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Article

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Indiscriminate attacks and the proportionality rule: what is incidental civilian harm?

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Abstract

Proportionality in the law of armed conflict imposes an absolute ceiling on the level of incidental civilian harm that an attack may be expected to cause. Despite its importance, surprisingly little attention has been paid so far to the notion of 'incidentality', in other words, to what it means for civilian harm to be incidental in nature. According to what we might call the Lesser Effect Thesis, civilian harm qualifies as incidental only if it is a mere side consequence of the attack, rather than its main or prevalent effect. Proponents of this approach suggest that where an attack is expected to affect a larger number of civilians or civilian objects compared to the number of military objectives, the civilian harm would become prevalent and therefore cannot be considered incidental in nature. The proportionality rule would not apply in these circumstances, and conducting such an attack would be outright indiscriminate. The purpose of this article is to explain why this interpretation amounts to a radical re-reading of proportionality that does not reflect the law, contradicts State practice, and is operationally unsound. Applying the rules of treaty interpretation, the article shows that civilian harm is incidental in nature when it constitutes the fortuitous and undesired consequence of an attack directed against a military objective and that the term 'incidental' as used in the law of armed conflict does not imply a relationship of proportion.

Introduction

On its face, proportionality in the law of armed conflict is straightforward.[1] The rule imposes a maximum ceiling on incidental civilian harm by stipulating that such harm must not be excessive in relation to the concrete and direct military advantage anticipated from an attack.[2] However, on closer inspection, a series of questions emerge. These include how

[1] arts 51(5)(b), 57(2)(a)(iii) and 57(b), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 8 June 1977, 1125 UNTS 3. The rule prohibits attacks 'which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'.

[2] Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martin Nijhoff 1987), 683 (proportionality contributes to determining 'where the limits lie').

the two limbs of the rule—incidental civilian harm and military advantage—should be quantified and compared, at what point the level of incidental civilian harm crosses the threshold of excessiveness and whether the rule extends to other categories of protected persons and objects beyond civilians and civilian objects. These and a host of other questions about the meaning and application of proportionality in the law of armed conflict have been debated at length for some time.[3]

In a recent issue of this Journal, Dr Luigi Daniele has made an important intervention into these debates in the form of an article focusing on 'incidentality', that is, the requirement for civilian harm to be incidental in character so as to fall within the ambit of the proportionality rule.[4] This topic has been somewhat neglected in the literature, and for this reason alone, Dr Daniele's work merits careful attention.[5] In a nutshell, the article argues in favour of what we might call the Lesser Effects Thesis. This suggests that civilian harm qualifies as incidental within the meaning of the proportionality rule only if it is expected to be the lesser effect of an attack, rather than its prevalent outcome. Taken to its logical conclusion, the Lesser Effects Thesis, as formulated by Dr Daniele, declares that attacks which are expected to impact a similar or higher number of civilians and civilian objects than the number of military objectives targeted cannot be considered to cause *incidental* civilian harm and therefore fall outside the scope of the proportionality rule. This interpretation is open to a range of objections, for both legal and operational reasons. The purpose of this article is to explore these points and to offer a reading of incidentality that is more firmly anchored in the law and State practice.

Since the bulk of my article revolves around disagreements, it is appropriate to underline that there is some common ground to share as well. Proportionality is not a self-standing norm, but forms part of a sequence of standards that govern targeting.[6] One does not get to proportionality unless the principle of distinction is first observed.[7] Nor is proportionality the end of the matter, as precautionary duties require belligerents to take all feasible precautions in their choice of means and methods of attack 'with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects'.[8] Dr Daniele is right to highlight how the prohibition against the use of human shields can be distorted into shifting blame for civilian casualties onto an adversary.[9] Similarly, whatever their moral merits, arguments that introduce considerations of citizenship or allegiance into the proportionality analysis are not compatible with the law as it stands,[10] as the rule does not admit such considerations.[11] Finally, he rightly suggests that

[3] For further unsettled questions, see Ben Clarke, 'Proportionality in Armed Conflicts: A Principle in Need of Clarification' (2012) 3 Journal of International Humanitarian Legal Studies 73–123. Among the rich body of work on proportionality, see, by way of recent examples, Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (2nd edn, Edward Elgar 2024) 388–93; Jeroen van den Boogaard, *Proportionality in International Humanitarian Law: Refocusing the Balance in Practice* (CUP 2023); Amichai Cohen and David Zlotogorski, *Proportionality in International Humanitarian Law: Consequences, Precautions, and Procedures* (OUP 2021).

[4] Luigi Daniele, 'Incidentality of the Civilian Harm in International Humanitarian Law and its *Contra Legem* Antonyms in Recent Discourses on the Laws of War' (2024) 29 Journal of Conflict and Security Law 21–54.

[5] It is symptomatic that two recent books on proportionality, van den Boogaard (n 3) and Cohen and Zlotogorski (n 3), deal with the matter only in a cursory manner, without offering any detailed analysis of the subject. Despite focusing on incidental harm, the meaning of incidentality is not discussed in depth either by Emanuela-Chiara Gillard, 'Some Reflections on the "Incidental Harm" Side of Proportionality Assessments' (2018) 51 Vanderbilt Journal of Transnational Law 827–34.

[6] Daniele (n 4) 27–28. See also Sandoz, Swinarski and Zimmermann (n 2) 683.

[7] art 48, Additional Protocol I.

[8] art 57(2)(a)(ii), Additional Protocol I.

[9] Daniele (n 4) 29–32.

[10] ibid 32–34. In addition to the literature cited ibid, see also Asa Kasher and Amos Yadlin, 'Military Ethics of Fighting Terror: An Israeli Perspective' (2005) 4 Journal of Military Ethics 3–32.

[11] Ian Henderson, *The Contemporary Law of Targeting: Military Objectives, Proportionality and Precautions in Attack under Additional Protocol I* (Martinus Nijhoff 2009) 227–29.

it is indefensible to selectively propose certain interpretations of the law of armed conflict for some conflicts, but not for others: the same rules and principles apply across different theatres and conflicts.[12] The present article will not engage with these points in further detail. Nor will it engage with certain other matters where there may be less common ground, including the question of whether complex structures consisting of multiple components, in particular high-rise buildings, qualify as single objects in their entirety or not.[13] The answer to this question has important implications for the application of the proportionality rule, but it is not essential to revisit this controversy in detail here to discuss incidentality.[14]

This article proceeds in five steps. It begins by offering some preliminary observations about the interpretation of the law of armed conflict at the intersection between humanitarian considerations and military necessity. Next, it traces the evolution of the principle of distinction over the course of the past century and identifies two competing approaches for defining indiscriminate attacks, the first focusing on outcomes and the second on intentions. The article then turns to Additional Protocol I (AP I) to explain how its drafters developed the emerging notion of indiscriminate attacks and why different types of indiscriminate attacks are prohibited by the Protocol for different reasons. The next section clarifies the meaning of incidentiality. It determines how deliberate effects and incidental harm should be distinguished from one another, identifies four different forms that incidental civilian harm may take, establishes the meaning of the term 'incidental' by applying the rules of treaty interpretation and explains why the idea that incidental civilian harm must be the lesser element of an attack is doctrinally unconvincing, unsupported by the law and operationally unsustainable. The article ends with some concluding thoughts, suggesting that efforts to reinforce the law of armed conflict are better served by focusing on precautionary obligations.

Readings and re-readings of the law

Proportionality is one of the principal targeting rules of the law of armed conflict. Its importance derives from the fact that it aims to protect civilians and civilian objects from harm they may suffer as a result of attacks directed against lawful military objectives. Given the extent to which civilians and civilian objects have come to bear the burden of contemporary warfare, it is essential to safeguard the rule from overly expansive

[12] Preamble, Additional Protocol I (declaring that the rules must be 'applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict').

[13] Daniele (n 4) 43–46.

[14] Suffice it to say that Dr Daniele does not address the key question that multi-component structures pose: whether or not they should be treated as a single object when their functionally distinct components are *structurally co-dependent*. Flats forming part of a high-rise residential building are a paradigmatic example. In situations where hostile forces only use a single flat located on a top floor, that flat may be functionally separate from the rest of the building, but it does not stay up in the air on its own. It remains in place because it is supported by, and as such is structurally co-dependent on, the building as a whole. In such cases, it is the overall structure, not just its individual component parts, which constitutes the 'object' within the meaning of art 52(2) of Additional Protocol I, much in the same way as the engine or wheels of a car are merely component parts of the vehicle to which they belong, even though it is possible to individually identify them as functionally distinct parts. In any event, unless the hostile forces in our example access the flat through teleportation or some similar method, they will have to make use of the staircase or elevator of the building, together with other shared spaces and services, to gain entry to the flat and to use it for their operations. If the flat qualifies as a distinct military objective, other spaces and objects used by the hostile forces must be capable of qualifying as military objectives for the same reasons, even on the basis of Dr Daniele's position. It should be emphasized that recognizing multi-component structures like a high-rise building as a single object does not displace the applicability of the proportionality rule to objects that are present inside the building, provided that these do not constitute structurally co-dependent parts of the latter and do not themselves qualify as military objectives. But see the position of Danish Ministry of Defence, *Military Manual on International Law Relevant to Danish Armed Forces in International Operations* (Defence Command Denmark 2016) 294 ('small objects contained within a large object are normally regarded as part of the object'). Obviously, any civilians inside the building are not a part of that structure and will have to be accounted for separately in any proportionality assessment.

interpretations or 'permissive re-translations', as Dr Daniele puts it.[15] The International Committee of the Red Cross (ICRC) shares these concerns, warning that certain interpretations of proportionality put forward in recent years may render civilian casualties more acceptable by defining '"military advantage" with increasing generosity while simultaneously excluding long-term, reverberating effects from the notion of "incidental harm"'.[16]

When discussing proportionality, it is useful to recall that the rule speaks not just to the protection of civilians and civilian objects but also to the inevitable consequences of war, as does the law of armed conflict more generally. The essence of war is combat.[17] Experience shows that it is virtually unavoidable that civilians should suffer some of the adverse effects of warfare.[18] Rules that ignore the need to protect civilians from the consequences of war sell short the moral imperative of preserving human life and dignity during conflict. However, rules that do not accept that some measure of civilian harm is inevitable in the conduct of military operations may end up imposing demands on belligerents that they cannot reconcile with prevailing over their enemies.

The resulting need for a compromise between imposing restraints on military operations and maintaining freedom of action is often described in terms of a balance between humanity and military necessity.[19] However, a framing that paints humanity and military necessity as polar opposites pulling in entirely different directions overlooks the fact that what is at stake here is the effectiveness of the law itself. It should be self-evident that in an ideal world, an utmost of humanitarian protection would be the most desirable position to take. But we do not live in an ideal world: wars happen. Rules that extend protections to the point where compliance with them would seriously jeopardize a belligerent's ability to prevail on the battlefield are unlikely to command respect. When pushed to choose between compliance at the cost of defeat or survival at the cost of non-compliance, it is difficult to see States, their armed forces, and individual combatants embracing the former option, however noble it might be. Humanity and military necessity are therefore not simply locked into a zero-sum relationship. It is necessary for the law of armed conflict to admit some considerations of military necessity to create the space to uphold principles of humanity. The legal regulation of warfare is therefore not a matter of absolutes, but a question of compromises: there is danger both in a lack of protective ambition and in unbridled humanitarian zeal.[20]

That these are not just abstract contemplations, but debates exercising the minds of State representatives, is shown by the drafting history of the proportionality rule in AP I. At the Geneva diplomatic conference, several nations argued strongly against introducing or codifying any rule of proportionality on the grounds that doing so would, in essence, permit

[15] Daniele (n 4) 25.

[16] International Committee of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Building a Culture of Compliance for IHL to Protect Humanity in Today's and Future Conflicts* (Geneva, 2024), 8.

[17] Carl von Clausewitz, *On War* (Princeton University Press 1976) 605.

[18] That civilians will suffer *some* harm is inevitable, but what harm and to what extent is not necessarily beyond human agency. eg see Neta C Crawford, *Accountability for Killing: Moral Responsibility for Collateral Damage in America's Post-9/11 Wars* (OUP 2013) 157.

[19] See Michael N Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' (2010) 50 Virginia Journal of International Law 795–839. Military necessity is generally understood as a permissive principle that 'permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money'; see *Trial of Wilhelm List and Others (Hostages Trial)* (1946) 8 Law Reports of Trials of War Criminals 34 (United States Military Tribunal), 66. In contrast, humanity is often portrayed as tempering the full effect of military necessity; eg Saint Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, 11 December 1868, (1867–1868) 58 British and Foreign State Papers 16 (referring to the point 'at which the necessities of war ought to yield to the requirements of humanity').

[20] cf Charles P Trumbull IV, 'Proportionality, Double Effects, and the Innocent Bystander Problem in War' (2023) 59 Stanford Journal of International Law 35–73, 69–72 (arguing that proportionality does not necessarily yield morally permissible results in individual cases, but should nevertheless be valued as a compromise that limits the scope of war and promotes 'ethical and humanitarian objectives at the systemic level in war').

'attacks causing loss of human life among the civilian population' and thereby weaken other provisions for 'the protection of the civilian population against the effects of hostilities'.[21] Other countries noted the uncertain character of the draft proportionality rule proposed by the ICRC and either suggested deleting it altogether[22] or at least narrowing it down to render it more precise.[23] A third group of nations was alive to the danger that the rule might be abused, but argued that an absolute prohibition of all incidental civilian harm 'would result in a very difficult situation',[24] given that in many battlefield situations, military objectives, the civilian population, and civilian objects were closely interspersed. As it was difficult to envisage a party refraining from an attack in such circumstances, these States suggested that an absolute prohibition would be unrealistic. Instead, it was preferable to lay down certain limits in the interest of protecting civilians, rather than leave the matter unaddressed.[25] Eventually, agreement was reached to include the proportionality rule as we know it today in AP I once the negotiating parties agreed to subject its operation to the precautionary duties now found in Article 57 of AP I.[26]

Pragmatism prevailed. The need for pragmatism was not lost on the ICRC either. As one of its representatives explained during the negotiations,

> the ICRC constantly had to bear in mind the fact that the ideal was the complete elimination in all circumstances of losses among the civilian population. But to formulate that ideal in terms of an impracticable rule would not promote either the credibility or the effectiveness of humanitarian law. In order to establish a balance between the various factors involved, the ICRC was proposing a limited rule the advantage of which was that it could be observed.[27]

Why recall these points here at some length?

In embarking on his interpretative effort to clarify the meaning of incidentality,[28] Dr Daniele adopts as his guiding principle the idea, originally formulated by Dr Alonso Gurmendi,[29] that 'the unapologetic protection of civilians, not the balance between necessity and humanity, should be the main focus of a modern re-reading' of the law of armed conflict.[30] The 'unapologetic protection of civilians' is *not* what the law of armed conflict

21 See Annex to the Summary Record of the Forty-Second Plenary Meeting, 27 May 1997, CDDH/SR.42, in Federal Political Department, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, VI (Bern, 1978) 219, 236 (Romania); Summary Record of the Seventh Meeting, 18 March 1974, CDDH/III/SR.7, in Federal Political Department, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, XIV (Bern, 1978) 51, 54 (Iraq), 56 (German Democratic Republic) and 56–57 (Arab Republic of Egypt); Summary Record of the Eighth Meeting, 19 March 1974, CDDH/III/SR.8, in ibid 59, 61 (Poland, Democratic People's Republic of Korea, Uganda); Summary Record of the Ninth Meeting, 20 March 1974, CDDH/III/SR.9, in ibid 71, 74 (Switzerland); Summary Record of the Twelfth Meeting, 26 March 1974, CDDH/III/SR.12, in ibid 89, 93 (Mongolia); Summary Record of the Twenty-First Meeting, 17 February 1975, CDDH/III/SR.21, in ibid 181, 183 (Romania), 188 (Mauritania), 193 (Viet Nam); Summary Record of the Thirty-First Meeting, 14 March 1975, CDDH/III/SR.31, in ibid 299, 305 (Romania).

22 eg Summary Record of the Eighth Meeting (n 21) 59, 69 (Hungary, Czechoslovakia).

23 eg ibid (n 21) 59, 59–60 (Norway), 60 (Sweden); Summary Record of the Twenty-First Meeting (n 21) 181, 191 (Sweden).

24 Summary Record of the Seventh Meeting (n 21) 51, 55 (Canada).

25 ibid and Summary Record of the Seventh Meeting (n 21) 51, 62 (Australia); Summary Record of the Twenty-First Meeting (n 21) 181, 185 and 191–92 (Australia), 187 (United Kingdom), 193–94 (USA).

26 Second Session (Geneva, 3 February–18 April 1975), Committee III Report, CDDH/215/Rev.l in Federal Political Department, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, XV (Bern, 1978) 259, 285. See also Report to Committee III on the Work of the Working Group, CDDH/III/224 in ibid 327, 330.

