



U.S. Army and Philippine Army soldiers conduct a targeting working group decision board during the Joint Pacific Multinational Readiness Center exercise on 7 June 2024. (Credit: SGT Samantha Aguridakis)

Practice Notes

Applying Vague Law to Violence How the Joint Force Can Master Proportionality Before a High-Intensity War

By Major John C. Tramazzo

Introduction: There Are Mixed Messages About Mitigating Civilian Harm

U.S. military forces deserve clear guidance on their leaders' tolerance for collateral damage. Unfortunately, there appear to be mixed messages about proportionality as the Department of Defense (DoD) simultaneously applies lessons learned in Afghanistan and contemplates armed conflict with a peer or near-peer adversary. On one hand, senior military officers are stressing the importance of increased offensive capabilities, "rings of fire," and "unrepentant lethality."¹ On the other, Pentagon leaders expect the joint force

to operate in a manner that is more protective of civilians than is required by the law of armed conflict (LOAC).² In particular, the DoD's August 2022 Civilian Harm Mitigation and Response Action Plan (CHMR-AP) reinforces several misconceptions as to what the law of proportionality requires.³

In the training environment, many commanders and staffs reflexively refrain from taking actions that may be lawful in the large-scale combat operations (LSCO) context.⁴ As then-Major Jason Young described for the Lieber Institute for Law & Land Warfare while assigned to the Joint Multinational Readiness

Center in Hohenfels, Germany, many commanders and staff officers are unwilling to employ large-caliber or unobserved fires to destroy a high-value enemy asset in the vicinity of a civilian object or in an urban area.⁵ His observations reflect a growing concern that the joint force lacks a fundamental understanding of how LOAC should apply in a high-intensity war.

This article provides further observations regarding the confusion that sometimes exists when warfighters apply the law to the operational function of fires. It zeroes in on the proportionality rule and the inherent dilemmas associated with applying it during LSCO. It differentiates between how the law of proportionality applied during the wars in Iraq and Afghanistan and how it should apply in a future war. Finally, it offers two recommendations that geographic combatant commanders, Service component commanders, theater special operations commanders, and other likely target engagement authorities can implement to mitigate the risks associated with misconceptions about the law. It urges increased engagement between general or flag officers and their subordinates on the topic of collateral damage, and it proposes the issuance of theater-specific, scenario-based tactical guides for use in training.

The Proportionality Rule Is Well-Established in Law but Vague and Difficult to Apply

Articles 51 and 57 of the 1977 Additional Protocol (AP I) to the Geneva Conventions require combatants to refrain from attacks in which the expected loss of life or injury to civilians, and damage to civilian objects incidental to the attack, would be “excessive in relation to the concrete and direct military advantage anticipated.”⁶ In addition, Article 57 of AP I requires combatants to “take all feasible precautions” to minimize the incidental loss of civilian life, injury to civilians, and damage to civilian objects.⁷

The United States has not ratified AP I and, therefore, is not bound by it, but U.S. officials acknowledge that both the general proportionality rule and the obligation to “take feasible precautions” reflect customary international law.⁸ For example, the DoD accepts large portions of AP I as legitimate

statements of customary international law and relies on these rules to train commanders and military lawyers.⁹ Further, the DoD *Law of War Manual* recognizes the duty to “take feasible precautions to reduce the risk of harm to the civilian population,” but the United States considers the word “feasible” to mean “practicable or practically possible.”¹⁰ The obligation does not require everything that is capable of being done.

These highly elastic rules often require subjective and imprecise determinations, and they implicate profound, competing moral obligations. As Professor William Fenrick, the former legal advisor to the International Criminal Tribunal for the former Yugoslavia, observed, “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.”¹¹ Proportionality does not necessarily require a mathematical comparison, nor does the rule demand a balancing test, but the law prohibits attack when “there is a significant imbalance between the military advantage anticipated, on the one hand, and the expected collateral damage to civilians and civilian objects, on the other.”¹² In essence, proportionality acknowledges that unavoidable civilian harm is sometimes legally justified.

The proportionality rule obligates commanders to reconcile humanitarian imperatives with military requirements. As the late Israeli scholar Yoram Dinstein explained, proportionality requires “pondering dissimilar considerations—to wit, civilian losses and military advantage—[which] is not an exact science.”¹³ The U.S. military incorporates science and technology (i.e., empirical data, probability, and complex modeling) into doctrine and practice to mitigate civilian harm.¹⁴ But, lawful targeting also requires substantial operational art (i.e., intuition, moral reasoning, and experience).¹⁵ For instance, throughout the U.S.-led campaign to destroy the Islamic State in Iraq and Syria, operational commanders continuously balanced the military advantages gained by killing various Islamic State of Iraq and Syria (ISIS) leaders in urban centers like Raqqa and Mosul with more tenuous concerns about generating propaganda fodder or creating more jihadists than they eliminated.¹⁶

The proportionality rule and the requirement to take feasible precautions are contextual. The application of the law should differ from conflict to conflict and even from engagement to engagement. In Syria, the death of one ISIS member may not justify damage to a single civilian object. On the other hand, in an armed conflict between the United States and a peer adversary, the destruction of a high-value unit or target (e.g., a Russian TOS-1 rocket launcher or a Chinese DF-17 missile) could justify high levels of collateral damage.¹⁷ In a high-intensity war, commanders and staff officers will “need to intuitively know and confidently apply the actual rules of war, unhindered by the lingering hangover of constrained [counterinsurgency rules of engagement]” that the joint force is most familiar with.¹⁸

