on the precision of these weapons.⁸⁷ These scholars argue that the military has replaced proportionality with precision and have confused technical ability with legal and ethical decision making.⁸⁸ There is simply no way to know if this is true because the decision-making process of commanders when conducting the proportionality analysis is not public. Although we can make assumptions based on statements made regarding the military attacks, it cannot be confirmed that commanders' reliance on the precision of drones has supplanted the proportionality analysis. To satisfy military, international, and humanitarian law, a proportionality analysis must be conducted, and the commander must determine that the attack would not be excessive.

45. Just like any other, in order to be legally valid, each mission must satisfy the proportionality analysis. Ryan Vogel notes that the Law of Targeting does not "turn on the type of weapon system used, and there is no prohibition under the laws of war on the use of technologically advanced weapons systems in armed conflict — such as pilotless aircraft or so-called smart bombs — so long as they are employed in conformity with applicable laws of war." Harold Koh, former Legal Adviser of the Department of State under President Obama, stated that "great care is taken to adhere to [the principles of distinction and proportionality] . . . , in both planning and execution" of lethal targeting operations, and asserted that such operations "comply with all applicable law, including the laws of war."⁸⁹ It is unclear if the use of drones is leading to relaxed moral standards, but for this system to continue to work, and for drones to comply with pertinent law, the proportionality test must be conducted on a case-by-case basis before every mission to ensure it complies with the Law of Targeting.

46. Although critics have expressed concern regarding the number of civilian casualties resulting from these attacks,⁹⁰ and the possibility that the military has ignored its

86 Sarah Kreps & John Kaag, *The Use of Unmanned Aerial Vehicles in Contemporary Conflict: A Legal and Ethical Analysis*, 44 *POLITY* 260, 267, 276 (2012).

87 Megan Braun & Daniel R. Brunstetter, *Rethinking the Criterion for Assessing Cia-targeted Killings: Drones, Proportionality and Jus Ad Vim*, 12 *J. MIL. ETHICS* 304, 304 (2013).

88 Sarah Kreps & John Kaag, *The Use of Unmanned Aerial Vehicles in Contemporary Conflict: A Legal and Ethical Analysis*, 44 *POLITY* 260, 269 (2012).

89 Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 *DENV. J. INT'L L. & POL'Y* 101, 103, 187, 188 (2010).

90 U.C. Jha, *Drones and Targeted Killings: Assessment of Applicable Principles and Laws*, ISIL Y. B. INT'L HUMAN. & REFUGEE L. 67, 167 (2014–2015).

obligation to conduct a proportionality analysis before each attack by relying too heavily on the precision of the drones,⁹¹ this article argues that the proportionality test is adequate to determine the legality of targeted attacks and must be applied to each mission regardless of the weapons system employed. The proportionality analysis applies to drone attacks as it does to any other weapon system.⁹² Whether a targeted attack is to be conducted by a Special Forces unit on the ground in the dark of night, or by a drone controlled by an operator thousands of miles away, in order for the mission to satisfy the proportionality test, the commander must determine that the military advantage outweighs the expected collateral damage.

IV. Conclusion

47. It is important for the global civilian population to understand the proportionality principle. The common definition of “proportional” is “corresponding in size, degree, or intensity; having the same or a constant ratio.”⁹³ Conversely, something that is “disproportionate” is “too great or too small when compared to something else.”⁹⁴ Finally, “excess” is “the state or an instance of surpassing usual, proper, or specified limits . . . the amount or degree by which one thing or quantity exceeds another.”⁹⁵

48. Also, the proportionality analysis is a military calculation. Politics are not this analysis and should be excluded from considerations. The proportionality principle is a tool used to protect civilian lives and objects. It is not to be bogged down by biased political discussions. Whether or not a military attack is justified on other grounds is beside the point. An attack is never to be deemed proportional because “he hit me first.” The question is simply how each attack is expected to harm civilians and civilian objects. Any attack that causes excessive harm to civilians is a war crime, regardless of politics.

49. The limitations of the actual proportionality analysis are also important to keep in mind. This calculation is limited to a forward-facing analysis made by the military commander, with the information available to them at the time, considering the totality of the circumstances. However, when discussed by news sources, attacks are analyzed in a backward facing manner with different information than was available to the military

91 Sarah Kreps & John Kaag, *The Use of Unmanned Aerial Vehicles in Contemporary Conflict: A Legal and Ethical Analysis*, 44 *POLITY* 260, 269 (2012).

92 Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 *DENV. J. INT’L L. & POL’Y* 101, 137 (2010).

93 *Proportional*, [MERRIAM-WEBSTER](#).

94 *Disproportionate*, [CAMBRIDGE DICTIONARY](#).

95 *Excess*, [MERRIAM-WEBSTER](#).

commander at the time that attack was planned.⁹⁶ These distinct points of view naturally can lead to different conclusions and an attack that might have been proportional, when viewed differently, may appear excessive.

50. When news media sources use terms such as “proportional” or “disproportionate,” they often use them within their common language definitions and analyze the military actions in a way inconsistent with the Law of Armed Conflict. However, this confusion is not new. Although the use of the terms makes sense within common vernacular, it is misleading and can confuse the issues. It is important that civilians understand the actual proportionality analysis made by military commanders in order to better understand why certain actions are taken.

51. This article explained the laws governing military attacks, described the use of drones, and discussed two major changes in the face of war that affect the proportionality analysis. These were the urbanization of the battlefield and the use of drones and other precision weapon systems. Although these changes affect the factors to be considered by military commanders when planning a military operation, the proportionality analysis need not be changed. As it stands, the proportionality principle is flexible enough to account for any current changes to war. As long as the commander considers expected collateral damage, and the full analysis is conducted, regardless of the weapon systems employed, the proportionality analysis will continue to protect civilians and civilian objects from excessive attacks.

⁹⁶ Nicole Gaouette, et al., *Trump says “Iran Appears to Be Standing Down” following its retaliatory attacks against Iraqi bases housing US troops*, [CNN POLITICS](#), Jan. 8, 2020.