27 Summary Record of the Twenty-First Meeting (n 21) 181, 183 (ICRC).

28 Daniele (n 4) 21.

29 Alonso Gurmendi, 'The Rabbit Hole, from Antwerp to Gaza' (*Opinio Juris*, 19 May 2021), <http://opiniojuris.org/2021/05/19/the-rabbit-hole-from-antwerp-to-gaza/> accessed 9 May 2024.

30 Daniele (n 4) 28.

is about, for better or for worse, as the negotiating history of the proportionality rule itself demonstrates. The single-minded prioritization of humanity over all other considerations reflects neither the spirit nor the terms of the law of armed conflict as it currently exists, but involves a deliberate 're-reading' of the rules, as Dr Gurmendi's formula readily acknowledges. This is not to suggest that a radical re-reading along these lines is somehow an illegitimate enterprise; each to their own. But it does raise the question to what extent such interpretative efforts are grounded in the *lex lata* or whether they roam more freely into the domain of the *de lege ferenda*.

Of course, these categories are fluid. One way in which the law develops is through the reinterpretation of existing rules, including in an effort to reconcile them with changing sensitivities and other societal developments. More often than not, the construction of legal meaning does not involve establishing truth in the form of the single correct reading, but requires separating tenable from untenable arguments and determining which of the tenable ones are more compelling. In all of this, the line between *lex lata* and *de lege ferenda* necessarily becomes somewhat blurred.

Still, these categories have meaning. Dr Daniele develops his own arguments in opposition to what he calls military-friendly re-translations, misinterpretations, misconceptions, legal fictions, expansive readings, circumventions, conceptual distortions, aporetic constructions, minimalist interpretations, and *contra legem* inversions.[31] No doubt such things exist. But these labels all suggest that Dr Daniele is taking issue with positions he believes diverge from what the law really is. Here, his article might have proceeded with greater caution. While it is right to draw attention to the significance of incidentality and to dismiss as untenable positions that ignore its role in the application of the proportionality rule, it is less rigorous in identifying, within the parameters of the rules of treaty interpretation,[32] the meaning of incidentality as that term is used in AP I. This matters because what, from the perspective of an 'unapologetic protection of civilians', is bound to look like a military-friendly position may, in fact, be one tempered by pragmatism, reflect perfectly tenable or even compelling understandings of the law, and be supported by established State practice. Again, there is nothing untoward in interrogating the compromises that underpin the existing rules, but it does mean that the shoe might be on the other foot: it is not the supposedly military-friendly practices that may be diverging from the law, but the interpretations offered by unapologetic re-readings of the rules.

Proportionality and indiscriminate attacks

The core idea behind the Lesser Effects Thesis is that harm inflicted on civilians and civilian objects by an attack directed against a lawful military objective qualifies as *incidental* only if it is expected to be the lesser effect of the attack compared to its impact on the intended target.[33] Where the effect on civilians or civilian objects is not merely an incidental or side consequence of the attack, but is foreseen to be its prevalent outcome, the attack does not fall within the scope of the proportionality rule. According to Dr Daniele, this is so because in such cases 'protected persons and objects (particularly in cases of virtually certain civilian harm) become joined to the lawful targets, falling entirely under the scope of the prohibition of indiscriminate attacks'.[34] In other words, an attack that affects civilians or civilian objects in equal or greater measure is not subject to a proportionality assessment, but is indiscriminate to begin with.

According to Dr Daniele, civilian harm is incidental provided that (i) it is not pursued as the main result of the attack; (ii) is a foreseeable rather than an almost certain consequence;

[31] ibid, 25, 33, 37, 40, 42, 43, 45, 50, 52.
[32] arts 31 and 32, Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 332.
[33] Daniele (n 4) 40.
[34] ibid.

and (iii) is not expected to impact civilians or civilian objects directly and in larger numbers than the number of lawful targets prosecuted in the attack.[35] Dr Daniele suggests that, by contrast, attacks which are expected to cause civilian harm as their prevalent outcome (what he calls the 'objective element') and are expected to do so with near certainty (the 'prognostic element') cannot be said to pursue (the 'volitional element') harm that is merely incidental.[36] Put differently, whether or not civilian harm is incidental is a matter of objective assessment—based on the quantity of the civilian persons and objects affected (which must be less than the number of military objectives targeted), the manner in which they suffer harm (which must be indirect and secondary) and the level of foreseeability (which cannot be virtually certain)—and ultimately does not depend on the subjective will of the belligerent.

The targeting rules of the law of armed conflict have evolved dramatically over the course of the past century. To better understand the relationship between proportionality and other types of indiscriminate attacks, and why the Lesser Effects Thesis, as presented by Dr Daniele, misconstrues that relationship, it is useful to briefly recall the development of the rules that now feature in AP I.

Distinction in land and naval warfare

The duty to distinguish between the adversary's armed forces and its civilian population is a long-standing principle of the modern laws of war.[37] Traditionally, belligerents were entitled to kill, disable, or capture members of hostile forces and to destroy or capture their military materiel and fortifications through all methods and means not specifically prohibited. In contrast, members of the civilian population who did not engage in hostilities had to be spared.[38]

Beyond these general principles, the laws of land warfare followed a different logic when it came to sieges, bombardment, and assaults. The rules distinguished between undefended and defended localities. Undefended localities offered no resistance to advancing forces and were open to occupation. Subjecting them to attack was unnecessary and hence unlawful.[39] In contrast, defended localities were liable to sieges, bombardment, and assaults in their entirety. Although the law required attacking forces to take all necessary steps to spare, as far as possible, buildings dedicated to art, science, or charitable purposes, hospitals, and places where the sick and wounded were collected,[40] other civilian structures found in defended localities did not benefit from such protections. As the *Manual of Military Law* published by the British War Office in 1914 explained:

> No legal duty exists for the attacking force to limit bombardment to the fortifications or defended border only. On the contrary, destruction of private and public buildings by

[35] ibid 41–42.

[36] ibid 42.

[37] eg Emer de Vattel, *Le droit des gens, ou Principes de la loi naturelle, appliqués à la conduite et aux affaires des nations et des souverains* (Carnegie Institution, Washington, 1758), Bk III, Ch VIII, §§ 139 and 145; Henry Wager Halleck, *International Law or Rules Regulating the Intercourse of States in Peace and War* (Van Nostrand, New York, 1861), Ch XVIIII, §§ 1–2; Johann Caspar Bluntschli, *Das moderne Völkerrecht der Civilisirten Staten als Rechtsbuch dargestellt* (C. H. Beck 1868), §§ 530–31, 568, 573–74.

[38] eg arts 15 and 22, Instructions for the Government of Armies of the USA in the Field (Lieber Code), 24 April 1863.

[39] art XV, Project of an International Declaration Concerning the Laws and Customs of War, Adopted by the Conference of Brussels, 27 August 1874, in Foreign Office, *British State and Foreign Papers 1873–1874*, Vol 65 (Ridgway 1881) 1059; art 25, Hague Convention II with Respect to the Laws and Customs of War on Land and its Annex, 29 July 1899, in Foreign Office, *British State and Foreign Papers 1898–1899*, Vol 91 (Ridgway 1902) 988; art XXV, Hague Convention IV respecting the Laws and Customs of War on Land and its Annex, 18 October 1907, in Foreign Office, *British State and Foreign Papers 1906–1907*, Vol 100 (Ridgway, London, 1911) 338. cf Lassa Oppenheim, *International Law: A Treatise (War and Neutrality)*, Vol II (Longmans Green and Co. 1906), § 253(9).

[40] art XVII, Project of an International Declaration Concerning the Laws and Customs of War (n 39); art 27, Hague Convention II (1899) (n 39); art 27, Hague Convention IV (1907) (n 39).

bombardment has always been, and still is, considered lawful, as it is one of the means to impress upon the local authorities the advisability of surrender.[41]

This locality-based approach to distinction required some modification in the maritime domain. Warships capable of bombarding the coast typically were not able to land troops to occupy ports and other localities on shore. Accordingly, ports and other places of importance along the shoreline could declare themselves to be undefended so as to immunize themselves from naval bombardment without having to fear occupation.[42] One obvious answer to this difficulty was to uphold the principle that undefended localities were not liable to naval bombardment in their entirety, but to entitle warships to attack specific points of military value present in those places, such as naval shipyards, munitions depots, and other warships.[43]

This exact solution of distinguishing between lawful targets and protected objects on a more granular level was adopted by the Second Hague Peace Conference in 1907. Hague Convention IX concerning Bombardment by Naval Forces in Time of War prohibits the bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings, but excludes from this prohibition the bombardment of certain objects of military value.[44] Importantly, Article 2 of the Convention provides that the commander of a naval force who proceeds to destroy such objects with artillery fire 'incurs no responsibility for any unavoidable damage which may be caused by a bombardment under such circumstances', though he must take 'all due measures in order that the town may suffer as little harm as possible'.[45] In drafting these provisions, the delegates at the Peace Conference agreed that naval fire had to be aimed exclusively at points liable to attack and that any unavoidable damage caused by the bombardment 'outside these limits' was borne by the local population and was not the responsibility of the force commander.[46]

Whereas translations of Article 2 of Hague Convention IX into English refer to 'unavoidable damage', the original French version of the text used the phrase 'dommages involontaires',[47] as did the delegates during the drafting process. Clearly, any 'dommages involontaires' caused by naval bombardments are 'involuntary' not in the sense that they do not involve the exercise of free will or that the damage is not foreseen and accepted as a real possibility. On the contrary: a naval commander obviously must apply his will to order his forces to open fire on objects located on shore and he must also expect that doing so may inflict harm on the local population, not least given his obligation under Article 2 of Hague Convention IX to take all due measures to keep that harm to a minimum. Bearing in mind that the delegates at the Peace Conference were in agreement that naval fire had to be aimed exclusively at legitimate military targets,[48] 'dommages involontaires' must therefore refer to damage that is caused to civilian persons or objects not targeted directly and is

41 War Office, *Manual of Military Law* (6th edn, HMSO 1914), Ch XIV, § 122. See also James Molony Spaight, *War Rights on Land* (Macmillan 1911) 157–88.

42 See Second Commission, Fourth Meeting, 5 July 1899, in James Brown Scott (ed), *The Proceedings of the Hague Peace Conferences: Translation of the Original Texts*, Vol I (OUP 1920) 410.

43 As proposed, for instance, by Seizième Commission, Bombardement des ville souvertes par des forces navales, Rapport présenté, au nom de la commission, par MM. Holland et den Beer Poortugael, rapporteurs, in (1896) 15 *Annuaire de'l Institute de Droit International* 145, 150–51. This approach may have been less of an innovation than it may seem at first sight. While in the law of land warfare undefended localities were not liable to attack as such, this rule was understood, at least by some, not to prohibit the destruction of individual buildings in such localities where military operations so required. See Plenary Conference, Fifth Meeting, 5 July 1899, in Scott (n 42),59.

44 arts 1 and 2, Hague Convention IX concerning Bombardment by Naval Forces in Time of War, 18 October 1907, in Foreign Office (1911) (n 39) 401.

45 art 2, Hague Convention IX.

46 Third Commission, Third Meeting, 8 August 1907 in James Brown Scott (ed), *The Proceedings of the Hague Peace Conferences: Translation of the Original Texts*, Vol III (OUP 1921) 341, 348.

47 Meaning 'involuntary damage'.

48 See Third Commission, Third Meeting, 8 August 1907 in Scott (n 46) 341, 348.

unintended in the sense of not being desired, but is nevertheless foreseeable and inflicted willingly.[49] In this context, it is important to remember that the rule applies to naval artillery fire. Indirect artillery bombardment involves walking shells onto a target through bracketing, that is, firing a succession of ranging shots and adjusting their direction by correcting range and deflection until the target is found, eventually allowing the gun or battery to open fire for effect to destroy the target.[50] Given the nature of artillery fire, 'dommages involontaires' necessarily covers not only harm that an exploding shell may cause to nearby civilian persons and objects when it scores a direct hit on its intended target, but also damage caused by projectiles that fall short, overshoot or otherwise fail to strike their desired point of impact, including projectiles that cause civilian harm directly and exclusively.[51]

In short, what distinguishes artillery fire causing 'unavoidable damage' or 'dommages involontaires' from artillery fire directed deliberately against civilians or civilian objects is the intent of the attacking force: civilians and civilian objects may end up suffering harm in both cases, but in the first situation the fires are directed against military targets and any harm to civilians and civilian objects is accepted, but not desired, whereas in the second case civilians and civilian objects are the deliberate target of the attack and the harm they suffer is desired. Moreover, the concept of 'unavoidable damage' or 'dommages involontaires' covers not only second-order effects where a projectile scoring a hit on a lawful target has harmful effects on surrounding civilians or civilian objects, but also first-order effects where artillery fire harms civilians or civilian objects directly and exclusively in the process of attempting to destroy a lawful target.

The Hague Rules of air warfare

The distinction between defended and undefended localities came under further pressure with the advent of heavier-than-air aviation. Like warships, military aircraft could subject enemy territory to bombardment, but were not able to occupy undefended localities.[52] Military aircraft could also penetrate hostile airspace at some distance behind the front lines, giving them greater reach into the enemy's hinterland than warships. Under the rules of land warfare, the mere presence of enemy forces within a town would render that locality open to bombardment, unless it surrendered.[53] Applying this rule to aerial bombardment was neither satisfactory nor practicable. The rule potentially opened up any town or city hosting a military presence of some description to enemy bombardment from the air. In principle, the local authorities could avoid this outcome by withdrawing that military presence and surrendering, yet how they might submit to a military aircraft circling above their heads was anyone's guess. Even before air operations emerged as a major domain of warfare during the First World War, some commentators already argued that in the light of these difficulties, aerial attacks should follow the rules laid down for naval bombardment in Hague Convention IX of 1907, so that the bombardment of undefended localities

[49] On foreseeability and intent, see Crawford (n 18), 178–83. cf Olivia Barth, *Zivilpersonen im modernen Luftkrieg: Herausforderungen des Rechts des bewaffneten Konflikts im Hinblick auf den Schutz von Zivilpersonen im Rahmen von Luftoperationen*, 237 (Duncker & Humblot 2020) 142.

[50] For an outline of naval fire control practices at the time, see Keith Allen, 'Notes on U.S. Battleship Main Battery Pre-war Fire Control Systems, 1910-1945: Part I' (2018) 55 Warship International 119–64, 120; Hobart Cole Ramsey, *Elementary Naval Ordnance and Gunnery, including Close-order Infantry Cover* (Little, Brown and Company 1918) 209–20. For information on more modern fire adjustment, see Headquarters Department of the Army, *Observed Fires*, ATP 3-09.30 (Washington, DC, 2017), Ch 5.

[51] See also MW Royse, *Aerial Bombardment and the International Regulation of Warfare* (Harold Vinal 1928) 172–73 ('The Hague rules, permitting the shelling of military objectives in civilian areas, thus permit, in reality, a certain degree of indiscriminate bombardment, since a gun ranged perfectly on the target would still scatter its shots over a wide area surrounding the target').

[52] Robert Homburg, 'Les Règles de la Guerre Aerienne' (1922) 6 Revue Juridique Internationale de la Locomotion Aerienne 405–18, 413 ('L'aviation ne peut donc faire aujourd'hui que du bombardement de destruction'); Paul Fauchille and Henry Bonfils, *Traité de Droit International Public, Vol. II (Guerre et Neutralité)*, II (8th edn, Rousseau 1921) 616–17.

[53] War Office (n 41), Ch XIV, § 119.

as such would be prohibited, but military objectives could be attacked wherever they were found, including inside undefended localities.[54]

This approach gathered wider support during the First World War and its aftermath.[55] It was also adopted by the drafters of the Hague Rules of Aerial Warfare in 1923.[56] It is worth quoting the relevant passages of Article 24 of the Hague Rules in full, given their impact on the subsequent development of the law, including the text of AP I:

1) Aerial bombardment is legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent.
2) Such bombardment is legitimate only when directed exclusively at the following objectives; military forces; military works; military establishments or depots; factories constituting important and well-known centres engaged in the manufacture of arms, ammunition or distinctively military supplies; lines of communication or transportation used for military purposes.
3) The bombardment of cities, towns, villages, dwellings or buildings not in the immediate neighbourhood of the operations of land forces is prohibited. In cases where the objectives specified in paragraph 2 are so situated that they cannot be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment.
4) In the immediate neighbourhood of the operations of land forces, the bombardment of cities, towns, villages, dwellings, or buildings is legitimate provided that there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population.

As is clear from Article 24(1), the Hague Rules abandon the old distinction between defended and undefended localities for the purposes of regulating aerial warfare.[57] Instead, they distinguish between localities that are not in the immediate neighbourhood of land operations and those that are. This distinction featured prominently in a proposal submitted to the Hague conference by the Italian delegation.[58] After declaring that only military objectives were liable to aerial bombardment, the Italian proposal prohibited all attacks against localities *outside* the immediate zone of ground operations. In cases where military objectives were present in such localities, they could be attacked by an aircraft only if the bombardment caused no harm to the civilian population at all; if aircraft could not adhere to this condition, they had to abstain from attacking. In contrast, military objectives could

[54] James Molony Spaight, *Aircraft in War* (Macmillan 1914) 16–20.