The Problem: The Joint Force Is Primed for Restraint

Two decades of low-intensity conflict in Afghanistan, Iraq, Syria, Somalia, Yemen, and Libya generated an intellectual war-fighting capability gap.¹⁹ Experts have expressed concerns about “insufficient legal expertise” within the joint force.²⁰ Most commanders and staffs are accustomed to “non-combatant casualty cutoff values” and collateral estimates of zero, an indication that senior leaders would not tolerate any collateral damage resulting from offensive strikes.²¹ In recent counterterrorism operations, combatant commanders accepted increased risk to their own forces to prevent incidental harm to civilians. For example, when special operations forces targeted ISIS leader Abu Ibrahim al-Hashimi al-Qurayshi in Syria in 2021, U.S. Central Command (CENTCOM) opted to launch a complex raid instead of a precision airstrike into Qurayshi’s multi-story dwelling.²² The raid was a success, but it resulted in the loss of a highly capable MH-60M Black Hawk helicopter in the Syrian desert.²³

The CENTCOM commander was not wrong considering the context in which he made decisions.²⁴ As Professors Michael Schmitt and Sean Watts noted in 2015, international law “imposes obligations and requires precautions that can [sometimes] expose combatants to tangibly greater



The CDEM is excellent for deliberate, precision attacks like the USS *Porter's* (pictured) Tomahawk strike on Syrian military bases in 2017. However, the next war will likely be marked by fluid battlespaces and a shift from deliberate to dynamic targeting. (Credit: SP3 Ford Williams)

danger.²⁵ Operational advantages over non-state actors like ISIS, including air superiority and exquisite intelligence, enabled battlefield precautions, precision warfare, and “zero tolerance” policies for civilian harm. Further, no responsible commander wants to kill civilians even though, under some circumstances, the law permits it.

Civilian harm will be unavoidable in a LSCO, a reality of armed conflict that the DoD *Law of War Manual* recognizes.²⁶ International law permits belligerents to take innocent lives and destroy civilian property to achieve military objectives.²⁷ But how, exactly, does one decide if or when a particular military aim justifies the taking of innocent lives?²⁸

History reveals how difficult it is to apply the law of proportionality.²⁹ In 1999, divergent views on collateral damage frustrated U.S. and allied efforts to quickly defeat Slobodan Milošević in Kosovo. In describing policymakers’ and partner nations’ conservative interpretations of the law, the North Atlantic Treaty Organization (NATO) Air Commander, Lieutenant General Michael Short, observed after the war that “concern for collateral damage drove [NATO] to extraordinary degree, and it will drive the next generation of warriors even more so.”³⁰ In November 2001, disagreements over collateral damage disrupted early targeting efforts in Afghanistan. *The Washington Post* reported on a dispute between operational commanders and the CENTCOM staff judge advocate

who purportedly refused to permit certain strikes against Taliban targets.³¹ Conflicting perspectives about proportionality required General Tommy Franks to resolve disputes and resulted in major delays and missed opportunities.³²

In a LSCO, U.S. commanders and staff will not have the luxuries of time or security to debate the law of targeting.³³ Tactical decision cycles will be more compressed than previous conflicts.³⁴ Peer adversaries will prioritize attacks on long-distance communications systems and U.S. command posts.³⁵ Wargames in the Indo-Pacific repeatedly reveal that the United States would lose “dozens of ships, hundreds of aircraft, and thousands of [personnel]” in a matter of days.³⁶

Interviews and interactions with officers currently attending intermediate level education programs reveal the same uncertainties that manifest during Combat Training Center (CTC) rotations. For example, during a series of unclassified tabletop exercises and wargames at the U.S. Naval War College, many participants from all Services hesitated to strike high-value enemy targets.³⁷ Some students opted for inaction based on relatively dense operating environments and concerns over how tactical decisions resulting in civilian harm could reverberate at the strategic level.³⁸ Many officers are intuitively inclined to exercise restraint and forego a thorough assessment of whether the expected collateral

damage would be excessive in relation to the military advantage anticipated.

A future war, regardless of whether it occurs in Europe or Asia, will be defined by lethality and density.³⁹ Considering how much firepower the joint force’s operational tasks would require and how congested the likeliest areas of operations are with civilians and civilian objects, tactical commanders and senior leaders alike must grapple with how to evaluate various military advantages and collateral concerns.⁴⁰ As Captain Wayne Hughes wrote in *Fleet Tactics*, “Nothing about battle can be understood without grasping the impact of its violence.”⁴¹ Decision makers at all echelons of the joint force need high quality training repetitions with the proportionality rule and meaningful feedback before an international armed conflict erupts.