[55] eg Paul Whitcomb Williams, 'Legitimate Targets in Aerial Bombardment' (1929) 23 American Journal of International Law 570–81, 573; Harpur Allen Gosnell, 'The Hague Rules of Aerial Warfare' (1928) 62 American Law Review 409–29, 419; Elbridge Colby, 'Aerial Law and War Targets' (1925) 19 American Journal of International Law 702–15; James W Garner, 'Proposed Rules for the Regulation of Aerial Warfare' (1924) 18 American Journal of International Law 56–81, 70–72; Paul Fauchille, 'Le Bombardement Aérien' (1917) 24 Revue générale de droit international public 56–74, 68–70. For a different view, see Herbert F Manisty, 'Aerial Warfare and the Laws of War' (1921) 7 Transactions Grotius Society 33–41, 34. On State practice during the War, see Enno Mensching, *Luftkrieg und Recht: Zur historischen Rolle des Humanitären Völkerrechts in der Einhegung der Luftkriegsführung* (Nomos 2022), 1210–79; Heinz Marcus Hanke, *Luftkrieg und Zivilbevölkerung: der kriegsvölkerrechtliche Schutz der Zivilbevölkerung gegen Luftbombardements von den Anfängen bis zum Ausbruch des Zweiten Weltkrieges* (P. Lang 1991) 15–51.

[56] Commission of Jurists to Consider and Report upon the Revision of the Rules of Warfare, General Report, 19 February 1923, in Despatch from the First British Delegate to the International Commission for the Revision of the Rules of Warfare, together with the General Report of the Commission of Jurists to Consider and Report upon the Revision of the Rules of Warfare, Cmd 2201 (1924).

[57] See Commission of Jurists, ibid, 27; Gosnell (n 55) 419.

[58] *Commission des Juristes chargée d'étudier et de faire rapport sur la révision des lois de la guerre* (Imprimerie Rapide du Centre 1923) 101. It also featured in the original American draft submitted to the conference: see art 33, Règles concernant la guerre des airs proposées par les Etats-Unis, Annex 3 to ibid 152.

be subjected to aerial bombardment *inside* localities in the immediate zone of ground operations, provided there existed a reasonably justifiable presumption that sufficiently important military concentrations were present. Accordingly, under the Italian proposal, no incidental civilian harm whatsoever was permissible in localities outside the immediate zone of combat operations, but incidental harm was permissible within that zone if the concentration of military objectives was sufficiently important.

While the wording of Article 24 of the Hague Rules is for the most part based on the Italian proposal, it also draws on a revised proposal submitted by the US delegation.[59] Like the Italian text, the American proposal declared that attacks from the air were legitimate only when directed against military objectives, adding that aerial bombardment 'must not involve the bombardment of the civilian population without distinction, but must be directed solely at military objects'.[60] Where military forces were located in cities, towns, or villages, their bombardment was prohibited unless 'the military concentration therein is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population'.[61]

By combining these two proposals, Article 24 of the Hague Rules failed reconcile a tension that cast a question mark over what exactly an '*indiscriminate* bombardment' of the civilian population within the meaning of Article 24(3) involves.[62] In the American proposal, indiscriminate attacks were understood narrowly as attacks not directed against military objectives. Attacks causing incidental civilian harm were treated separately and not as a category of indiscriminate attacks. In contrast, the text of Article 24(3) mentions indiscriminate attacks in a passage that originally prohibited all types of civilian harm, including harm inflicted incidentally. Two readings of Article 24(3) are thus possible.

The first reading follows the American proposal and defines indiscriminate attacks as attacks not directed against military objectives, but excludes from the definition attacks that cause civilian harm incidentally. The difficulty with this interpretation is that bombardments causing incidental civilian harm would thus be permissible in locations outside the immediate neighbourhood of ground operations mentioned in Article 24(3),[63] yet the condition set out in Article 24(4) that such harm must be justified by a sufficiently important military concentration applies only in localities inside the zone of land operations.[64] Thus, causing incidental civilian harm would not have to be justified with reference to the importance of the military concentration to be attacked where the bombardment takes place away from the battlefield. This contradicts both the Italian and the American proposal and is unlikely to reflect what the drafters had intended.[65] The second reading avoids this result by suggesting that 'indiscriminate bombardment' under the Hague Rules refers to attacks that cause any kind of civilian harm, including incidental harm. On this

[59] ibid 120–21. See John Bassett Moore, *International Law and Some Current Illusions and Other Essays* (Macmillan 1924) 197.

[60] *Commission des Juristes* (58) 121.

[61] ibid.

[62] That the meaning of 'indiscriminate bombardment' was fundamentally unclear was widely recognized at the time. eg Committee of Imperial Defence, 'Restriction of Air Warfare', 1 March 1938 (PRO AIR 8/155), para 61 ('The weak point of this paragraph is the word "indiscriminate", which for some reason is so constantly and loosely used in connection with air bombardment'). See also Heinz Marcus Hanke, 'The 1923 Hague Rules of Air Warfare: A Contribution to the Development of International Law Protecting Civilians from Air Attack' (1993) 33 International Review of the Red Cross 12–44, 24–27.

[63] eg art 24 does not prevent the aerial bombardment of enemy forces outside the immediate neighbourhood of land operations, provided this does not involve the bombardment of cities, towns, villages, dwellings or buildings. See Garner (n 55) 72.

[64] The interpretation offered by Spaight, which suggests that indiscriminate attacks within the meaning of art 24(2) include those that cause 'considerable and widespread incidental damage to the civilian population', overlooks this point: James Molony Spaight, *Air Power and the Cities* (Longmans, Green and Co 1930) 214 and James Molony Spaight, *Air Power and War Rights* (3rd edn, Longmans 1947) 217. Making the same error is Karl Heinz Kunzmann, *Die Fortentwicklung des Kriegsrechts auf den Gebieten des Schutzes der Verwundeten und der Beschießung von Wohnorten* (Dissertation 1960) 184.

[65] See Gosnell (n 55) 420.

interpretation, Article 24(3) comprehensively prohibits all incidental civilian harm in localities outside the zone of ground operations, while pursuant to Article 24(4) incidental civilian harm would be permissible in the immediate neighbourhood of land operations provided that the military concentration was sufficiently important.[66] The difficulty with this interpretation is that indiscriminate attacks would thus be unlawful in some circumstances, but permissible in others, depending on the location where incidental civilian harm is caused.[67] This is hardly a model of clarity.

Indiscriminate attacks: outcomes v intentions

These interpretative difficulties are merely a sign of a more fundamental dilemma that haunts the principle of distinction: should indiscriminate attacks be defined with reference to outcomes or intentions?

An approach based on outcomes identifies indiscriminate attacks as any attack that causes harm to civilians or civilian objects as a matter of fact: if civilian persons or objects have suffered harm as a result of an attack, whether directly or incidentally, the attack would be indiscriminate. However, this approach essentially amounts to a complete prohibition of causing any incidental civilian harm. Such a complete prohibition would render the conduct of military operations impossible in a wide range of situations and create a powerful incentive for adversaries to seek shelter among the civilian population to immunize themselves from enemy attack.[68] A total ban also contradicts State practice and the general consensus, reflected in Article 2 of Hague Convention IX and Article 24(4) of the Hague Rules, that some level of incidental civilian harm is permissible in at least some circumstances.[69] An interpretation of Article 24(3) of the Hague Rules along these lines has therefore been rejected as unrealistic by the majority of commentators.[70] In a memorandum issued in 1938, the British Committee of Imperial Defence declared such an interpretation to be in conflict with the laws and usages of war on land and at sea and dismissed it as 'clearly impracticable'.[71] At the same time, an exclusively outcome-based definition of

[66] Charles Cheney Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, 3 (2nd edn, Little, Brown, and Company 1947) 1827 (adopting this interpretation, but expressing doubt whether it in fact represents the law of aerial bombardment).

[67] For such an approach, see *Shimoda et al v The State*, Judgment, 7 December 1963, Tokyo District Court (1964) 8 Japanese Annual of International Law 212, 237 (distinguishing between permissible and impermissible indiscriminate bombardment from the air).

[68] As noted by many, eg Kunzmann (n 64) 184; Eberhard Spetzler, *Luftkrieg und Menschlichkeit: Die völkerrechtliche Stellung der Zivilpersonen im Luftkrieg* (Musterschmidt 1956) 190; Å Hammarskjöld, 'Consultation de M. Hammarskjöld', in Comité International de la Croix-Rouge (ed) *La Protection des Populations Civiles contre les Bombardements* (Albert Kundig 1930) 9, 47; Marcel Sibert, 'Consultation de M. Sibert', in ibid, 131, 162–63; Vaisseau Yvon, 'La Guerre Aerienne' (1924) 8 Revue Juridique Internationale de la Locomotion Aerienne 338–63, 362; Spaight (n 54) 16.

[69] The point was generally accepted in the contemporary literature: eg Alex Meyer, *Völkerrechtlicher Schutz der friedlichen Personen und Sachen gegen Luftangriffe: Das geltende Kriegsrecht* (Ost-Europa-Verlag 1935) 144–45; Spaight (n 54) 15–16. See also Spaight, *Air Power and the Cities* (n 64) 214 ('It is impossible to deny to a belligerent the right to destroy the potential and destined means of its own destruction. … To accord him that rights and at the same time to qualify it by allowing only the use of such a degree of force that human life cannot be endangered is to make that right a nullity').

[70] eg Albrecht Randelzhofer, 'Flächenbombardement und Völkerrecht', in Heinrich Kipp, Franz Meyer, and Armin Steinkamm (eds), *Um Recht und Freiheit: Festschrift Friedrich August Freiherr von der Heydte zur Vollendung des 70. Lebensjahres* (Duncker & Humblot 1977) 471, 484; Spetzler (n 68) 190; Hammarskjöld (n 68) 47; George MacDonogh, 'Consultation de Sir George MacDonogh' in Comité International de la Croix-Rouge (ed), *La Protection des Populations Civiles contre les Bombardements* (Albert Kundig 1930) 55, 65; Sibert (n 68) 160–66; KVRT, 'Aerial Warfare and International Law' (1942) 28 Virginia Law Review 516–27, 524; Royse (n 51) 232 ('To interpret "indiscriminate bombardment", as laid down in paragraph 3 of Art 24, on the basis of incidental damage to non-combatant populations, would thus, in effect, eliminate aerial bombardment'). See also Georg Röhrig, *Die Ziele selbständiger Luftangriffe* (Ost-Europa-Verlag 1938) 70.

[71] Committee of Imperial Defence (n 62), para 61. But see *Coenca frères c Etat allemand* (1927) *Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix* (1928) 683, 1 December 1927 (Tribunal arbitral mixte gréco-allemand) (declaring a German air raid on the Greek town of Salonica, which caused damage to the plaintiffs in 1916, contrary to international law). The Tribunal's failure to clarify the applicable law, and to consider the permissibility of incidental harm in that context, attracted strong criticism. See Albert Erdelbrock, *Das Luftbombardement: Eine Darstellung der für das Luftbombardement geltenden*

indiscriminate attacks also means that attacks which are deliberately directed at civilians or which are carried out with no attempt to distinguish between military objectives and the civilian population would not be indiscriminate as long as they did not, as a matter of fact, inflict harm on civilians or civilian objects. An outcome-based definition is therefore too broad and underinclusive at the same time.

Indiscriminate attacks may also be defined with reference to the intentions of the belligerents: as long as a party directed their attack against legitimate military objectives rather than against civilians or civilian objects, the attack would not be indiscriminate. The Hague Rules themselves adopt this approach.[72] While Article 24(1) of the Hague Rules insists that aerial bombardment is legitimate only if directed against military objectives, Articles 24(3) and 24(4) nevertheless follow the rules of land warfare and refer to 'the bombardment of cities, towns, villages, dwellings or buildings'—with the implication that attacks directed against military objectives in built-up areas would still involve the bombardment of those localities *per se*.[73] The same understanding emerges from the Draft Convention for the Protection of Civilian Populations Against New Engines of War approved by the International Law Association in 1938.[74] Accordingly, what distinguishes lawful attacks on defended localities from unlawful ones is that in the former case the bombardment is directed at specific military objectives, even though harm may befall civilians and civilian objects in both situations.

Of course, the problem with an intent-based approach is that, without further safeguards, it may only impose limited and not very robust constraints on belligerents. This is so because even attacks directed solely against military objectives may cause very extensive harm to civilians and civilian objects where the latter are interspersed with the former, whether due to targeting errors, insufficient precision, adverse weather conditions, or the destructive radius of the weapons employed, to the point where there might be little practical difference between attacks directed solely against lawful targets and those that are not.[75] Moreover, an intent-based approach makes it difficult to assess compliance.[76] The presence of civilian casualties and destruction in the aftermath of an attack is an objective fact that permits third parties to determine with relative ease whether or not a belligerent has complied with its obligations if an outcome-based approach is applied. However, it becomes difficult if not impossible for third parties to assess compliance if they have to base their assessment solely on the intentions of the belligerent. Not only is intent intangible, but it would be all too easy for a belligerent to act in bad faith by claiming that its operations were targeted at military objectives, whereas in reality they were not. Unless constrained by other restrictive rules, defining indiscriminate attacks purely with reference to the subjective intentions of the attacker could hollow out the protective content of the concept. This is exactly why the drafters of the Hague Rules set out the forerunner of today's proportionality rule in Article 24(4): the purpose of that provision was to curb the intent-based approach by requiring the attacking party to hold a reasonable presumption

Völkerrechtssätze im Anschluss an das Urteil des deutsch-griechischen gemischten Schiedsgerichts vom 1. Dezember 1927 (Bonn, 1929, Eberhards-Karl Universität).

72 See Hanke (n 62) 25.

73 Spaight, *Air Power and the Cities* (n 64) 216; N Sloutzki, 'New Destructive Agencies of War' (1924) 20 Current History 434–39, 437–38.

74 art 3, Draft Convention for the Protection of Civilian Populations Against New Engines of War, in International Law Association, *Report of the Fortieth Conference held at Amsterdam, August 29 to September 2, 1938* (1939) 37–86 (prohibiting the bombardment of defended localities by any means unless 'objects of military character' can be clearly recognized).

75 Along these lines, see *Shimoda* (n 67) 239 ('aerial bombardment with an atomic bomb, even if its target is confined to military objectives, brings about the same result as a blind aerial bombardment because of the tremendous destructive power of the bomb').

76 Julius Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes and War-Law* (Stevens & Sons 1954) 625; Williams (n 55) 578. See also Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar 2019) 362.

that the military concentration to be attacked is sufficiently important to expose the civilian population to the dangers posed by the bombardment.[77]

Additional Protocol I and the notion of indiscriminate attacks

The modern targeting rules found in AP I lean heavily on the corresponding provisions of the Hague Rules of Aerial Warfare. They also develop the Hague Rules in several respects, including by resolving some of the interpretative difficulties surrounding the notion of indiscriminate attacks. Specifically, Article 51(4) of AP I identifies three types of indiscriminate attacks: (i) those which are not directed at a specific military objective; (ii) those which employ a method or means of combat which cannot be directed at a specific military objective; and (iii) those which employ a method or means of combat the effects of which cannot be limited as required by AP I. This definition significantly strengthens the protective function of the rules. However, it is important to underline that the different types of indiscriminate attacks listed in Article 51(4) of AP I contravene the principle of distinction for different reasons. This has significant implications for the proportionality rule, as the present section will explain.

Indiscriminate attacks under AP I

The principle of distinction, as formulated in Article 48 of AP I, demands that military operations be directed only against military objectives. It follows that operations directed against persons or objects that do not qualify as military objectives are not permissible. Indeed, Articles 51(2) and 52(1) of AP I expressly confirm that civilians and civilian objects must not be made the object of attack. It also follows from the principle that military operations must be *directed* at military objectives, so that attacks which are not specifically targeted in that manner are unlawful, even if they are not deliberately aimed at civilians or civilian objects. Accordingly, Article 51(4) of AP I identifies three types of attacks which although not deliberately directed at civilians or civilian objects, are not properly targeted at military objectives either and, consequently, are of a nature to strike military objectives and civilians or civilian objects without distinction.

First, Article 51(4)(a) mentions attacks that are not directed at a specific military objective. This echoes the language of Article 24(1) of the Hague Rules, which declared aerial bombardment to be legitimate only when directed at a military objective. One example of an attack caught by this rule is blind fire not aimed at any particular target.[78] Secondly, Article 51(4)(b) lists attacks which employ a method or means of combat which cannot be directed at a specific military objective. This represents a significant improvement over the Hague Rules in as much as Article 51(4)(b) prevents belligerents from employing methods or means that are incapable of discrimination whilst proclaiming that they only intended to target lawful military objectives.[79] The provision thus draws the logical inference from the obligation to direct attacks only against military objectives: when belligerents employ methods or means of combat incapable of distinction, they cannot in any meaningful way intend to target solely lawful military objectives.[80] Thirdly, Article 51(4)(c) includes among

[77] See Randelzhofer (n 70) 485.

[78] eg Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (3rd edn, CUP 2016) 171.

[79] Spaight, *Air Power and the Cities* (n 64) 215 ('A military objective must be a "bombable" objective; otherwise the rule [that military objectives are liable to attack], in its application to military objectives situated in urban areas, will be simply a charter for a *régime* of practically indiscriminate bombardment. The objective must be a target which there is a reasonable probability of hitting under the conditions in which the bombardment is conducted').

[80] *Prosecutor v Milan Martić* (2007) Judgment, IT-95-11, 12 June 2007 (ICTY Trials Chamber), para 463 (holding that the characteristics and method of employment of a non-guided high dispersion weapon, which were known to the accused, made it incapable of hitting specific targets in the prevailing circumstances and therefore rendered it indiscriminate). See also Michael Bothe, Karl Josef Partsch, and Waldemar A Solf, *New*

indiscriminate attacks those which employ methods or means of combat the effects of which cannot be limited as required by other provisions of AP I itself,[81] including as required by the rule of proportionality.[82] This resolves the question, left open by the ambiguous language of the Hague Rules, as to whether all attacks causing incidental civilian harm are indiscriminate: it follows from Article 51(4)(c) that only those attacks which cause *excessive* levels of incidental civilian harm are indiscriminate in nature.[83]

As we have seen, the rules of Hague Convention IX of 1907 and the Hague Rules of 1923 focused on intent and not on outcomes. The rules of AP I do the same. By prohibiting civilians and civilian objects from being made the object of attack, Articles 51(2) and 52(1) of AP I ban their deliberate targeting, which is concerned with the way an attack is directed, not its result.[84] 'Directing' an attack refers to selecting the intended target and deciding upon the attack.[85] In other words, directing is a decision-making process concerned with determining who or what the intended target of the attack should be. The purpose of Article 51(4)(a) of AP I is to prohibit random fire not specifically intended to target a military objective. The point of Article 51(4)(b) of AP I is to prohibit methods or means of combat that are incapable of being directed against military objectives because their use must be considered to preclude an intention to attack only lawful targets. Finally, since attacks may cause substantial levels of civilian harm even when they are strictly aimed against lawful targets, the point of Article 51(4)(c) of AP I is to prevent an intent-based approach from becoming a mere 'eye-wash', as James Spaight put it,[86] by barring belligerents from conducting an attack that is expected to cause overly high levels of civilian harm as a mere by-product of targeting lawful military objectives. The relevant harm here is the one expected by those planning or launching the attack, not the harm that actually resulted from the attack once carried out.[87] Accordingly, in all of these cases, the focus is on intent and expectations, not on outcomes.

When Article 51(4) of AP I describes indiscriminate attacks as those which are 'of a nature to strike military objectives and civilians or civilian objects without distinction', it is also important to recognize that the three types of indiscriminate attacks listed in that provision do not violate the principle of distinction in the same manner.[88] Under Articles 51(4)(a) and (b) of AP I, an intent to comply with the principle of distinction is either

Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949 (2nd edn, Nijhoff 2013) 376.

[81] See n 110 and the accompanying text.

[82] As expressly highlighted by art 51(5)(b), Additional Protocol I.

[83] This also emerges from the ICRC's commentary to its draft Additional Protocols, which recognizes that civilians are liable to suffer incidental harm, but that such harm would affect civilians indiscriminately where it is 'expected to entail incidental losses among the civilian population and cause the destruction of civilian objects to an extent disproportionate to the direct and substantial military advantage anticipated.' See International Committee of the Red Cross, *Draft Additional Protocols to the Geneva Conventions of August 12, 1949: Commentary* (Geneva, 1973) 56–57 and 59.

[84] See Third Session (Geneva, 21 April–11 June 1976), Committee III Report, CDDH/236/Rev.l in Federal Political Department, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, XV (Bern, 1978) 259, 384 ('The Committee changed the prohibition contained in the ICRC draft (and, indeed all the amendments) from to "kill or injure" to "make the object of attack". This change was designed to make clear that what was forbidden was the deliberate attack against persons *hors de combat* not merely killing or injuring them as the incidental consequence of attacks not aimed at them *per se*.')

[85] *Prosecutor v Bosco Ntaganda* (2019) Judgment, ICC-01/04-02/06, 8 July 2019 (ICC Trial Chamber VI), para 744.

[86] James Molony Spaight, *Air Power and the Cities* (Longmans, Green and Co 1930) 197.

[87] *Ermittlungsverfahren gegen Oberst Klein und Hauptfeldwebel W (Kunduz)* (2010), 16 April 2010 (Generalbundesanwalt), 46–47 (declaring proportionality to be inapplicable, despite civilian casualties, as the accused expected no incidental civilian harm); confirmed by *Hanan v Germany*, App. No 4871/16, Judgment, 16 February 2021 (2021), paras 211–18; *Prosecutor v Stanislav Galić* (2003) Judgment and Opinion, IT-98-29-T, 5 December 2003 (ICTY Trial Chamber), para 58. See also Cohen and Zlotogorski (n 3) 89; Michael A Newton, 'Reframing the Proportionality Principle' (2021) 51 Vanderbilt Law Review 867–85, 883.

[88] See Judith Gardam, *Necessity, Proportionality, and the Use of Force by States* (CUP 2004) 94–95 (noting the conceptual differences).

absent or incompatible with the means and methods employed. By contrast, such an intent *is* present in attacks causing incidental civilian harm, since by definition, such attacks are directed against a lawful military objective.[89] This means that in disproportionate attacks, distinction is lacking not because an intent to distinguish is missing altogether, but because the belligerent accepts that the attack may result in excessive levels of incidental civilian harm.[90] Put differently, what renders a disproportionate attack a violation of the principle of distinction is not the fact that it fails to distinguish at all, but that it is carried out notwithstanding an expectation that it will cause excessive incidental harm. Disproportionate attacks violate the principle of distinction because they are *insufficiently* discriminative.[91]

Three points may be drawn from this. First, the targeting rules of AP I continue to focus on the intentions of the belligerents—whether or not they direct their attacks against lawful targets—rather than on the outcomes of attacks. Secondly, in line with the pre-existing rules, incidental civilian harm is not a violation of the principle of distinction,[92] unless it surpasses the excessiveness threshold imposed by the proportionality rule, in which case Article 51(4)(c) of AP I stipulates that the attack is indiscriminate.[93] Thirdly, the different types of indiscriminate attacks listed in Article 51(4) are of 'nature to strike military objectives and civilians or civilian objects without distinction' for different reasons. Specifically, disproportionate attacks are indiscriminate because they cause excessive levels of incidental civilian harm, not because they fail to distinguish at all.

Indiscriminate attacks and incidental harm

None of the foregoing sheds much light on the meaning of incidentiality though. Based on our analysis of Article 51(4) of AP I, we can conclude that incidental harm involves situations where an attack is directed against military objectives and not against civilians and civilian objects, yet the latter still suffer harm.[94] Beyond this, not much else can be gleaned from these rules. Dr Daniele suggests that repeated references to incidentality in other provisions of AP I imply that no civilian harm is permissible under the Protocol unless it qualifies as incidental.[95] Even if this was correct, which it is not,[96] other provisions of AP I that

[89] As rightly recognized by Daniele (n 4), 27. See also *Galić* (n 87), para 387 (distinguishing random shelling into a residential neighbourhood not aimed at a military objective from shelling aimed at military objectives present among a group of civilians where the civilian harm to be expected was clearly excessive in relation to the military advantage anticipated).

[90] Michael N Schmitt, 'The Principle of Discrimination in 21 Century Warfare' (1999) 2 Yale Human Rights and Development Law Journal 143–82, 150.

[91] See Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (4th edn, CUP 2011), 109. See also APV Rogers, *Law on the Battlefield* (3rd edn, Manchester University Press 2012) 30; Françoise Hampson, 'The Principle of Proportionality in the Law of Armed Conflict' in Sarah Perrigo and Jim Whitman (eds), *The Geneva Conventions under Assault* (Pluto 2010) 42, 49–50.

[92] See n 69 and the accompanying text.

[93] It is worth recalling that the drafters of Additional Protocol I were agreed that the definition of indiscriminate attacks in what is now art 51(4) Additional Protocol I 'was intended to take account of the fact that means or methods of combat which can be used perfectly legitimately in some situations could, in other circumstances, have effects that would be contrary to some limitations contained in the Protocol, in which event their use in those circumstances would involve an indiscriminate attack'. See Committee III Report, CDDH/215/Rev.l (n 26) 274. This confirms that incidental civilian harm is not an effect that violates the principle of distinction, unless it is excessive. See also n 83.

[94] Summary Record of the Fifth Meeting, 14 March 1974, CDDH/III/SR.5, in Federal Political Department, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, XIV (Bern, 1978) 35, 37 (ICRC, explaining that the situations covered by incidental harm are different from situations where the civilian population or individual civilians are made the object of attack). See also *Public Committee Against Torture in Israel v Government of Israel (Targeted Killing Case)* (2006) HCJ 769/02 (High Court, Israel), para 42 ('The principle of proportionality arises when the military operation is directed toward combatants and military objectives, or against civilians at such time as they are taking a direct part in hostilities, yet civilians are also harmed').

[95] Daniele (n 4) 37.

[96] art 51(3) of Additional Protocol I removes the immunity of civilians from direct attack when and for such time as they directly participate in hostilities. This allows the deliberate targeting of such civilians, including inflicting direct harm. Similarly, it is generally accepted that an attack directed against civilians due to target

mention incidental harm do not offer any additional insights into the meaning of the term. For example, the precautionary duty to take all feasible measures in the choice of means and methods of attack to avoid, or in any event to minimize, incidental civilian harm does not assist further.[97]

Dr Daniele suggests that the meaning of incidentiality can be understood only as something related to the consequences of an attack: incidental or non-incidental is a quality that describes the consequences an attack may be expected to generate.[98] Specifically, he argues that incidental harm refers to the *side* consequences of an attack, to be distinguished from its *prevalent* consequences.[99] If the civilian harm expected is not a side consequence, it cannot fall within the scope of the proportionality rule, but instead must be considered under other rules relating to distinction. Dr Daniele offers the bombing of a 'high-rise tower building full of civilians' with an enemy unit located in the basement as an example.[100] He suggests that in this scenario, civilian harm would be the prevalent outcome of the attack. For this reason, it cannot be said that the attack would be 'exclusively directed at singularly identified lawful targets, with means and methods the effects of which were intended to be limited' as required by AP I.[101] Rather, the civilians and civilian objects would 'become joined to the lawful targets', 'falling entirely under the scope of the prohibition of indiscriminate attacks', rather than the rule of proportionality.[102]

This analysis sits uneasily with the fact that the relevant rules in Article 51 of AP I are focused on the manner in which attacks are directed, not on their outcomes. Attacks that intentionally target civilians or civilian objects or which employ means and methods that are not directed at military objectives or cannot be so directed are in breach of Article 51(2), 51(4)(a) or 51(4)(b) of AP I, regardless of whether or not civilians and civilian objects were in fact harmed in those attacks. For this reason, the war crime of intentionally directing attacks against the civilian population under Article 8(2)(b)(i) of the Rome Statute does not require civilians to be injured or killed,[103] as confirmed by the Pre-Trial Chamber in the *Katanga* case.[104] Similarly, training a grossly inaccurate missile on a target located in a sprawling capital city is an indiscriminate attack in breach of Article 51(4)(b) even if the missile malfunctions and never reaches its destination. It remains an indiscriminate attack even if, by pure chance, the missile does manage to strike a military objective and nothing else. Alternatively, if the missile were to strike civilians or civilian objects, it makes no difference whether they suffered harm as a first-order or as a second-order effect. The fact that Article 51(4) applies to attacks that 'are of a *nature* to strike military objectives and civilians or civilian objects without distinction' underlines that the actual outcomes are not determinative[105]: it is the indiscriminate nature of the attack that contravenes the rule, not whether its outcome is indiscriminate.

misidentification is not indiscriminate, at least where all feasible measures to verify the target have been taken, a point that is implicit in art 57(2)(b) of Additional Protocol I. See Bothe, Partsch, and Solf (n 80) 408. See also United Kingdom Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict* (OUP 2004), para 16.45.

97 art 57(2)(a)(ii), Additional Protocol I.

98 Daniele (n 4) 37.

99 ibid 40.

100 ibid.

101 ibid.

102 ibid.

103 International Criminal Court, *Elements of Crimes* (The Hague, 2013), 12. See Knut Dörmann, Louise Doswald-Beck, and Robert Kolb, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (CUP 2003) 130–31.

104 *Prosecutor v Germain Katanga* (2007) Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest for Germain Katanga, ICC-01/04-01/07-4, 7 July 2007 (ICC Pre-Trial Chamber I), para 37.

105 Emphasis added.

Applying these points to the high-rise building scenario, the bombing would not contravene Article 51(4)(a) of AP I as long as it was directed at the enemy unit in the basement.[106] Nor would it violate Article 51(5)(b) of AP I as long as it involved the use of a weapon capable of being directed at the enemy unit with some degree of accuracy.[107] That leaves Article 51(4)(c) of AP I and the question of whether the effects of the attack were limited as required by AP I. The rule applies to any kind of effect that cannot be limited as required by the Protocol, whatever exact mechanism or process brings about that effect. Uncontrollable consequences such as those caused by fire or flooding fall within the scope of the rule, as do the blast and fragmentation effects of conventional high-explosive weapons.[108] The attack on the high-rise building must therefore comply with Article 51(4)(c) regardless of the weapon employed. As confirmed by its drafting history, Article 51(4)(c) bans the use of weapons which, although capable of perfectly legitimate use in some situations, produce effects that in a different set of circumstances cannot be reconciled with the limitations imposed by other applicable rules of AP I.[109] The Bothe, Partsch, and Solf Commentary identifies three such limitations[110]: the rules dealing with the protection of the environment[111] the rules relating to attacks on military objectives located on or near dams, dykes and nuclear electrical generating stations[112]; and the rule of proportionality. The first two rules are not relevant to the high-rise building scenario, which leaves proportionality. However, at this point, we have come full circle: Dr Daniele suggests that the attack on the building is not subject to the proportionality rule and must be assessed against the rules on indiscriminate attacks, yet the only indiscriminate attack rule that is engaged, Article 51(4)(c), calls for the application of the proportionality rule. His argument thus seems to prove what it sets out to deny.

The meaning of incidental civilian harm

Our analysis of Article 51 of AP I has shown that disproportionate attacks are a distinct type of indiscriminate attack. Unlikely other indiscriminate attacks, which fail to respect the principle of distinction in its entirety, disproportionate attacks violate that principle because they are insufficiently discriminative. It is therefore necessary to distinguish indiscriminate attacks that cause civilian harm deliberately from attacks that are not directed against civilians or civilian objects, but harm them as a by-product of targeting military objectives. The present section addresses this question by discussing the problem of the parallel targeting of military objectives and civilians or civilian objects and by distinguishing four different forms that incidental civilian harm may take. It then turns to the essence of the Lesser Effects Thesis, which is the idea that incidental harm involves a relationship of proportion, whereby incidental civilian harm must be the lesser effect of an attack compared to its desired effect on the intended target. It argues that this position does not reflect the meaning of the term 'incidental' as it is used in AP I, is not supported by the area bombardment rule in Article 51(5)(a) of AP I, is operationally unsound, and is contradicted by State practice.

[106] Recall that 'directing' an attack 'means selecting the intended target and deciding on the attack', as per *Ntaganda* (n 85), para 744.

[107] cf United Kingdom Ministry of Defence (n 96), para 5.23.3 (referring to a level of 'precision to ensure a reasonable probability that the targets under attack will be hit').

[108] Sandoz, Swinarski, and Zimmermann (n 2) 623.

[109] Committee III Report, CDDH/215/Rev.l (n 26) 274. See also Ministère des armées, *Manuel de Droit des Opérations Militaires* (Paris, 2022) 114. eg it may be perfectly permissible to use an incendiary weapon the effects of which cannot be controlled against specific targets located on a military base, but not to use the same weapon against targets located in a populated area.

[110] Bothe, Partsch, and Solf (n 80) 347.

[111] arts 35(3) and 55, Additional Protocol I.

[112] art 56, Additional Protocol I.

Parallel targeting: deliberate v incidental harm

Where an attack is directed against a lawful target, as in the high-rise building example, and employs means and methods capable of affecting that target with some accuracy, neither Article 51(4)(a) nor Article 51(4)(b) of AP I are engaged: by definition, such attacks do not involve random fire or means and methods incapable of being directed against lawful targets. However, the fact that in the high-rise building example the attack has been directed at the enemy unit located in the basement does not exclude the possibility that it may *also* have been directed at the civilians inside the building in parallel.[113] If so, any civilian harm would not be incidental to prosecuting a lawful target, but would be the result of deliberately targeting civilians in contravention of Article 51(2) of AP I. The proportionality rule therefore would not be applicable.