Some may argue that the Collateral Damage Estimation Methodology (CDEM)⁴² is sufficient to govern future targeting decisions. The CDEM is excellent for deliberate, precision attacks like the USS *Porter's* Tomahawk strike on Syrian military bases in 2017.⁴³ New technology, like the Digital Precision Strike Suite Collateral Estimation algorithm and the Digital Imagery Exploitation Engine tool, will improve deliberate targeting.⁴⁴ However, the next war will likely be marked by fluid battlespaces and a shift from deliberate to dynamic targeting.⁴⁵ In the absence of meaningful guidance from senior leaders, some tactical commanders might kill 100 civilians to destroy a high-value enemy target, “while another might . . . opt for a lesser allowance of killing ten civilians.”⁴⁶ Still, many others may not attack at all and will assume unnecessary risk to their own forces. Neither the CDEM nor algorithmic warfare tools can substitute genuine human understanding of the laws applicable to dynamic targeting.⁴⁷

As the ongoing war in Ukraine makes clear, a future conventional war will be dynamic, destructive, and deadly for civilians.⁴⁸ In a war between the United States and the People’s Republic of China (PRC) in the Western Pacific, for example, the joint force would presumably seek to destroy enemy surface warships, missile sites, merchant shipping, sea lines of communication, choke points for energy and trade, sea- and land-based logistics, and PRC resupply

and sustainment capabilities.⁴⁹ Degraded communications, contested airspace, and imperfect intelligence will challenge the joint force and demand decentralized decision-making in battle.⁵⁰ Emerging stealth technology, Global Positioning System (GPS) spoofing, and the presence of maritime militia will further complicate efforts to characterize the environment and increase the likelihood of incidental harm.⁵¹ Commanders and staffs must deliberately prepare to apply proportionality to future targeting dilemmas.

In a LSCO, on-scene commanders will probably lack access to, or the time to seek, legal advice and a higher headquarters' approval to conduct offensive attacks.⁵² Warfighters will need more than vague legal principles, lengthy handbooks, and generic rules of engagement (ROE) to navigate future battlefield dilemmas. Tactical commanders need meaningful guidance from senior leaders on how to value military advantages relative to expected collateral concerns.⁵³

The Remedies: Personal Engagement and Scenario-Based Tactical Targeting Guides

To alleviate confusion and promote future compliance with the law, senior leaders within the geographic combatant commands, Service component commands, theater special operations commands, and other warfighting headquarters (e.g., corps, divisions, multi-domain task forces, fleets, carrier strike groups) can implement two immediate measures. Senior leaders can engage more frequently with operational and tactical level commanders and staff officers on the topic of collateral damage. Also, senior commanders can issue scenario-based tactical guides for use in training.

Operational Commanders Need Mentorship on Proportionality

War with a peer competitor will be unlike anything the modern U.S. military has experienced, and winning will be an absolute necessity.⁵⁴ Thus, senior leaders must cultivate an understanding of how the law applies in high-intensity engagements through focused education at all echelons. In targeting meetings, commanders' roundtables, professional development sessions, town

8	Is the <i>attack</i> 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? If yes, DO NOT ATTACK If no, proceed to step 9.
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Figure 1.⁵⁵ Targeting checklists, like this one from the *Newport Rules of Engagement Handbook*, and generic rules of engagement will not help warfighters apply the law of armed conflict intuitively.

halls, and after-action reviews in training environments, senior commanders should engage with their subordinates on potential targeting dilemmas within their area of operations. As Professor David Glazier, a legal scholar who spent twenty-one years as a surface warfare officer, noted in 2021, “Troops . . . deserve the best possible guidance on the internationally recognized rules governing conflict . . .”⁵⁶ Commanders at all echelons must de-emphasize “legislative” ROE and, instead, challenge subordinates to consider realistic scenarios so that they may internalize principles, not just memorize external, written texts.⁵⁷

While LOAC provides a sufficient framework to navigate targeting dilemmas,⁵⁸ senior leaders must fill the framework with their operational beliefs and expectations. The commanding general of U.S. European Command, Service component commanders in Europe, Sixth Fleet commander, and Special Operations Command-Europe should address whether the destruction of civilian (or uncharacterized) vehicles would be excessive in relation to the destruction of a Russian tank column with over-the-horizon missiles. In the Indo-Pacific, senior commanders ought to address whether the destruction of a civilian community, airport, tourist infrastructure, or wind turbine would be excessive in relation to the destruction of a land-based People’s Liberation Army (PLA) missile site with over-the-horizon RGM-84 or UGM-84 Harpoon missiles.

These hypothetical dilemmas are not unrealistic. Chinese cruise ships like *The Coconut Princess* regularly ferry hundreds of passengers from the port city of Sanya to places like the tiny Woody Island to sunbathe, dive, and fish.⁵⁹ An additional 1,500 civilians live on Woody Island⁶⁰ alongside the PLA Navy’s “Unit 92155,” an air defense brigade armed with HQ-9 surface-to-air missiles featuring a 200-kilometer range.⁶¹ Senior commanders should address

whether it would be reasonable to bombard Unit 92155 with naval fires or whether precision missiles are required.

As the *Newport Rules of Engagement Handbook* notes, “Scenario-based ROE training will ensure that ROE are understood and applied properly by all units and members of the [force].”⁶² Some tactical units already conduct scenario-based training exercises supported by tactical aids developed by command judge advocates.⁶³ Scenario-based training events led by JAs are helpful, but they typically reveal the JA’s opinions on proportionality, not the senior commander’s guidance and intent. As retired Brigadier General Mark S. Martins once noted, “Understanding . . . LOAC is a matter of training, not of lawyering.”⁶⁴ Personal engagements between senior-level commanders and warfighters will facilitate a deeper understanding of the law and its contextual nature. The opportunity to regularly ask senior leaders about collateral damage will stimulate confidence in the practical application of theater ROE, which do not, and should not, delineate specific tactics.

Scenario-Based Tactical Guides Will Enrich Training

Additionally, senior-level commanders should develop scenario-based tactical guides for the employment of force in LSCO. Scenario-based tactical guides will operationalize key legal principles for training purposes and will promote intuitive application of the law on future battlefields. In July 2009, General Stanley McChrystal issued a tactical directive in his capacity as the NATO commander in Afghanistan.⁶⁵ Subsequent commanders updated the directive to account for changes in the operating environment.⁶⁶ In those directives, the commanders described specific tactical expectations to illustrate broader operating principles (e.g., prohibitions on entering Afghan houses without Afghan National Security Forces to promote the local government’s legitimacy; a preference for



Game board pieces representing ships are positioned during a wargame reenactment of the Battle of Jutland at U.S. Naval War College in Newport, Rhode Island. (Credit: U.S. Naval War College)

foot patrols over mounted patrols to signal humanity and care).⁶⁷ Senior commanders serving today should not wait for a future war to clarify their expectations regarding the conduct of kinetic strikes in Europe or Asia.

Forward-looking, scenario-based tactical guides that specifically address LSCO targeting dilemmas will stimulate necessary debate, facilitate meaningful planning, and establish a foundation for competent judgment.⁶⁸ Theater-specific, scenario-based tactical guides should address issues relating to the employment of unobserved fires in urban terrain, the destruction infrastructure (e.g., bridges, dams), subterranean threats, and other targeting predicaments.⁶⁹ Digital versions of tactical guides can hyperlink to video footage from previous U.S. attacks in urban areas, media coverage of airstrikes against high-value terrorist targets in which civilians were killed, and even news reports about Russian missile attacks in Ukraine to

provoke thinking and genuine understanding within their organizations. In the same way that Army Doctrine Publication 6-22, *Army Leadership and the Profession*, links leadership philosophies to historic applications of core principles,⁷⁰ senior commanders can define the command's collateral damage expectations by endorsing past targeting decisions and condemning others.

Even experts in the law of targeting typically fail to reach “judgment consensus” when faced with hypothetical targeting dilemmas.⁷¹ Grappling with theater-specific vignettes will increase the likelihood that warfighters will incorporate the law and commander's intent in executing future strikes. Warfighting commands can leverage advances in modeling and simulation technology to expose tactical commanders to the proportionality dilemmas described in the guide and to reinforce the commander's guidance on incidental harm.⁷²

Tactical guides might even raise completely fictional dilemmas so long as warfighters would readily comprehend the essential, underlying guidance. Senior leaders can borrow from P.W. Singer and August Cole's concept of “useful fiction” to pose plausible, hypothetical dilemmas.⁷³ By expressing collateral damage expectations through narrative and scenario-based tactical guides, senior leaders can also bridge the gap between generations. As Second Lieutenant Allison Annick wrote for the U.S. Naval Institute, “[T]he use of [fictional intelligence or FICINT] in schoolhouses allows for a broader assemblage of knowledge and creativity in considering possible threats.”⁷⁴

Conclusion: Senior Leaders Must Create Shared Understanding

Generals and admirals “cannot prescribe the appropriate use of force for every condition that a complex battlefield will produce,” but

senior commanders are obligated to manage uncertainty and to create shared understanding.⁷⁵ Joint targeting doctrine requires senior commanders to “articulate risk tolerance sufficiently to let on-scene commanders understand . . . intent.”⁷⁶ There is currently a lack of clarity at various echelons about how much incidental harm to tolerate in a high-intensity conflict.⁷⁷ Some believe that restraint and legitimacy will not be decisive factors in a LSCO.⁷⁸ Others argue that preventing collateral damage is “one of the most important military objectives in contemporary warfare,” regardless of the conflict’s intensity.⁷⁹ Increased engagement on the topic of collateral damage and scenario-based tactical guides will alleviate confusion and promote confidence in targeting.

In his 1884 short story, *A Premature Burial*, Edgar Allen Poe wrote, “The boundaries which divide Life from Death are at best shadowy and vague. Who shall say where the one ends, and where the other begins?”⁸⁰ The law of proportionality implicates these same shadowy and vague boundaries. In the absence of meaningful targeting guidance from senior leaders, warfighters will continue to demonstrate the dangerous symptoms of counterterrorism and counterinsurgency hangover—reluctance, hesitation, and uncertainty. Mastery of the proportionality rule may not be possible unless senior leaders establish logical parameters. Warfighters certainly deserve legal maneuver space, but senior commanders should articulate where that space begins and ends. **TAL**