The *Katanga* case illustrates this type of situation. There, the Trial Chamber of the International Criminal Court found that an attack carried out in 2003 by the armed forces of the Democratic Republic of the Congo against Bogoro, a village in the country's Ituri region, was directed both against military objectives and against the civilian population.[114] The Trial Chamber underlined that intentionally directing an attack against civilians had to be distinguished from attacks that cause civilian harm incidentally.[115] An intention to make civilians the object of attack could be inferred from various factors, such as 'the means and methods used during the attack, the number and status of the victims, the discriminatory nature of the attack or, as the case may be, the nature of the act constituting the attack'.[116] Applying this to the case at hand, the Trial Chamber had no difficulty in finding that numerous acts of violence carried out during the attack on Bogoro were intentionally directed against civilians.[117] Acts such as firing aimed shots at civilians or attacking them with machetes were in no sense incidental to the attack on lawful military objectives. In contrast, the Trial Chamber was unable to determine whether or not acts of violence aimed at a group consisting of both civilians and enemy fighters were deliberately directed against civilians, as there was insufficient evidence to conclude that the perpetrators specifically meant to make the civilians concerned the object of attack.[118]

The *Katanga* case confirms that individual acts of violence directed at civilians violate the prohibition to make civilians the object of attack pursuant to Article 51(2) of AP I even when those acts form part of a broader attack that is also directed at lawful military objectives. This is particularly clear in circumstances where the violence inflicted on civilians is functionally separate from the violence targeting lawful objectives. During the attack on Bogoro, it would have been perfectly feasible to target enemy fighters without stopping to slaughter civilians along the way. The acts harming civilians were not functionally related to the acts harming the enemy. This may be contrasted with an artillery attack targeting a military objective: ranging shots that may cause civilian harm are an integral part of the artillery unit's efforts to attack the military objective, including shots that cause only civilian harm, and for that reason do not constitute a direct attack on civilians or civilian objects.

The *Katanga* case also illustrates that in situations where civilians and civilian objects are interspersed with military objectives, it may be difficult to establish whether specific

113 This may be what Dr Daniele has in mind when says that the attack on the high-rise was not 'exclusively directed at singularly identified lawful targets' and that civilians have become 'joined to the lawful targets'. See Daniele (n 4) 37. For a different example, see APV Rogers, 'Conduct of Combat and Risks Run by the Civilian Population' (1982) 21 Military Law and Law of War Review 293–320, 296.

114 *Prosecutor v Germain Katanga* (2014) Judgment, ICC-01/04-01/07, 7 March 2014 (ICC Trial Chamber II), para 802.

115 ibid.

116 ibid, para 807.

117 eg ibid, para 558 ('the Chamber considers that, although the murders occurred at the start of the attack, that is, at a time when the UPC soldiers were not yet fleeing and were fighting, the fact that the women were accompanying children who were directly killed by machete suffices, in its view, to establish that this group of civilians was targeted intentionally').

118 ibid, para 875.

acts of violence were directed at both or only against the latter. The mere fact that civilians or civilian objects have suffered harm does not establish, on its own, whether that harm was inflicted upon them deliberately or whether it was incidental to the attack on the military objectives. The Trial Chamber held that the deliberate, intentional nature of the harm may be inferred from other objective factors, such as the means and methods used during the attack.[119] This suggests that taking all feasible measures in the choice of means and methods to avoid, or in any event to minimize, civilian harm during an attack directed against a military objective negates an intent to deliberately make civilians and civilian objects the object of the same attack.[120] It is difficult to see how it could be otherwise: one cannot at the same time both avoid and deliberately pursue the same outcome.[121]

Returning to the example of the high-rise building, if the bombing was directed at the military unit located in the basement, employed means and methods capable of targeting that unit with some accuracy and was not intentionally directed at civilians and civilian objects inside the building, as may be confirmed by precautionary measures taken prior and during the bombing, then the civilian harm inflicted by the attack would be incidental in nature and subject to the proportionality rule.

Different types of incidental harm

It is important to underline that incidental harm may take different forms. The fact that civilians and civilian objects are exposed to the same first-order effects as the military objective targeted by an attack does not prevent the harm they may suffer from being incidental,[122] contrary to what Dr Daniele suggests in relation to the high-rise building example.[123]

First, it should be a matter of consensus that where civilian harm is the secondary effect of an attack targeting a military objective, it is incidental in nature and absent any contrary evidence, does not amount to a direct attack on civilians or civilian objects (Fig. 1). This would be the case, for instance, where an attack carried out against an enemy armoured vehicle with an anti-tank guided missile causes a secondary explosion on impact, which in turn harms a civilian or civilian object located nearby. In this situation, the civilian harm is the indirect result of the attack on the armoured vehicle. Since it is delayed in time and in the causal chain of events, it is easily recognizable as incidental in nature.

Secondly, civilians and civilian objects inside or on a military objective may suffer harm as a result of an attack against that military objective (Fig. 2). Examples include civilians and civilian objects present inside military installations, military vehicles, or any other objects that qualify as military objectives pursuant to Article 52(2) of AP I. In such cases, the civilians and civilian objects concerned may suffer harm at the same time and in the same manner as the intended target of the attack. For instance, cannon fire directed from a helicopter against a military vehicle driven by an enemy combatant and carrying a civilian passenger is likely to affect the vehicle, the enemy combatant, and the civilian passenger simultaneously and, for all intents and purposes, in the same way. Despite this, it is well-

119 ibid, para 802.

120 Of course, this simply means that the attack would not fall under art 51(2) of Additional Protocol I. Whether it complies with the rules in art 51(4) of Additional Protocol I, including proportionality, is a separate question.

121 The point is that complying with precautionary obligations almost certainly excludes an intent to deliberately target civilians or civilian objects, but it is worth underlining that it does not follow that failing to take all feasible precautions in attack implies, or proves, that the attack was also deliberately directed against civilians or civilian objects. It is perfectly possible to conduct an attack against a lawful target that fails to minimize civilian harm without it also being deliberately directed against civilians or civilian objects. This would be the case, for example, where a party fails to take feasible steps to reduce the level of non-excessive incidental civilian harm expected from an attack to its minimum.

122 This is demonstrated by the inability of the Trial Chamber in *Katanga* to determine, in the absence of sufficient evidence, whether violence against a group consisting of lawful targets and civilians was specifically directed at the latter, even though both were exposed to the same acts of violence and lethal effects. See *Katanga* (n 114), para 875.

123 Daniele (n 4) 40.

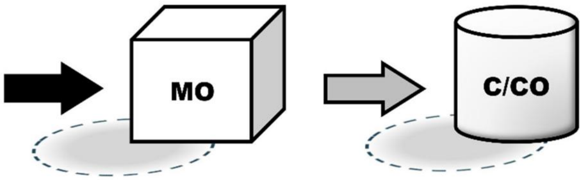

Figure 1. An attack affects a Military Objective and generates a secondary effect, which causes harm to a Civilian/Civilian Object.

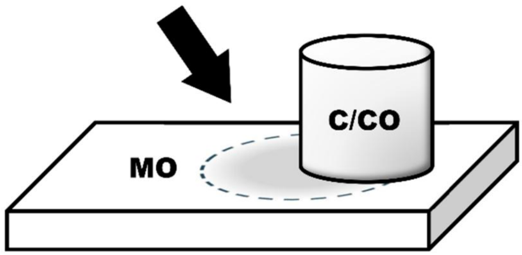

Figure 2. A Civilian/Civilian Object is present in or on a Military Objective and both are affected simultaneously by an attack.

established that harm suffered by civilians and civilian objects located inside or on military objectives is subject to the proportionality rule and therefore qualifies as incidental harm. Commenting on its 1973 draft of the Additional Protocols, the ICRC declared that 'civilians who are *within* or in the immediate vicinity of military objectives run the risk of "incidental" effects as a result of attacks launched against these objectives'.[124] The point is repeated in the official Commentary on the Additional Protocols,[125] features in various national manuals[126] and is widely accepted in the literature[127] and in practice.[128]

Thirdly, an attack directed against a military objective may affect the target and any nearby civilians and civilian objects simultaneously and in the same manner (Fig. 3). For example, where a tank directs its main gun against an enemy dugout, the weapon's lethal effect radius may extend beyond the enemy position to encompass nearby civilians and civilian objects. In such cases, the target and any nearby civilians or civilian objects may be impacted by the blast and fragmentation effect in much the same way. As a result, any civilian harm is likely to be immediate and direct, rather than delayed and secondary. Such civilian harm must qualify as incidental, since it does not meaningfully differ from the immediate and direct harm that civilians and civilian objects may suffer when they are located inside a military objective and which, as we have seen, is treated as incidental in nature. Indeed, if it were otherwise, any attack that generates immediate and direct effects beyond the confines of the military objective it targets and in doing so causes civilian harm would have to be considered as a deliberate attack on

[124] International Committee of the Red Cross (n 83) 57 (emphasis added and footnote omitted). See also International Committee of the Red Cross, *Draft Rules for the Limitation of the Danger Incurred by the Civilian Population in Time of War* (Geneva, 1956), 81 (noting that 'loss and destruction which the attack is liable to inflict upon the civilian population' may be caused both by direct and indirect effects).

[125] Sandoz, Swinarski, and Zimmermann (n 2) 684.

[126] United States Department of Defense, *Law of War Manual* (updated edn, July 2023), § 5.12.3.3; Ministère des armées (n 109) 267; Danish Ministry of Defence (n 14) 317.

[127] eg van den Boogard (n 3) 161–62 (with further references).

[128] eg International Criminal 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* (2000), paras 71–79.

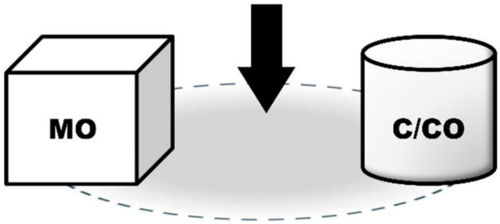

Figure 3. An attack affects a Military Objective and a nearby Civilian/Civilian Object simultaneously.

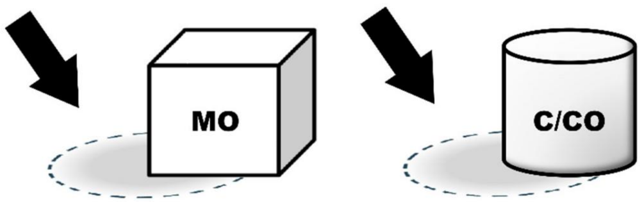

Figure 4. Distinct elements of an attack affect a Military Objective and a Civilian/Civilian Object separately.

civilians or civilian objects in contravention of Articles 51(2) or 52(1) of AP I. This would render unlawful the use of weapons in circumstances where their effects cannot be wholly contained within the military objective they targeted. Such a requirement would be utterly unworkable, as it is difficult to see how the effects of most firearms, guns, and other weapons generating or relying on explosive effects could be so contained when they are used in the vicinity of civilians or civilian objects.[129]

Finally, an attack directed against a military objective may consist of several distinct acts of violence, some of which may affect the military objective, whilst others may only affect nearby civilians or civilian objects (Fig. 4). In these situations, civilians and civilian objects may be impacted directly by harmful effects without those effects having a simultaneous impact on the military objective being targeted. Direct and indirect fires offer one example. As we have seen earlier, the notion of 'unavoidable damage' or 'dommages involontaires' in Article 2 of Hague Convention IX of 1907 extends to the harm that civilians may suffer while artillery fire directed against a military objective is being adjusted during a naval bombardment.[130] Similarly, in the *Gotovina* case, the Trial Chamber of the International Tribunal for the former Yugoslavia applied the proportionality rule to artillery fire directed against military objectives located inside residential areas, holding that the accused accepted the risk of causing excessive civilian harm in light of the limited accuracy of the shelling and the blast and fragmentation effects of the projectiles.[131] By necessary implication, this decision qualifies civilian harm caused by shells that were expected not to hit their

[129] eg even small explosive munitions, such as the GBU-39 Small Diameter Bomb, create shockwaves that may shatter windows in an urban environment. Unless such damage qualifies as incidental harm, it would render an attack using this munition outrightly indiscriminate.

[130] See the text accompanying nn 44–51 above.

[131] *Prosecutor v Ante Gotovina, Ivan Čermak and Mladen Markač* (2011) Judgment, IT-06-90-T, 15 April 2011 (ICTY Trial Chamber), para 1910. The Trial Chamber's reasoning has come under heavy criticism, eg Walter B Huffman, 'Margin of Error: Potential Pitfalls of the Ruling in the Prosecutor v. Ante Gotovina' (2012) 211 Military Law Review 1–56. Some of its findings were reversed on appeal, but the reasons for that reversal do not put into question the applicability of the proportionality rule. See *Prosecutor v Dario Kordić and Mario Čerkez* (2004) Judgment, IT-95-14/2, 17 December 2004 (ICTY Appeals Chamber), paras 49–84.

intended target as incidental in nature, including where those shells may have had no effect on their intended target.

Weapons with delayed effects, such as anti-personnel landmines, provide another set of examples. Amended Protocol II to the Convention on Certain Conventional Weapons prohibits the indiscriminate use of land-mines, booby-traps, and other devices, including any placement of these weapons that is expected to cause excessive incidental civilian harm.[132] In principle, landmines, booby-traps, and other devices falling under Amended Protocol II may all be activated by civilians without causing a simultaneous impact on military objectives.[133] This implies that civilian harm may qualify as incidental even where the harmful effect on civilians is direct, rather than secondary, and not necessarily accompanied by a simultaneous effect on the military objective the attack was directed against.[134] This is further confirmed by the view, adopted by a large number of States,[135] that proportionality applies to explosive remnants of war, which necessarily implies that the harm which civilians or civilian objects affected by such remnants suffer is incidental in nature.[136]

Earlier, we concluded that incidental civilian harm involves situations where an attack is directed against a military objective, but not against civilians and civilian objects, yet the latter still suffer harmful effects.[137] However, this reveals little about how such harm might arise in practice. Taking a closer look, we have now found that the law of armed conflict recognizes different types of incidental civilian harm. The notion includes not only harm that civilians and civilian objects may suffer indirectly as a secondary effect of an attack directed against a military objective, as in Fig. 1, but also harm caused by direct and simultaneous effects, as in Fig. 2 and Fig. 3, as well as harm caused by direct and non-simultaneous effects that have no impact on the intended target,[138] as in Fig. 4.[139] The

132 art 3(8)(c), Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on 3 May 1996 (Protocol II, as Amended on 3 May 1996) Annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, 3 May 1996, 2048 UNTS 93.

133 eg a civilian may activate an anti-personnel mine, and suffer harm as a result, without any military objectives being present at the time.

134 art 3(8)(c), Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on 3 May 1996 (Protocol II, as Amended on 3 May 1996) Annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, 3 May 1996, 2048 UNTS 93.

135 eg Responses to Document CCW/GGE/X/Wg.1/Wp.2, entitled IHL and ERW, dated 8 March 2005, Response from Norway, CCW/GGE/XI/WG.1/WP.5, 29 July 2005, paras 17–21; Response from Austria, CCW/GGE/XI/WG.1/WP.14, 4 August 2005, paras 8–11; Response from Japan, CCW/GGE/XI/WG.1/WP.12, 4 August 2005, para 3; Response from Switzerland, CCW/GGE/XI/WG.1/WP.13, 3 August 2005, paras 13–15; Response from the Czech Republic, CCW/GGE/XIII/WG.1/WP.2, 10 February 2006, paras 4 and 6. See also International Committee of the Red Cross, Existing Principles and Rules of International Humanitarian Law applicable to Munitions that may become Explosive Remnants of War, CCW/GGE/XI/WG.1/WP.7, 28 July 2005, paras 19–21. This position was affirmed by seventy-six States at the Third Review Conference of the High Contracting Parties to the Convention on Certain Conventional Weapons: see Final Declaration as Adopted with Oral Amendments at the Final Plenary Meeting of the Conference on 17 November 2006, CCW/CONF.III/11 (Part II), 17 November 2006 ('*Noting* the foreseeable effects of explosive remnants of war on civilian populations as a factor to be considered in applying the international humanitarian law rules on proportionality in attack and precautions in attack').

136 Asia Pacific Centre for Military Law, Expected Civilian Damage and the Proportionality Equation—To What Extent should the Mid to Longer Term Consequences of Explosive Remnants of War be taken into Consideration in the Proportionality Assessment, CCW/CONF.III/WP.9, 15 November 2006.

137 See text accompanying n 94.

138 See Michael N Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (2nd edn, CUP 2017) 472 ('Collateral damage can consist of both direct and indirect effects. Direct effects are "the immediate, first order consequences [of a cyber attack], unaltered by intervening events or mechanisms". By contrast, indirect effects of a cyber attack comprise "the delayed and/or displaced second-, third-, and higher-order consequences of action, created through intermediate events or mechanisms"', quoting Joint Chiefs of Staff, *Joint Targeting*, Joint Publication 3-60 (2018), II-35). Dr Daniele denies that harm caused by direct and simultaneous effects could qualify as incidental harm, which he suggests has to be 'secondary and indirect'. See Daniele (n 4) 42.

139 See Bothe, Partsch, and Solf (n 80) 406–07 (noting that the drafters of Additional Protocol I declined to limit incidental harm to harm occurring in the 'immediate vicinity of military objectives').

fact that such harms may be expected with virtual or even complete certainty has no bearing on whether or not they qualify as incidental in nature. The proportionality rule requires those who plan or decide upon an attack to account for all civilian harm that they must reasonably expect from an attack, in other words, all civilian harm that is probable or likely to occur in the course of the attack.[140] This is a minimum requirement. The fact that civilian harm is expected to materialize at higher levels of certainty does not make it any less incidental.

Returning once more to the example of the high-rise building, the fact that the attack directed against the enemy unit in the basement produces effects that may impact both the enemy unit and civilians or civilian objects located inside the building at the same time and in the same manner—that is by way of primary blast and fragmentation effects, followed by secondary fragmentation and possibly injury, death or damage resulting from the partial or complete collapse of the building[141]—does not preclude the civilian harm from qualifying as incidental and does not prevent the proportionality rule from being engaged.[142]

The meaning of 'incidental': lesser consequences?

The Lesser Effects Thesis suggests that incidental harm must not simply be a consequence of an attack on a military objective, but that it must be a *side* consequence, rather than the prevalent one.[143] Accordingly, where the civilian harm expected from an attack is not the lesser consequence of an attack compared to the effect it is expected to have on the intended target, it cannot qualify as incidental in nature. This raises two questions: does the term 'incidental' as employed in the relevant provisions of AP I require a distinction to be drawn between the lesser and the prevalent consequences of an attack, and, if so, how are we to determine what amounts to a lesser and a prevalent consequence?

Neither AP I nor other law of armed conflict treaties define the word 'incidental' in express terms.[144] Consulting an authoritative dictionary to identify the ordinary meaning of the notion reveals that it refers to something 'occurring or liable to occur in fortuitous or subordinate conjunction with something else of which it forms no essential part; casual'.[145] This suggests that incidental civilian harm is the accidental or casual by-product of an attack carried out against a military objective.[146] Describing it as something occurring in subordinate conjunction with an attack confirms that incidental civilian harm constitutes a variable that is dependent on the attack, which in turn is the independent variable. Nothing in this dictionary definition implies that incidental harm must be of a lesser magnitude, scale, or extent than other consequences of the attack. However, the word may also be used as a noun, rather than as an adjective, to refer to an 'incidental circumstance, event, charge, expense, etc'.[147] When used in this sense, the term may imply a relationship of

140 Cohen and Zlotogorski (n 3) 88–92.

141 See Geneva International Centre for Humanitarian Demining, *Explosive Weapon Effects: Final Report* (Geneva, 2017) 41–61 and 81–107.

142 Once again, this is on the assumption that the attack was directed against the enemy unit, was not directed against civilians and civilian objects, as confirmed for instance by precautionary measures, and employed means and methods that were capable of being directed against military objectives.

143 See Daniele (n 4) 37. Elsewhere, Dr Daniele distinguishes incidental effects from 'principal', 'primary', 'similar or higher' or 'main' effects: see ibid, 38, 40, 41.

144 Incidental harm is also mentioned in Art 1(b)(i), Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) Annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, 10 October 1980, 1342 UNTS 137.

145 Oxford English Dictionary, s.v. 'incidental (*adj.*), sense 1.a', July 2023, <https://doi.org/10.1093/OED/5186866329> accessed 6 June 2025.

146 The same emerges from the other authentic languages of Additional Protocol I. Thus, the Chinese version uses '附带', the French text 'incidemment', the Spanish version 'incidentalmente' and the Russian text 'попутно', all of which may be translated as 'accidental', 'in passing' or 'accompanying'.

147 Oxford English Dictionary, s.v. 'incidental (*n.*),' July 2023, <https://doi.org/10.1093/OED/5230115523> accessed 6 June 2025.

proportion. Thus, the notion of incidental charges typically refers to fees or costs that are smaller than the main body of expenses to which they relate.

As our earlier discussion of the rules on indiscriminate attacks has shown, the context of the proportionality rule in AP I offers few clues about the meaning of incidentiality, other than confirming that incidental civilian harm arises in the course of an attack directed against military objectives and that it excludes harm resulting from acts of violence deliberately targeting civilians or civilian objects. Turning to the object and purpose of AP I does not take us much further. Considering the text as a whole,[148] one might conclude that the Protocol's object and purpose is to 'protect the victims of armed conflicts', as suggested by its preamble, in a variety of different circumstances, ranging from belligerent occupation to detention and the conduct of hostilities. However, it would be a mistake to understand this to mean that the protection of the victims of armed conflict is the sole and overriding object and purpose of AP I in the sense that it requires interpreters to consistently ascribe a meaning to the text that confers the widest possible amount of protection without regard to any other factors. All law of armed conflict instruments, including AP I, are based on a balance between military necessity and humanitarian principles, a point that interpretative efforts may not ignore.[149] The protective object and purpose of AP I should not be taken as an invitation to redraft its provisions by consistently prioritizing humanitarian outcomes without restraint at the expense of other considerations or by disregarding the compromises on which those provisions are based.[150] This applies with added force to proportionality, since the rule was specifically meant to reconcile humanitarian imperatives with operational realities, as its negotiating history shows.[151] With this in mind, it would stretch the object and purpose element of treaty interpretation to its breaking point to suggest that the notion of incidentality in AP I must, because of the Protocol's protective dimension, imply a relationship of proportion.[152] The better view is that the object and purpose of AP I is too sweeping to clearly demand one specific interpretation over another in this particular case. Since recourse to the object and purpose of AP I therefore does not lead to a conclusive outcome, it is appropriate to apply the supplementary methods of interpretation.

The *travaux préparatoires* suggest that the drafters employed the term 'incidental' mostly as a synonym of 'accidental'. Thus, the ICRC described incidental effects as accidental effects in the commentary on its 1973 draft of the Additional Protocols,[153] declaring that '[*p*]*roportionality* covers the *accidental* effects of attacks on protected persons and objects, as the word "incidental" indicates'.[154] Introducing the proportionality rule during the subsequent negotiations in Geneva, the ICRC once more described proportionality as applying to effects that 'incidentally or accidentally endanger the civilian population'.[155] Elsewhere, it referred to the 'incidental or indirect risks' that attacks pose for civilians.[156] The

[148] Richard K Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 218.

[149] Kubo Mačák and Ellen Policinski, 'In Pursuit of a Treaty's Soul: A Study of the Object and Purpose of the Fourth Geneva Convention' (2024) 73 International and Comparative Law Quarterly 385–415, 399–400.

[150] As noted earlier, a different approach is taken by Daniele (n 4) 53 ('The best interpretation is always the one that limits the harm it can cause to the most vulnerable to the minimum').

[151] See text accompanying nn 21–27. See also Sandoz, Swinarski, and Zimmermann (n 2) 685 (the proportionality rule is 'is aimed at establishing an equitable balance between humanitarian requirements and the sad necessities of war').

[152] It is for States to agree on how the law should 'conciliate the necessities of war with the laws of humanity', as the Saint Petersburg Declaration (n 19) notes, and not for commentators to unpick those agreed compromises.

[153] *Draft Additional Protocols* (n 83) 64.

[154] ibid 65.

[155] Summary Record of the Second Meeting, CDDH/III/SR.2, 12 March 1974, in Federal Political Department, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, XIV (Bern, 1978) 13, 13. See also Summary Record of the Twenty-First Meeting (n 21) 181 ('incidental or accidental danger').

[156] Summary Record of the Twenty-Third Meeting, CDDH/III/SR.23, 19 February 1975, in Federal Political Department, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, XIV (Bern, 1978), 201, 204.

negotiating States also understood incidental losses to mean accidental effects[157] and distinguished the incidental consequences of attacks from harm inflicted on protected persons deliberately.[158] The drafters also made reference to incidentiality in relation to the predecessor of Article 51(2) of AP I, which in its second sentence prohibits threats or acts of violence 'the primary purpose of which is to spread terror among the civilian population', noting that this prohibition does not extend to 'terror that is merely an incidental effect of acts of warfare which have another primary object'.[159] However, here, incidental effects are distinguished not from primary effects, which could imply a relationship of proportion, but from the primary purpose of the violence. Overall, nothing in the *travaux préparatoires* therefore suggests that the notion of incidentiality involves a relationship of proportion. Instead, what the preparatory work demonstrates is that incidental harm was understood to mean accidental or inevitable harm.[160]

Applying the rules of treaty interpretation therefore leads to the conclusion that incidental civilian harm refers to the harm that civilians or civilian objects are expected to suffer in fortuitous conjunction with an attack on a military objective, irrespective of the magnitude, scale, or extent of that harm when compared to the impact the attack is expected to have on the military objective targeted. Accordingly, what distinguishes the incidental effects of an attack from its non-incidental effects is not their order of magnitude, scale, or extent, but the requirement that incidental effects be the fortuitous and undesired, rather than the deliberate and desired, consequence of an attack that is directed against a military objective. In other words, the conceptual counterpart of incidental effects is not an attack's prevalent effects, but its deliberate and desired outcomes.[161]

For the sake of completeness, we should note how incidentiality is understood in the literature and in international practice. Incidental civilian harm is often described as unavoidable or inevitable harm.[162] Very few authors appear to suggest that it must be the lesser consequence of an attack, as the Lesser Effects Thesis would have it. Most of those who take this position did so before the adoption of AP I and as a matter of *de lege ferenda*. Writing in 1916, Louis Rolland argued that since the risk of civilian harm could not be eliminated completely in aerial bombardment, only those attacks should be considered unlawful that were likely to affect mainly or exclusively the civilian population not cooperating in the production of military materiel.[163] A similar argument was made at one point by James Spaight, who suggested that the Hague Rules of Air Warfare should have prohibited

[157] Summary Record of the Thirty-First Meeting (n 21) 305 (Romania).

[158] Committee III Report, CDDH/236/Rev.l (n 84) 384.

[159] Committee III Report, CDDH/215/Rev.l (n 26) 274.

[160] Summary Record of the Sixteenth Meeting, CDDH/III/SR.16, 10 February 1975, in Federal Political Department, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, XIV (Bern, 1978), 127, 138 (US); Summary Record of the Twenty-Sixth Meeting, CDDH/III/SR.26, 27 February 1975, in Federal Political Department, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, XIV (Bern, 1978), 233, 241 (UK).

[161] cf Eliav Lieblich, 'Beyond Life and Limb: Exploring Incidental Mental Harm Under International Humanitarian Law' in Derek Jinks, Jackson N Maogoto, and Solon Solomon (eds), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies: International and Domestic Aspects* (T.M.C. Asser 2014) 185, 196 (distinguishing the prohibition on intentionally terrorizing the civilian population from incidental terror).

[162] eg Responses to Document CCW/GGE/X/Wg.1/Wp.2, entitled IHL and ERW, dated 8 March 2005, Response from Response from the USA, CCW/GGE/XI/WG.1/WP.4, 25 July 2005, paras 9 ('The incidental loss of life or injury and collateral damage must be carefully considered. This is meant as unavoidable damage to civilian personnel or property while attacking a military objective'); *Shimoda* (n 67) 238 ('it is naturally anticipated that the aerial bombardment of a military objective is attended with the destruction of non-military objectives or casualty of non-combatants; and this is not illegal if it is an inevitable result accompanying the aerial bombardment of a military objective').

[163] Louis Rolland, 'Les Partiques de la Guerre Aérienne dans le Conflict de 1914 et le Droit des Gens' (1916) 23 Revue générale de droit international public 497–604, 555 ('Seuls sunt illégitimes el condamnables les bombardements aériens de nature, étant données les circonstances dans lesquelles ils sont opérés, à atteindre principalement ou exclusivement la population civile ne coopérant pas à la production du matériel militaire') (emphasis removed).

the bombardment of a military objective situated in a populated area 'unless its size, its location and the conditions of attack are such that there is a reasonable certainty that it will be the main recipient of the bombs dropped'.[164] In rejecting the idea that the prohibition of indiscriminate bombardment in Article 24(3) of the Hague Rules of Air Warfare banned all incidental harm, Karl Heinz Kunzmann argued that the provision must be understood to permit attacks on a military objective provided that any harm suffered by the civilian population remained limited and a mere side effect.[165]

However, by far the most established approach both in the literature and in international practice is to treat the concept of incidental civilian harm as synonymous with the phrase 'collateral damage'. In *Kupreškić*, the International Criminal Tribunal for the former Yugoslavia held that the protection of civilians and civilian objects 'may cease entirely or be reduced or suspended' in situations where 'belligerents cannot avoid causing so-called collateral damage to civilians'.[166] The Eritrea-Ethiopia Claims Commission too has equated incidental harm with collateral damage,[167] as has the International Criminal Court[168] and individual judges of the International Court of Justice.[169] National law of armed conflict manuals consistently employ collateral damage as a synonym for incidental civilian harm,[170] as do expert manuals.[171] In fact, this is not a novel development that has emerged only after the

[164] Spaight, *Air Power and the Cities* (n 64) 214. However, the primary concern of Spaight's rule seems to be precision, not incidental effects. Indeed, elsewhere Spaight suggests that bombing a military objective in a populated area is prohibited if 'the natural and reasonably probable result of an attempt to bomb it will be *widespread and wholly disproportionate* loss of non-combatant life throughout the district' (ibid, 201, emphasis added). This standard reflects the excessiveness threshold of the proportionality rule of Additional Protocol I more closely than the lesser effect threshold postulated by the Lesser Effects Thesis.

[165] Kunzmann (n 64) 184 ('der Angriff auf ein militärisches Objekt ist nur erlaubt, wenn die dabei entstehende Schädigung der Zivilbevölkerung sich in Grenzen hält und eine bloße Nebenwirkung darstellt').

[166] *Prosecutor v Kupreškić et al* (2000) Judgment, IT-95-16, 14 January 2000 (ICTY Trial Chamber), para 522. See also *Prosecutor v Dario Kordić and Mario Čerkez* (2004) Judgment, IT-95-14/2, 17 December 2004 (ICTY Appeals Chamber), para 52 ('It is, however, accepted that attacks aimed at military objectives, including objects and combatants, may cause "collateral civilian damage"'),

[167] Eritrea-Ethiopia Claims Commission, *Partial Award Regarding Western Front, Aerial Bombardment and related Claims, Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 & 26* (19 December 2005), para 36.

[168] *Katanga* (n 114), para 895; *Ntaganda* (n 85), para 1056.

[169] Separate Opinion of Judge Guillaume, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (1996) ICJ Rep. 226, 289; Dissenting Opinion of Judge Shahabuddeen, ibid, 404; Dissenting Opinion of Judge Higgins, ibid, 587.

[170] eg Ministère des armées (n 109) 117 ('effets incidents (collatéraux)'); Ministerio de Defensa, *Derecho Internacional Humanitario (DIH) en las FAS* (Madrid, 2022), 64 ('los daños incidentales o colaterales'); North Atlantic Treaty Organization, *Allied Joint Doctrine for Joint Targeting*, AJP 3.9 (Brussels, 2021), 1–24 ('Civilian losses expected from military action (collateral damage) must not be excessive in relation to the concrete and direct military advantage anticipated'); New Zealand Defence Force, *Manual of Armed Forces Law: Law of Armed Conflict*, Vol 4 (2nd edn, 2022) 8–4, ('Incidental damage (also known as "collateral damage") means damage to or destruction of civilian objects or the natural environment which is not the intended result of an attack on a military objective, but which is a consequence of that attack'); Bundesministerium der Verteidigung, Bundesministerium der Verteidigung, *Humanitäres Völkerrecht in bewaffneten Konflikten* (Berlin, 2018) 145 ('Mittel und Methoden der Operationsführung sind so zu wählen, dass Kollateralschäden vermieden oder minimiert werden'); United Kingdom Ministry of Defence (n 96), para 13.5 ('"collateral casualties" or "collateral damage" means the loss of life of, or injury to, civilians or other protected persons, and damage to or the destruction of the natural environment or objects that are not in themselves military objectives'); Australian Defence Headquarters, *The Manual of the Law of Armed Conflict* (Canberra, 2006), Glossary, 2 (defining collateral damage as 'Incidental damage to persons, objects or locations arising out of combat action against a legitimate military objective').