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Notes

1. See, e.g., *U.S. Four-Star General Warns of War with China in 2025*, REUTERS (Jan. 28, 2023), <https://www.reuters.com/world/us-four-star-general-warns-war-with-china-2025-2023-01-28/>; see also Jon Harper, *Army Leader Warns About Potential Land War with China*, NAT’L DEF. (Mar. 17, 2021), <https://www.nationaldefensemagazine.org/articles/2021/3/17/army-leader-warns-about-potential-land-war-with-china>; Mallory Shelbourne, *Davidson: China Could Try to Take Control of Taiwan in Next Six Years*, USNI NEWS (Mar. 9, 2021), <https://news.usni.org/2021/03/09/davidson-china-could-try-to-take-control-of-taiwan-in-next-six-years>; Sam LaGrone, *CNO Gilday’s New Guidance Sets Clear Goals to Bring Lethality to Surface Force*, USNI NEWS (Jan. 11, 2021), <https://news.usni.org/2021/01/11/cno-gildays-new-guidance-sets-clear-goals-to-bring-lethality-to-surface-force>; Carol V. Evans, *Providing Stability and Deterrence: The U.S. Army in INDO-PACOM*, PARAMETERS, Spring 2021, at 25; Sydney J. Freedberg, Jr. & Andrew Eversden, *Firepower & People: Army Chief on Keys to Future War*, BREAKING DEF. (Oct. 10, 2022), <https://breakingdefense.com/2022/10/firepower-people-army-chief-on-keys-to-future-war-exclusive>. The term “unrepentant lethality” appears in General Mike Minihan’s March 2022 Air Mobility Command strategy. GEN. MIKE MINIHAN, AIR MOBILITY COMMAND, AIR MOBILITY COMMAND STRATEGY (29 Mar. 2022) (“We will center our efforts on a foundation of unrepentant lethality.”). My inclusion of the term unrepentant lethality is intended to show a need for clearer guidance on collateral damage tolerance from senior leaders.

2. Memorandum from Sec’y of Def. to Senior Pentagon Leadership et al., subject: Civilian Harm Mitigation and Response Action Plan (CHMR-AP) 3 n.1 (Aug. 25, 2022) (“Nothing in this plan is intended to suggest that existing DoD policies or practices are legally deficient or that the actions to be implemented pursuant to this plan are legally required, including under the law of war. The U.S. military routinely implements heightened policy standards and processes that are more protective of civilians than, and supplementary to, law of war requirements, without such standards and processes modifying or creating new legal requirements.”).

3. See, e.g., Lt. Gen. (Ret.) David A. Deptula, *In a Dangerous World, New Pentagon Mitigation Plan Would Hobble U.S. Forces*, DEF. OP. (Sept. 13, 2022), <https://defenseopinion.com/in-a-dangerous-world-new-pentagon-mitigation-plan-would-hobble-u-s-forces/183>. Unfortunately, even U.S. joint doctrine now reflects an institutional unwillingness to accept any collateral damage. Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 3162.02 warns that engagements resulting in collateral damage “negatively affect the ability of the joint force to achieve the commander’s objectives.” CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3162.02A, METHODOLOGY FOR COMBAT ASSESSMENT encl. D, para. 1a (16 July 2021) [hereinafter CJCSI 3162.02A]. The instruction assumes that collateral damage results from either: “(1) lack of positive identification (2) munition malfunction (3) secondary explosions and/or (4) human error.” *Id.* The instruction does not acknowledge that, in some situations, commanders may intentionally kill innocents or damage civilian objects to achieve military objectives.

4. John Spencer, Urban Warfare Project, *Attacking the City of Razish*, MODERN WAR INST., at 54:07-59:06 (May 29, 2020), <https://mwi.westpoint.edu/attacking-city-razish>; John Spencer, Urban Warfare Project, *Attacking the City of Dara Lam*, MODERN WAR INST., at 24:03-26:39 (July 10, 2020), <https://mwi.usma.edu/attacking-city-dara-lam>.

5. Major Jason D. Young, *Civilian Harm Mitigation and Response Action Plan: Observations from a Combat Training Center*, ARTICLES OF WAR (Apr. 21, 2023), <https://lieber.westpoint.edu/chmr-ap-observations-combat-training-center>.

6. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts arts. 51(4)(b), 57(2)(a)(iii), (2)(b), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

7. *Id.* art. 57(2)(a)(ii).

8. OFF. OF GEN. COUNS., U.S. DEP’T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL 189 (12 June 2015) (C2, 13 Dec. 2016) [hereinafter LAW OF WAR MANUAL];

see also Michael J. Matheson, *Remarks on the United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions at the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law*, 2 AM. U. J. INT’L L. & POL’Y 419, 426-27 (1987) (“We support the principle that all practicable precautions, taking into account military and humanitarian considerations, be taken in the conduct of military operations to minimize incidental death, injury, and damage to civilians and civilian objects, and that effective advance warning be given of attacks which may affect the civilian population, unless circumstances do not permit.”).

9. David Luban, *Opting Out of the Law of War: Comments on Withdrawing from International Custom*, 120 YALE L. J. ONLINE 151 (2010), <http://yalelawjournal.org/forum/opting-out-of-the-law-of-war-comments-on-withdrawing-from-international-custom> (noting that “[a] significant consequence of the rules of [customary international law] is that states train their militaries in them. The United States, which did not ratify Additional Protocol I, nevertheless accepts portions of it as legitimate statements of customary international law and build these rules into its law-of-war training and [judge advocate] practice.”).

10. LAW OF WAR MANUAL, *supra* note 8, at 190.

11. William Fenrick, *Attacking the Enemy Civilian as a Punishable Offence*, 7 DUKE J. COMPAR. & INT’L L. 539, 545 (1997).

12. PROGRAM ON HUMANITARIAN POL’Y & CONFLICT RSCH. AT HARV. UNIV., HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE 98, r. 14 cmt. 7 (2013).

13. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 122 (2004); see also Int’l Crim. Tribunal for the Former Yugoslavia, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia*, 39 I.L.M. 1257, 1271, ¶¶ 48, 50 (June 8, 2000) [hereinafter *Final Report*].

14. For a sense of how the DoD incorporates science into targeting doctrine, see, e.g., JOINT CHIEFS OF STAFF, JOINT PUB. 3-60, JOINT TARGETING, at xiii (31 Jan. 2013) [hereinafter JP 3-60]. See also U.S. DEP’T OF AIR FORCE, DOCTRINE PUB. 3-60 TARGETING ch. 3 (12 Nov. 2021) [hereinafter AFDP 3-60] (noting that “successful dynamic targeting . . . requires a great deal of prior planning . . .”). For an example of how the DoD incorporates science in practice, see Major Kyle David Borne, *Targeting in Multi-Domain Operations*, MIL. REV. May-June 2019, at 60. See also Lieutenant Colonel John Cherry, Squadron Leader Kieran Tinkler & Michael Schmitt, *Avoiding Collateral Damage on the Battlefield*, JUST SECURITY (Feb. 11, 2021), <https://www.justsecurity.org/74619/avoiding-collateral-damage-on-the-battlefield>.

15. See James Kraska, *Command Accountability for AI Weapon Systems in the Law of Armed Conflict*, INT’L L. STUD. 97, 415 (arguing that “some tactical situations pose particularly complex problems that may require exceptionally nuanced trade-offs, special empathy, or choices among seemingly divergent ethics”); see also Anaïs Maroonian, *Contextualization of the Principle of Proportionality in International Humanitarian Law: Criteria and Examples*, ARTICLES OF WAR (Mar. 6, 2023), <https://lieber.westpoint.edu/contextualization-principle-proportionality-ihl-criteria-examples> (describing how the legal principle of proportionality requires a balancing of two competing interests).