[171] eg *Tallinn Manual 2.0* (n 138) 471 ('Incidental death of, or injury to, civilians, or damage to, or destruction of civilian objects, is often termed "collateral damage"'); Program on Humanitarian Policy and Conflict Research, *HPCR Manual on International Law Applicable to Air and Missile Warfare* (CUP 2013) 19 ('"Collateral damage" means incidental loss of civilian life, injury to civilians and damage to civilian objects or other protected objects or a combination thereof, caused by an attack on a lawful target'); Yoram Dinstein and Arne Willy Dahl, *Oslo Manual on Select Topics of the Law of Armed Conflict Rules and Commentary* (Springer International 2020) 78 ('the expected collateral damage to civilians and civilian objects must not be excessive compared to the overall military advantage anticipated'); Louise Doswald-Beck (ed), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (CUP 1995), para 46(d) ('An attack shall not be launched if it may be expected to cause collateral casualties or damage which would be excessive in relation to the concrete and direct military advantage anticipated from the attack as a whole').

adoption of AP I: the practice of referring to incidental civilian harm as collateral damage was already in evidence during the diplomatic conference that drafted the Protocol.[172] The equation of incidental civilian harm with collateral damage is significant in the present context because the term 'collateral' does not imply any relationship of proportion. Rather, the word refers to something that is 'situated or placed side by side (with one another); running side by side, parallel',[173] or as something that is 'accompanying, attendant, concomitant' when the term is used in a figurative sense.[174] The widespread and consistent practice of treating incidental civilian harm and collateral damage as synonymous concepts confirms our earlier conclusion that the notion of incidental harm refers to the fortuitous or concomitant consequences an attack that are foreseen but undesired, to be distinguished from its deliberate and desired effects, without implying that these consequences have to be of a lesser magnitude, scale, or extent compared to the attack's non-incidental effects.

How to distinguish between lesser and prevalent consequences?

However, if we were to accept, for the sake of argument, that civilian harm is incidental in nature only if it constitutes the lesser consequence of an attack, then it becomes necessary, as a preliminary step under the Lesser Effects Thesis, to determine whether any civilian harm expected is in fact the lesser, rather than the prevalent, effect of the attack before proceeding to apply the proportionality rule.[175] Those who plan or decide upon an attack would therefore have to carry out a two-stage analysis: first, determine whether the civilian harm is truly incidental and, second, apply the proportionality rule if the answer is affirmative. To enable the first stage of this analysis, advocates of the Lesser Effects Thesis must explain in what sense the incidental civilian harm must be less compared to the main effect of the attack. In principle, they may adopt either a qualitative or a quantitative approach to do so.

A qualitative approach

A qualitative approach would require those who plan or decide upon an attack to compare the significance of the harmful effects the attack is expected to have on civilians or civilian objects with the significance of the desired effects it is anticipated to have on the target. Accordingly, planners and commanders must first confirm that the significance of the harmful civilian effects expected from the attack is less than the significance of the desired effects on the target, otherwise the civilian harm does not qualify as incidental and the proportionality rule would not be engaged. Secondly, assuming that the civilian harm does qualify as incidental in nature, they must proceed to the actual proportionality assessment. This requires them to perform four steps: first, calculate the incidental civilian harm expected; secondly, calculate the concrete and direct military advantage anticipated; thirdly, compare these two values; and fourthly, ensure that the incidental civilian harm is not excessive in relation to the concrete and direct military advantage.[176] Whereas incidental civilian harm may be calculated by relying on quantitative factors, namely the number

[172] Summary Record of the Eighth Meeting (n 21), 67 (US); Committee III Report, CDDH/215/Rev.l (n 26), 283; Report to Committee III on the Work of the Working Group on Arts 46 and 48 to 53 of Protocol I, submitted by the Rapporteur, CDDH/III/264/Rev.l, in Federal Political Department, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, XV (Bern, 1978) 347, 351. See also Department of the Air Force, *International Law: The Conduct of Armed Conflict and Air Operations* (Washington, DC, 1976), 1–11.

[173] Oxford English Dictionary, s.v. 'collateral (*adj.*), sense 1.a', June 2024, <https://doi.org/10.1093/OED/7574210137> accessed 6 June 2025.

[174] Oxford English Dictionary, s.v. 'collateral (*adj.*), sense 2.a', June 2024, <https://doi.org/10.1093/OED/1048410571> accessed 6 June 2025.

[175] Daniele (n 4) 37.

[176] See van den Boogaard (n 3) 260.

of civilians and civilian objects expected to suffer harm,[177] calculating military advantage calls for a qualitative assessment, since attacks against different military objectives under different circumstances offer widely divergent military benefits.[178] This turns proportionality into a qualitative assessment overall, since it is impossible to compare the significance of the incidental civilian harm with the significance of the military advantage anticipated in simple numerical terms.[179]

Both stages of the analysis therefore demand a qualitative assessment, and both require us to compare the same factors, that is, incidental civilian harm on the one side and the desired military advantage on the other side. This poses a problem. Most commentators believe that the excessiveness standard of the proportionality rule requires belligerents to strike a reasonable or equitable balance between the incidental civilian harm and the military advantage,[180] with many suggesting that the threshold of excessiveness is crossed only if there is a clear, manifest, or significant imbalance between the two elements.[181] The upshot is that the excessiveness standard applicable at the second stage of the analysis may allow for somewhat higher levels of incidental civilian harm than the lesser effect threshold applicable at the first stage.[182] This makes little sense. Where civilian harm passes the first stage because it is outweighed by the military advantage, it would always pass the excessiveness standard applicable at the second stage. By contrast, where civilian harm fails the first stage because it is not outweighed by the military advantage, it would not qualify as incidental in nature and therefore the actual proportionality assessment would not be applicable, even though the level of civilian harm involved may not necessarily be excessive. In both cases, the second stage of the analysis—the actual proportionality assessment—would become entirely redundant. To borrow a phrase from Dr Daniele, this would turn the proportionality rule on its head.[183]

Alternatively, we may reject the idea that the excessiveness standard of the proportionality rule allows for somewhat higher levels of incidental civilian harm than the lesser effect threshold. Instead, we may consider the two standards to be identical: civilian harm is incidental and not excessive if it is outweighed by the military advantage. However, this merely amounts to saying that excessive incidental civilian harm cannot be justified under the proportionality rule. This is correct, but it means that the two-stage analysis proposed by the

177 However, it would still be necessary to make a qualitative determination to decide how the different types of civilian harm under the proportionality rule—civilian death, civilian injury, damage to civilian objects—should be weighed in relation to each other.

178 eg destroying an enemy tank attacking friendly forces offers greater levels of military advantage than destroying an obsolete model stored in a warehouse.

179 While it is possible to assign numerical values to different types of military advantage, ascribing a certain number to the destruction of an enemy aircraft, the elimination of a high-ranking enemy commander or the breaking of enemy fighting morale still requires a qualitative judgment.

180 eg Enzo Cannizzaro, 'Proportionality in the Law of Armed Conflict' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014) 332, 340; Sandoz, Swinarski, and Zimmermann (n 2) 685.

181 Gary D Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (3rd edn, CUP 2021) 229; Ian Henderson and Kate Reece, 'Proportionality under International Humanitarian Law: The "Reasonable Military Commander" Standard and Reverberating Effects' (2021) 51 Vanderbilt Law Review 835–55, 838; Dinstein (n 78) 155; Cannizzaro (n 180) 337; Bothe, Partsch, and Solf (n 80) 352; APV Rogers, 'The Principle of Proportionality' in Howard M Hensel (ed), *The Legitimate Use of Military Force: The Just War Tradition and the Customary Law of Armed Conflict* (Aldershot 2008) 189, 208; Randelzhofer (n 70) 484–85 and 491; Kenneth Allen Raby, *Bombardment of Land Targets: Military Necessity and Proportionality Interpellated* (Charlottesville 1968, Judge Advocate General's School), 87–88. See also *HPCR Manual* (n 171) 98 (the excessiveness standard 'is not a matter of counting civilian casualties and comparing them to the number of enemy combatants that have been put out of action. It applies 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').

182 See van den Boogaard (n 3) 254 ('It may even be argued that even when the collateral damage is slightly more than the military advantage, it is not excessive because the imbalance is not "extreme", nor is the collateral damage "clearly" excessive compared to the anticipated military advantage', though note that van den Boogaard does not support this argument).

183 Daniele (n 4) 51.

Lesser Effects Thesis collapses into a single stage, rendering the lesser effect threshold superfluous.

A quantitative approach

A quantitative approach does not fare much better. This would require planners and commanders to compare the number of civilians and civilian objects the attack is expected to harm with the number of military objectives it is meant to affect. Provided that the attack impacts a lower number of civilians and civilian objects than the number of military objectives, the civilian harm qualifies as incidental in nature. In contrast, if the number of civilians and civilian objects is equal to or higher than the number of military objectives affected, the civilian harm constitutes the main or prevalent outcome of the attack. If so, it does not qualify as incidental, and the proportionality rule is not engaged.

This is the approach adopted by Dr Daniele.[184] It seems largely based on a misapplication of the rule set out in Article 51(5)(a) of AP I. This declares that indiscriminate attacks include the following type:

> an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects.

According to Dr Daniele, Article 51(5)(a) of AP I 'confirms that even when several lawful targets are the objective of the attack, it remains absolutely prohibited to target them through means or methods that involve the shelling of densely populated areas or areas with a similar concentration of protected objects or persons interspersed among the lawful targets.'[185] From this, he infers that attacks which are expected to affect a similar or higher number of protected persons or objects compared to the number of military objectives targeted do not involve incidental harm and are therefore not subject to the proportionality rule, but instead are outright indiscriminate attacks.[186] This reasoning does not stand up to closer scrutiny.

The purpose of Article 51(5)(a) of AP I is to restrict the practice of target area bombardment, also known as saturation or carpet bombing.[187] Target area bombardment involves bombing localities or geographical areas containing a number of military objectives in their entirety, rather than targeting those military objectives individually.[188] Three features of the rule are relevant for our purposes. First, the rule applies to 'bombardment by any methods or means'. This covers all types of bombardment, including bombardment from the air or by artillery.[189] However, it does not extend to attacks employing other means or methods of warfare, such as small arms fire, other direct fire weapons, mines, or improvised explosive devices. Secondly, the rule implements the principle of distinction.[190] Where clearly

184 ibid 40 (suggesting that attacks which strike 'lawful targets together with a similar or higher number or concentration of protected persons and/or objects' do not entail incidental civilian harm and therefore are not subject to the proportionality rule, but instead are outright indiscriminate).

185 ibid 35.

186 ibid 40.

187 See Ove Bring, 'Target Area Bombing' (2013) 43 Israel Yearbook on Human Rights 199–214; Hans Blix, 'Area Bombardment: Rules and Reasons' (1979) 49 British Yearbook of International Law 31–69; Randelzhofer (n 70); Esbjörn Roseblad, 'Area Bombing and International Law' (1976) 15 Military Law and the Law of War Review 53–112.

188 Morris Greenspan, *The Modern Law of Land Warfare* (University of California Press 1959) 336.

189 Committee III Report, CDDH/215/Rev.l (n 26) 275.

190 See Roseblad (n 187) 86 (noting that an earlier version of the prohibition was part of the proportionality rule, whereas later the rule was linked to the principle of distinction). This is evident in the 1973 draft of Additional Protocol I, which in draft art 46(3)(a) declared that it was forbidden 'to attack *without distinction*, as one single objective, by bombardment or any other method, a zone containing several military objectives,

separated and distinct military objectives are co-located with civilians and civilian objects, treating those military objectives as a single lawful target and bombarding them as such may involve the use of means and methods that do not distinguish between the distinct military objectives and civilians or civilian objects at the same level of granularity as would have been the case had those military objectives been attacked individually. Target area bombardment in such circumstances is indiscriminate, as it would not be directed at military objectives with sufficient levels of distinction.[191] Thirdly, the rule applies to the bombardment of wider areas. This is so because it prohibits attacks that treat several clearly separated and distinct military objectives as a single lawful target. By definition, a group of several clearly separated military objectives implies that these are located at a certain distance from one another and that collectively they cover an area of a certain size.[192]

By overlooking these features of Article 51(5)(a) of AP I, Dr Daniele draws certain conclusions that the provision does not support. The rule applies only to the bombardment of cities, towns, villages, or other areas of a certain size that contain a similar concentration of civilians or civilian objects. It does not apply, for instance, to the example of the high-rise building, since the attack is directed against a military unit located in the basement, the unit is not dispersed among a concentration of civilians and civilian objects and, in any case, a single building is not a city, town, village, or other area. The area bombardment rule cannot simply be extended to other circumstances, whether by analogy or by turning it into a principle of general application, divorced from the conditions laid down in Article 51(5)(a) of AP I.[193] What the rule prohibits is subsuming several clearly separated and distinct military objectives into a single, overall target for blanket attack, where those military objectives are located in a city, town, or village, or any other area containing a concentration of civilians or civilian objects similar to that found in a city, town, or village.[194] It does not prohibit directing acts of violence against those military objectives individually: in fact, where it applies, the very purpose of Article 51(5)(a) of AP I is to demand that an attack carried out against clearly separated and distinct military objectives should target these on an individual basis.[195] Accordingly, the rule provides no support whatsoever for the idea that it is prohibited to direct an attack, whether by bombardment or by other means, against several military objectives located in a densely populated area where these objectives are targeted individually or that civilian harm may qualify as incidental in nature only where the attack impacts a smaller number of civilians or civilian objects than the number of military objectives it is meant to target.[196]

which are situated in populated areas, and are at some distance from each other' (emphasis added). See International Committee of the Red Cross (n 83) 56.

[191] The application of the rule thus turns on what 'clearly separated and distinct' military objectives implies. This has been the subject of considerable debate during the diplomatic conference. See Summary Record of the Fifth Meeting (n 94) 36–37 (ICRC); Report to Committee III on the Work of the Working Group, CDDH/III/224 (n 26) 330. See also Blix (n 187) 61–69.

[192] The size of the area depends on the number of military objectives and on the meaning of 'clearly separated and distinct' objectives. During the drafting of what is now art 51(5)(a) of Additional Protocol I, the USA declared that its 'delegation took the words "clearly separated" to refer not only to a separation of two or more military objectives which could be observed or which were usually separated, but to include the element of a significant distance. Moreover, that distance should be at least sufficiently large to permit the individual military objectives to be attacked separately'. See Summary Record of the Thirty-First Meeting (n 21) 307.

[193] See also Enno Mensching, *Luftkrieg und Recht: Zur historischen Rolle des Humanitären Völkerrechts in der Einhegung der Luftkriegsführung* (Nomos 2022) 472.

[194] The numerical comparison is between cities, towns, and villages on the one side and other areas on the other side, *not* between the number of military objectives and the number of civilians or civilian objects. Committee III Report, CDDH/407/Rev.1 (n 26), 455.

[195] Rogers (n 113) 306.

[196] eg United Kingdom Ministry of Defence (n 96) para 5.24.4 (as amended) ('An attack on a military objective in a populated area may result in unavoidable incidental injury or loss to civilians or civilian objects. This will not render the attack unlawful if the distinction and discrimination rules are complied with').

Operational considerations and state practice

Seen from an operational perspective, the quantitative approach seems divorced from reality. Taken to its logical conclusion, it suggests that the proportionality rule would not be applicable where an attack directed against a single military objective is expected to harm a single civilian or civilian object, since in these circumstances the number of civilians or civilian objects exposed to harm is equal to the number of military objectives targeted, rather than lower. To fully appreciate the implications of this position, it is important to underline that the proportionality rule covers all civilian persons, except for those directly participating in hostilities,[197] and all civilian objects that are expected to suffer injury, death, or damage from an attack. Neither the identity of the civilians nor the value, size, or any other feature of the civilian objects has any bearing on the applicability of the rule: it extends to all civilians and to all civilian objects exposed to the risk of injury, death or damage.[198] Accordingly, pressing Dr Daniele's interpretation to its logical conclusion, even the most trivial damage that an attack is expected to inflict on a single civilian object, regardless of its nature or importance, would not qualify as incidental harm where the attack targets a sole military objective. To illustrate the point, proportionality would not apply to an attack on an enemy armoured vehicle with a rocket-propelled grenade if the explosion is expected to shatter the glass of a streetlight standing nearby. In fact, pressing ahead with such an attack would, according to Dr Daniele's approach, amount to an indiscriminate attack. This is absurd.

To dismiss the example of the streetlight as an extreme and unrepresentative case does not counter these objections. In reality, the attack on the armoured vehicle is likely to damage not only a streetlight, but may also leave dents on an adjacent car, shatter windows, obliterate road signs, ruin the pavement, and pockmark the façade of surrounding buildings. Should there be a secondary explosion, the damage could be more substantial. The number of civilian objects likely to be harmed will therefore far exceed the number of military objectives, in this case, a single armoured vehicle, targeted by the attack. While the streetlight example is set in an urban context, the situation would be similar if the attack took place in a non-urban setting, if we accept that 'all parts or elements of the natural environment are civilian objects'.[199] Thus, it would constitute an indiscriminate attack to fire a rocket-propelled grenade at the armoured vehicle at the edge of a wood if this was likely to split a tree. Changing the scenario to an attack targeting more than one military objective does not lead to a different outcome if the number of civilians or civilian objects exposed to harm also increases, which will be the case in many, if not most, situations.