16. See, e.g., MICHAEL JOSEPH MCNERNEY ET AL., RAND CORP., UNDERSTANDING CIVILIAN HARM IN RAQQA AND ITS IMPLICATIONS FOR FUTURE CONFLICTS (2022); John Spencer & Jayson Geroux, *Urban Warfare Project Case Study #2- Mosul*, MODERN WAR INST. (Sept. 15, 2021), <https://mwi.usma.edu/urban-warfare-project-case-study-2-battle-of-mosul>.
17. Robin Geiss, *The Principle of Proportionality: Force Protection as a Military Advantage*, 45 ISR. L. REV. 71 (2012).
18. Lieutenant General (Ret.) Charles Pedo & Colonel Peter Hayden, *The Eighteenth Gap: Preserving the Commander's Legal Maneuver Space on "Battlefield Next"*, MIL. REV., Mar.-Apr. 2021, at 6, 7 (arguing that an institutional misunderstanding of the law of war represents a critical "warfighting capability gap" in the U.S. Army and that, "mastery of the law of war may very well mean the difference between victory and defeat").
19. *Id.*
20. MIRANDA PRIEBE ET AL., RAND CORP., MULTIPLE DILEMMAS: CHALLENGES AND OPTIONS FOR ALL DOMAIN COMMAND AND CONTROL 29 (2020).
21. See Major General (Ret.) Charles Dunlap, *Civilian Casualties, Drones, Airstrikes and the Perils of Policy*, WAR ON THE ROCKS (May 11, 2015), <https://warontherocks.com/2015/05/civilian-casualties-drones-air-strikes-and-the-perils-of-policy>.
22. *Hearing to Receive Testimony on the Posture of United States Central Command and United States Africa Command Before the S. Comm. on Armed Servs.*, 117th Cong. 18 (2022) (statement of Gen. Kenneth F. McKenzie, Jr., U.S. Marine Corps, Commander, U.S. Central Command) (stating "Rather than target [Abu Ibrahim al-Hashimi al-Qurayshi] with an airstrike, we accepted increased risk to U.S. forces by launching a raid, expressly planned to separate noncombatants in the objective area from the ISIS leader and his subordinates."); see also Tactical Directive from Headquarters, Int'l Sec. Assistance Force, Kabul, Afghanistan (6 July 2009) [hereinafter 2009 Tactical Directive] ("I recognize that the carefully controlled and disciplined employment of force entails risk to our troops.").
23. Stefano D'urso & David Cenciotti, *U.S. MH-60M Helicopter Used in Raid to Kill ISIS Leader in Syria Blown Up on the Ground by U.S. Forces*, THE AVIATIONIST (Feb. 3, 2022), <https://theaviationist.com/2022/02/03/u-s-mh-60m-helicopter-used-in-raid-to-kill-isis-leader-in-syria-blown-up-on-the-ground-by-u-s-forces>.
24. MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 157 (2015) (arguing that "it is a state's duty to accept greater risks for its own military forces as a means to limit harm to noncombatants in the course of armed conflict").
25. Michael N. Schmitt & Sean Watts, *State Opinio Juris and International Humanitarian Law Pluralism*, 91 INT'L L. STUD. 171, 173 (2015).
26. LAW OF WAR MANUAL, *supra* note 8, § 1.4.2.1.
27. *Id.* U.S. nuclear weapons policy supports the conclusion that even "extensive" incidental harm may not be "excessive." See, e.g., Written Statement of the Government of the United States of America, Legality of Threat or Use of Nuclear Weapons (Request for Advisory Opinion) (June 20, 1995), 95 I.C.J. 23 ("Whether an attack with nuclear weapons would be disproportionate depends entirely on the circumstances, including the nature of the enemy threat, the importance of destroying the objective, the character, size and likely effects of the device, and the magnitude of the risk to civilians. Nuclear weapons are not inherently disproportionate.").
28. Luke A. Whittemore, *Proportionality Decision Making in Targeting: Heuristics, Cognitive Biases, and the Law*, 7 HARV. NAT'L SEC. J. 577, 578 (2015) (noting that "few writers have sought to explain and predict how those commanders actually make decisions as human beings limited by their cognitive capacities in a suboptimal decision-making environment").
29. Patrick Tomlin, *Subjective Proportionality*, ETHICS, Jan. 2019, at 254.
30. Michael Short, *Operation Allied Force from the Perspective of the NATO Air Commander*, in LEGAL AND ETHICAL LESSONS OF NATO'S KOSOVO CAMPAIGN, 78 INT'L L. STUD. 19, 24 (2002); see also *Final Report*, *supra* note 13, ¶ 19 ("[S]triking an ammunition depot or a terrorist training camp would not be prohibited because a farmer is plowing a field in the area. On the other hand, a very significant military advantage would be necessary to justify the collateral death or injury to thousands of civilians."); see also Wesley K. Clark, *No Formulas: Bosnia, Haiti, and Kosovo*, in COMMANDING HEIGHTS: STRATEGIC LESSONS FROM COMPLEX OPERATIONS 49 (Michael Miklaucic ed., 2010) [hereinafter COMMANDING HEIGHTS]; Timothy Cross, *The Balkans Revisited: Kosovo, 1999*, in COMMANDING HEIGHTS, *supra* at 55. NATO forces intentionally bombed the central studio of the state-owned broadcasting corporation in Belgrade to disrupt command, control, and communications and attacked radio relay buildings, towers, and electrical power transformer stations. *Final Report*, *supra* note 13, ¶ 72; Judith A. Miller, *Commentary*, 78 INT'L L. STUD. 107, 110 (2002). During Operation Allied Force, General Clark unapologetically assumed responsibility for "inevitable accidents and collateral damage," including an inadvertent strike on the Chinese embassy, which he believed were lawful in relation to the military advantages gained by striking these targets from the air. Clark, *supra* at 53.
31. Thomas E. Ricks, *Target Approval Delays Irk Air Force Officers*, WASH. POST (Nov. 18, 2001), <https://www.washingtonpost.com/wp-srv/nation/Airwar18.html>; see also Michael N. Schmitt, *Target Approval Delays Cost Air Force Key Hits: Law, Policy, Ethics and the Warfighter's Dilemma*, 1 J. MIL. ETHICS 113 (2002); Anais Maroonian, *Proportionality in International Humanitarian Law: A Principle and a Rule*, ARTICLES OF WAR (Oct. 24, 2022), <https://lieber.westpoint.edu/proportionality-international-humanitarian-law-principle-rule> (describing how the principle of proportionality invites highly open-ended legal inquiries).
32. See Schmitt, *supra* note 31.
33. MARK F. CANCELAN ET AL., CTR. FOR STRAT. & INT'L STUDS., THE FIRST BATTLE OF THE NEXT WAR WARGAMING A CHINESE INVASION OF TAIWAN 3-4 (2023) (arguing that "delays and half measures by the United States would make the defense [of Taiwan] harder, increase U.S. casualties, allow China to create a stronger lodgment, and raise the risk of escalation").
34. DAVID C. GOMPERT ET AL., RAND CORP., WAR WITH CHINA: THINKING THROUGH THE UNTHINKABLE 34 (2016).
35. Milford Beagle et al., *The Graveyard of Command Posts*, MIL. REV., May-June 2023, at 10.
36. See CANCELAN ET AL., *supra* note 33, at 3.
37. See Glenn M. Sulmasy, *The Law of Armed Conflict in the Global War on Terror: International Lawyers Fighting the Last War*, 19 NOTRE DAME J. L., ETHICS & PUB. POL'Y 309 (2005) (describing the tendency among military leaders and international lawyers to apply obsolete legal principles from previous conflicts to present fights and future scenarios).
38. Joshua W.M. Bunte, *Exploring Organizational Factors Influencing the Moral-Self of U.S. Navy Commanding Officers 146-47* (2018) (Ph.D. dissertation, Northcentral University) ("According to one rear admiral (lower half) with 38 years of service and ten operational deployments in the surface warfare community, 'most guys are quick to give their life for their country, but not their job for a moral dilemma.'").
39. OFF. OF DIR. OF NAT'L INTEL., THE FUTURE OF THE BATTLEFIELD (2021) [hereinafter FUTURE OF THE BATTLEFIELD].
40. See, e.g., TERRENCE K. KELLY ET AL., RAND CORP., EMPLOYING LAND-BASED ANTI-SHIP MISSILES IN THE WESTERN PACIFIC (2013).
41. WAYNE P. HUGHES & ROBERT GIRRIER, FLEET TACTICS AND NAVAL OPERATIONS (2018) (ebook).
42. CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3160.01D, NO-STRIKE AND THE COLLATERAL DAMAGE ESTIMATION METHODOLOGY (21 May 2021) (CUI).
43. See Jim Garamone, *Trump Orders Missile Attack in Retaliation for Syrian Chemical Strikes*, U.S. DEP'T OF DEF. (Apr. 6, 2017), <https://www.defense.gov/News/News-Stories/Article/Article/1144601/trump-orders-missile-attack-in-retaliation-for-syrian-chemical-strikes>.
44. For an explanation of these tools, see DIR., OPERATIONAL TEST & EVALUATION, FY 2021 ANNUAL REPORT 267-73 (2021).
45. ROBBIN F. LAIRD, TRAINING FOR THE HIGH-END FIGHT: THE STRATEGIC SHIFT OF THE 2020s (2021). In accordance with Joint Publication 3-60, *Joint Targeting*,
- The targeting process can be generally grouped into two categories: deliberate and dynamic. Deliberate targeting normally supports the joint force's future plans effort, which is overseen by the plans directorate of a joint staff. Normally, the future operations directorate focuses on 24 hours out to 72 hours. This is a critical linkage during targeting execution. Dynamic targeting is normally employed in current operations planning because the nature and time frame associated with current operations (usually the current 24-hour period) typically require[] more immediate responsiveness than is achieved in deliberate targeting.
- JP 3-60, *supra* note 14 at II-1.
46. Scott Graham, *The Non-Combatant Casualty Cut-off Value: Assessment of a Novel Targeting Technique in Operation Inherent Resolve*, INT'L CRIM. L. REV., 2018, at 1, 26 (concluding that the NCV methodology is a strategically and legally sound measure to control target engagement and mitigate civilian casualties).
47. Frank Wolfe, *Pentagon Removed Non-Combatant Casualty Cut-Off Value From Doctrine in 2018*, DEF. DAILY (June 11, 2021), <https://www.defensedaily.com/pentagon-removed-non-combatant-casualty-cut-off-value-doctrine-2018/pentagon>; see also MILAN VEGO, JOINT OPERATIONAL WARFARE: THEORY AND PRACTICE III-25 (2009) (noting that, "computers . . . cannot replace the human mind and the skills and experience of operational commanders and their staffs"); U.S. DEP'T OF DEF., INSTR. 3000.09, AUTONOMY IN WEAPONS SYSTEMS (25 Jan. 2023); Jeffrey S. Thurner, *No One at Controls: Legal Implications of Fully Autonomous Targeting*, JOINT FORCE Q., 4th Quarter, 2012, at 77 (establishing that human