To avoid these outcomes, we could temper the quantitative approach by reintroducing some qualitative considerations, for instance by excluding minor harm to civilian objects from the first stage of the analysis,[200] forgetting about objects to just focus on civilian

[197] art 51(3), Additional Protocol I.

[198] The point here is that *all* civilian persons and *all* civilian objects are subject to the proportionality rule, with no exceptions, other than those flowing from art 51(3) of Additional Protocol. This is the case irrespective of the fact that certain persons or objects may enjoy additional protections. As far as objects are concerned, dams, dykes and nuclear electrical generating stations must not be made the object of attack pursuant to art 56 of Additional Protocol I if doing so 'may cause the release of dangerous forces and consequent severe losses among the civilian population'. Depending on the circumstances, the prohibition of 'severe losses' may be more constraining than the proportionality rule, though this prohibition is additional to proportionality and does not change the status of dams, dykes and nuclear electrical generating stations under that rule. The proportionality rule too does not differentiate between different types of civilians, even though assigning a higher value to certain categories of civilians during the targeting process may not be incompatible with the rule. But see René Provost and Vishakha Wijenayake, 'Collateral Kids: Weighing the Lives of Children in Targeting' (2024) 37 Leiden Journal of International Law 1–21 (suggesting that there is a legal obligation, rather than just moral or operational reasons, to weigh children more heavily in the proportionality assessment).

[199] International Committee of the Red Cross, *Guidelines on the Protection of the Natural Environment in Armed Conflict: Rules and Recommendations relating to the Protection of the Natural Environment under International Humanitarian Law, with Commentary* (Geneva, 2020), 20.

[200] However, it would be far from clear where the threshold should lie between minor harm that passes the first stage to qualify as incidental harm automatically and more serious harm that requires a civilian object to be

persons,[201] or by adopting a different ratio between the number of civilian persons and objects likely to suffer harm and the number of military objectives targeted.[202] However, in each of these cases, it is difficult to see on what principles these adjustments would rest and how they could be reconciled with Dr Daniele's reasoning. Alternatively, we could just abandon the quantitative approach as unfounded and utterly unworkable.

It should not come as a surprise to find that States do not adopt such a restrictive position.[203] A case in point is the Collateral Damage Estimation Methodology (CDEM)[204] developed by the USA and employed across the North Atlantic Treaty Organization,[205] the European Union,[206] and by several other States.[207] The purpose of CDEM is to assist military forces in the implementation of their precautionary obligations by assessing and mitigating the incidental civilian harm expected from an attack.[208] CDEM thus reflects not only how nations relying on this process understand their legal obligations, but also represents their actual practice in combat operations. The CDEM process involves a five-level analysis to assess and mitigate incidental civilian harm. The first level verifies the military objective to be attacked and determines the presence of any protected objects, described as 'collateral concerns' that may be affected because they fall within the effects range of the weapon to be used.[209] The second, third, and fourth levels develop weaponeering options to achieve the desired effect on the target and to mitigate any collateral damage. Where all available mitigation techniques have been exhausted and some collateral damage appears unavoidable, the fifth level of CDEM determines the number of civilians and other noncombatants likely to be injured or killed by the attack, so as to produce an overall casualty estimate.[210] This is then subject to the applicable decision-making protocols. In the present context, the point to emphasize is that the CDEM analysis assumes that the attack engages a single military objective, accounts for all collateral concerns that present themselves, and may produce a casualty estimate consisting of any number of protected persons. In other words, the process proceeds on the basis that civilian harm is incidental even where the attack affects the same or a substantially higher number of civilians or civilian objects compared to the number of military objectives targeted.[211]

counted under the quantitative approach. Also, if minor harm to objects were to qualify as incidental in nature automatically, why should a similar adjustment not be made for civilians?

201 However, bearing in mind that proportionality applies to civilians and civilian objects in equal measure, it is not clear how the Lesser Effects Thesis could be applied only to civilian persons, but not to civilian objects.

202 Rather than demanding that the number of civilians and civilian objects affected must be lower than the number of military objectives targeted, a different ratio could be applied: see *Ermittlungsverfahren gegen Oberst Klein* (n 87) 66 (declaring the death of several dozens of civilians not to be excessive in relation to the destruction and killing of several military objectives). However, it is not clear what that ratio should be (eg 2:1, 3:1 … 10:1?), on what principled justification the chosen ratio could rest and how this adjustment can avoid the objections raised by the qualitative approach.

203 eg Norwegian Ministry of Defence, *Manual of the Law of Armed Conflict* (Norwegian Chief of Defence, Oslo, 2013) 46–47.

204 The most recent version of the CDEM is not in the public domain. However, the general principles of the process are reflected in early published versions, including Chairman of the Joint Chiefs of Staff, *No-Strike and the Collateral Damage Estimation Methodology*, CJCSI 3160.01A (Washington, DC, 12 October 2012).

205 North Atlantic Treaty Organization (n 170) 1–27.

206 European External Action Service, 'Avoiding and Minimizing Collateral Damage in EU-led Military Operations Concept', Council doc 5785/16, 3 February 2016.

207 Generally, see Pieter van Malderen and Simon Gerard, 'Legal and Operational Challenges Related to Methods and Means of Warfare in Urban Conflicts' (2020) 58 Military Law and the Law of War Review 161–70, 164–68; John Cherry, Kieran Tinkler, and Michael Schmitt, *Avoiding Collateral Damage on the Battlefield*, Just Security, 11 February 2021 <https://www.justsecurity.org/74619/avoiding-collateral-damage-on-the-battlefield/> accessed 6 June 2025.

208 Chairman of the Joint Chiefs of Staff (n 204) D-1.

209 ibid D-A-7.

210 ibid D-A-30.

211 It is worth noting that CDEM does not account for transient traffic or for secondary explosions, nor does the casualty estimate evaluation produce a figure for protected objects. See ibid, D-A-30 and D-A-31. The CDEM process therefore does not even capture all categories of persons and objects that may be subject to the

Conclusion

The essence of the Lesser Effects Thesis, as presented by Dr Daniele, is that proportionality in the law of armed conflict involves a two-stage analysis.[212] Since the rule only applies to incidental civilian harm, it is first necessary to determine whether any injury, death, or damage an attack is expected to inflict on civilians or civilian objects is incidental in nature. To qualify as such, Dr Daniele suggests that the harm must be the indirect, secondary, and mere side consequence of an attack, rather than its prevalent effect. Specifically, the number of civilians or civilian objects affected must be lower compared to the number of military objectives targeted. Should the attack affect the same or a larger number of civilians or civilian objects, the harm they may suffer would become the main or prevalent outcome and cannot be considered incidental in nature. The proportionality rule would not apply in these circumstances, and conducting such an attack would violate, according to Dr Daniele, the prohibition of indiscriminate attacks. However, where the civilian harm expected is a mere side consequence of the attack, it is necessary to proceed to the second stage of the analysis and conduct a proportionality assessment to determine whether or not the harm is excessive in relation to the concrete and direct military advantage anticipated.

This argument represents a radical re-reading of the proportionality rule that restricts its application to a narrow set of circumstances and significantly expands the scope of the prohibition of indiscriminate attacks. The present article has shown that this interpretation does not reflect the law as it stands, is contradicted by State practice, and is operationally unsound. Civilian harm is incidental in nature when it constitutes the fortuitous and undesired consequence of an attack directed against a military objective. The conceptual counterpart of incidental harm is the deliberate and desired effect of an attack. Applying the rules of treaty interpretation to AP I confirms, as does international practice, that the term 'incidental' does not imply a relationship of proportion whereby incidental civilian harm must be the lesser consequence of an attack compared to its deliberate and desired impact on the military objective.[213] The area bombardment rule set out in Article 51(5)(a) of AP I does not support such a conclusion either. Accordingly, incidental civilian harm within the meaning of AP I refers to (a) injury, loss of life, or damage that civilians or civilian objects are expected to suffer collaterally or in fortuitous conjunction with an attack on a military objective; in situations where (b) the civilians or civilian objects concerned are not deliberately targeted, as may be confirmed by the attacking party having taken feasible precautionary measures; and where the harm they are expected to sustain (c) is foreseen at least as a probable consequence of the attack or at higher levels of certainty; (d) is inflicted knowingly and willingly, but not as a desired outcome; (e) is caused directly or indirectly by first-order or lower-order effects of the attack, whether or not these are accompanied by simultaneous effects on the military objective targeted; and (f) regardless of the magnitude, scale, or extent of the civilian harm compared to the impact the attack is anticipated to have on the military objective.

Many observers have been less than impressed by the proportionality rule codified in AP I. They suggest that the rule is deeply ambiguous, demanding a comparison between two disparate values and providing only very limited guidance to commanders on how they

proportionality rule. It is also worth noting that CDEM does not imply that the casualty figure produced by the process is proportionate. This must be assessed separately.

[212] Daniele (n 4) 37, 52.

[213] To avoid any misunderstandings, it is worth underlining that this point has no bearing on the outcome of the actual proportionality assessment: all civilian harm that is incidental in nature is subject to the proportionality analysis, regardless of whether it constitutes the lesser effect of an attack or not. Depending on the circumstances, it is perfectly possible that incidental civilian harm that is not the lesser effect of an attack may be excessive in relation to the concrete and direct military advantage anticipated, and therefore prohibited, just as it is perfectly possible that it may not be excessive.

should go about this task.[214] Richard Baxter went so far as to declare proportionality to be 'little more than a cautionary rule, requiring the commander to stop and think before he orders a bombardment'.[215] Perhaps we should indeed not expect too much from proportionality. The excessiveness standard marks the outer boundaries of the harm an attack may exact on the civilian population as a by-product of targeting a military objective. Inevitably, the rule shines at its brightest in extreme situations, where the excessiveness of an attack is manifest.[216] The less blatantly the two scales of the proportionality assessment—incidental civilian harm and military advantage—are out of balance, the less obvious it is that the attack has come close to the excessiveness threshold, let alone crossed it. Yet, despite these shortcomings, proportionality forms an essential part of the legal framework that governs targeting in the modern law of armed conflict. This is so because it seeks to prevent the principle of distinction from being hollowed out by attacks which, although properly directed against military objectives, are insufficiently discriminate.[217]

However, where the line between insufficiently discriminate attacks and those that are outright indiscriminate runs is not clear. Writing in 1972, the General Counsel of the United States Department of Defense declared that

> The existing laws of armed conflict do not prohibit the use of weapons whose destructive force cannot be limited to a specific military objective. The use of such weapons is not proscribed when their use is necessarily required against a military target of sufficient importance to outweigh inevitable, but regrettable, incidental casualties to civilians and destruction of civilian objects.[218]

The Department's *Law of War Manual* has reconfirmed this position more recently: where the destructive effect of a weapon is not confined to the military objective under attack, but extends to nearby civilians or civilian objects, this does not render the attack indiscriminate *per se*, but engages the proportionality rule.[219] As we have noted earlier, if it were otherwise, no weapon could be deployed unless its destructive effects were wholly confined to the military objective targeted. This would prevent the conduct of attacks in a vast range of situations. A rule prohibiting attacks with such spill-over effects would not be realistic. At the same time, this cannot be taken as a licence to use weapons which, in the prevailing circumstances, have effects that far exceed what is required to destroy, capture, or neutralize the military objective being targeted.[220] As the ICRC notes in its Commentary to Article 51(4)(c) of AP I, a weapon employed in an attack may be so powerful as to have effects which cannot be limited as required by AP I:

214 eg Kalshoven and Zegveld (n 91) 114–15; Rogers (n 113) 311.

215 RR Baxter, 'Modernizing the Law of War' (1977) 78 Military Law Review 165–83, 179. Elsewhere, Baxter was not overly optimistic about the rule either: see RR Baxter, 'The Law of War' in Maarten Bos (ed), *The Present State of International Law and Other Essays: Written in Honour of the Centenary Celebration of the International Law Association 1873–1973* (Springer 1973) 107 ('Finely spun legal rules turning on notions of proportionality or the taking of precautions bear no relationship to the conditions under which war is carried on').

216 See Sassòli (n 76) 364 ('although the proportionality rule is an important instruction for those who engage in attacks, its respect can only be evaluated in extreme cases').

217 Randelzhofer (n 70) 485. See also Yoram Dinstein, 'The Principle of Proportionality' in Kjetil Mujezinovic Larsen, Camilla Guldahl Cooper, and Gro Nystuen (eds), *Searching for a 'Principle of Humanity' in International Humanitarian Law* (CUP 2013) 72, 74–75; William J Fenrick, 'The Rule of Proportionality and Protocol I in Conventional Warfare' (1982) 98 Military Law Review 91–128, 126–27.

218 Letter dated 22 September 1972 from J Fred Buzhardt, General Counsel of the Department of Defense, to Senator Edward Kennedy, Chairman of the Subcommittee on Refugees of the Committee on the Judiciary, in Arthur W Rovine, 'Contemporary Practice of the United States Relating to International Law' (1973) 67 American Journal of International Law 118–26, 124.

219 United States Department of Defense (n 126), § 6.7.4.

220 See also Spaight, *Air Power and the Cities* (n 64) 221–23.

> For example, if a 10 ton bomb is used to destroy a single building, it is inevitable that the effects will be very extensive and will annihilate or damage neighbouring buildings, while a less powerful missile would suffice to destroy the building.[221]

While few States will have 10-ton bombs in their arsenals, it is safe to assume that most are able to field weapons with a destructive radius that exceeds the boundaries of many military objectives. Where the destructive effect of a weapon needlessly surpasses what is necessary to destroy, capture, or neutralize a specific target, it is not unreasonable to ask whether such an attack employed means or methods of combat the effects of which cannot be limited as required by AP I.

Just as the law of armed conflict does not impose any clear standard of accuracy and precision that a weapon must meet in order to qualify as being capable of distinction,[222] it also does not define at what exact point, if any, the destructive radius of a weapon may render it incapable of sufficient distinction in a given set of circumstances. The absence of such a precise standard may not be critical, though, bearing in mind that States are subject to a duty to 'take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects'.[223] In circumstances where it is feasible to employ a weapon with a more limited destructive effect that presents a lower risk to civilians and civilian objects compared to another, more powerful weapon, States must choose the former.[224] A compelling argument may therefore be made that the prohibition in Article 51(4)(c) of AP I of attacks which employ a method or means of combat the effects of which cannot be limited as required by AP I includes not only attacks in breach of the rules mentioned by Bothe, Partsch, and Solf,[225] but also those that fail to choose means or methods of combat more suitable to avoiding, or in any event to minimizing, incidental civilian harm where such a choice was feasible, as required by Article 57(2)(a)(ii) of AP I. Accordingly, where it was feasible for a party to choose means or methods of combat that were more likely to avoid, or in any event to minimize, the incidental civilian harm expected from the attack, a failure to do so would render the attack indiscriminate under Article 51(4)(c) of AP I.[226]

A more general point emerges from these considerations. The most promising way to reinforce the proportionality rule is not by advancing interpretations that seek to increase its constraining effect to a point where it would render the conduct of many military operations all but impossible. The idea that incidentality requires civilian harm to be the lesser effect of an attack implies, when taken to its logical conclusion, that targeting a sole military objective must be treated as an indiscriminate attack if it were to cause even the most trivial of harm to a civilian object. Not only does this idea find no support in the existing law, but it is so divorced from operational reality that it has no hope of securing compliance. To recall the words of the ICRC, such an approach does 'not promote either the credibility or the effectiveness of humanitarian law'.[227] A better way to safeguard the protective scope of

221 Sandoz, Swinarski, and Zimmermann (n 2) 623.

222 International Committee of the Red Cross, *Explosive Weapons With Wide Area Effects: A Deadly Choice in Populated Areas* (Geneva, 2022) 89–90.

223 art 57(2)(a)(ii), Additional Protocol I.

224 See Report of the United Nations Fact-Finding Mission on the Gaza Conflict (Goldstone Report), UN Doc A/HRC/12/48 (25 September 2009), paras 653–703 (declaring mortar fire directed against a small number of enemy fighters in a populated area where large numbers of civilians were present to be a violation of arts 57(2)(a)(ii) and (iii) of Additional Protocol I).

225 See n 110.

226 To return one last time to Dr Daniele's example of the high-rise building, those planning or deciding upon an attack against the enemy unit in the basement must choose those means or methods of combat which are most likely to avoid or at least reduce the level of incidental civilian harm expected from attacking the building, to the extent feasible. A failure to do so constitutes a violation of art 51(4)(c) of Additional Protocol I.

227 Summary Record of the Twenty-First Meeting (n 21) 181, 183 (ICRC).

the law is to encourage greater transparency in the conduct of proportionality assessments, to test those assessments against the benchmark of international practice and, bearing in mind that the excessiveness standard of the proportionality rule merely imposes a maximum ceiling on incidental civilian harm, to insist on full compliance with other precautionary obligations, in particular the duty to take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental civilian harm.

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