operators will retain control over kinetic targeting decisions for the foreseeable future).

48. See, e.g., Guy Faulconbridge, *Ukraine War, Already with up to 354,000 Casualties, Likely to Last Past 2023 – U.S. Documents*, REUTERS (Apr. 12, 2023), <https://www.reuters.com/world/europe/ukraine-war-already-with-up-354000-casualties-like-drag-us-documents-2023-04-12>; see also Michael Beckley & Hal Brands, *What Will Drive China to War?*, THE ATLANTIC (Nov. 1, 2021), <https://www.theatlantic.com/ideas/archive/2021/11/us-china-war/620571> (“Tamping or reversing Chinese aggression in the Western Pacific could require a massive use of force.”).

49. Evans, *supra* note 1, at 31.

50. See, e.g., Dmitry Filipoff, *Fighting DMO, Part 1: Defining Distributed Maritime Operations and the Future of Naval Warfare*, CTR. FOR INT’L MARITIME SEC. (CIMSEC) (Feb. 20, 2023), <https://cimsec.org/fighting-dmo-pt-1-defining-distributed-maritime-operations-and-the-future-of-naval-warfare>; see also Scott Pence, *Fighting as Intended: The Case for Austere Communications*, JOINT FORCE Q., 3d Quarter, 2021, at 4, 8 (describing a “communications-denied operational environment” as the convergence of anti-space, electronic warfare, cyber warfare, and information warfare effects).

51. See Yusuke Saito, *Reviewing Law of Armed Conflict at Sea and Warfare in New Domains and New Measures: Submarine Cables, Merchant Missile Ships, and Unmanned Marine Systems*, 44 TUL. MAR. L.J. 107, 120 (2019) (noting that “the extensive practice of deception in the past has significantly affected the safety of peaceful shipping”); see also H.I. Sutton, *This Is What a Chinese Stealth Warship Looks Like on Radar*, USNI NEWS (Sept. 27, 2021), <https://news.usni.org/2021/09/27/this-is-what-a-chinese-stealth-warship-looks-like-on-radar>; Chris Parry, *Maritime Operations and Missions: The Falklands Case*, in FROM THE NORTH ATLANTIC TO THE SOUTH CHINA SEA 323, 335 (Julian Pawlak & Johannes Peters eds., 2021) (noting that “the proliferation of high-end modular weapons and sensor systems in an increasing diversity of civilian platforms will further complicate ISTAR (Intelligence, Surveillance, Target Acquisition and Reconnaissance) functions”); FUTURE OF THE BATTLEFIELD, *supra* note 39, at 4 (describing how GPS spoofing misdirects platforms); see, e.g., Brett Tingley, *Scores of ‘Dark Vessels’ Belonging to China’s Maritime Militias are Operating in Contested Waters*, THE DRIVE (Feb. 22, 2022), <https://www.thedrive.com/the-war-zone/44390/scores-of-dark-vessels-belonging-to-chinas-maritime-militias-are-operating-in-contested-waters>.

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63. See J06 Office of the Staff Judge Advocate, U.S. INDO-PACIFIC COMMAND, <https://www.pacom.mil/Contact/Directory/J0/J06-Staff-Judge-Advocate> (last visited Oct. 22, 2024).

64. Martins, *supra* note 57, at 90-91 (noting that by 1993, soldiers in Somalia were conducting regular, scenario-based ROE training in anticipation of similarly complex targeting problems).

65. 2009 Tactical Directive, *supra* note 22, at 1.

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