principle of necessity in a proportionality judgment? (2) What is the minimum probability of an event occurring for it to be reasonably considered ''expected'' or ''anticipated''? (3) To what length does ''the reasonable commander'' go in order to acquire intelligence about an attack so that the parameters of a proportionality calculus can be considered sound? The most important question, by far, is what it means to *weigh* anticipated military progress and expected incidental harm to civilians, proportionality *stricto sensu.*

In a first-semester German law class students learn that proportionality has three dimensions: adequacy (a reasonable connection of the means chosen to the goal sought), necessity, and commensurability. It is the last dimension that has so far stubbornly evaded scholarly efforts at concretization but which most urgently requires clarification. The absence of a consensual understanding of non-excessive incidental civilian harm comes into sharp relief in international case law. International criminal jurisprudence has largely failed to elucidate the concept of a ''balance'' between loss of human life and military gain. The Gotovina case provides the most striking example of this desideratum.

Answering the question of what it means properly to accommodate both military and humanitarian concerns in hostilities is not only—not even primarily—a matter of academic urgency. My research on the question of how military personnel define a legitimate target of attack in air warfare suggests that for the practitioner (specifically the practitioner under time pressure) a proportionality assessment may often amount to merely establishing necessity, or, in other words, answering the question: Have we done everything to minimize the collateral damage to be expected from a certain attack? However, collateral damage that was unavoidable, i.e., necessary, is not therefore also proportionate. The ''extra protective layer'' that the prescription of commensurability adds to combat operations thus often gets lost. One reason why this is true, even during good-faith applications of the law, may well be the difficulty of determining what commensurability between anticipated military advantage and expected incidental loss of civilian life means in any given situation.

The danger is that in the absence of an intersubjective legal standard, commentators and practitioners may fall back on their moral principles and intuitions. Recourse to morality in the interpretation of law is not per se problematic. However, if we approach the question of how much civilian life may justifiably be endangered for a certain military gain from a moral point of view, we cannot but consider the aims for which a belligerent has resorted to force in the first place. When we make purely intuitive or moral proportionality judgments, what inevitably guides our ideas, if implicitly or even subconsciously, is whether we think the attacker overall has a legal, just, or politically urgent reason for harming civilians. This is not how the law works. For the legal prescription of proportionality to be action-guiding on its own, we require an intersubjective *legal* understanding of proportionality, one that abstracts from the legality, morality, or prudential worth of a belligerent's reasons for resort to force and corresponding overall goals in war.

Richard Gross

Thank you, Janina. Daniel?

Daniel Cahen

I will start with a very brief historical comment. I would like to stress that the introduction of the principle of proportionality marks a fundamental evolution. It has all the hallmarks of the passage from a total war paradigm, which marked the first half of the 20th century

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with so many tragic consequences for civilians, to a legal order in which there is a legal requirement to mitigate civilian casualties. This is fantastic progress.

Having said that, however, this principle also requires constant interpretation. Just looking at the plain treaty language that General Gross quoted earlier, it is obvious that when you look at terms like ''military advantage,'' which must be concrete and direct, or the IHL definition prohibiting ''excessive harm to civilians,'' for example, there will be interpretive trouble coming, because those are extremely complex notions. The proportionality calculus in general is always extremely difficult, whatever the legal domain under consideration. If you add to this the fact that under the principle of proportionality you have to, in a sense, attribute a quantitative value to human life, which is almost unthinkable in ethical terms, then it is obvious that there are diverging views on this issue. From our perspective, the most important thing is really that those diverging views remain within the confines of the existing rules, as they exist on the treaty and on customary law.

Here there are really two main obstacles, because either you attribute so much value to civilian protection that you render the principle meaningless, and, in a way, you completely hamper military operations, or, on the other hand, you attribute so much value to the military advantage that is being sought, and so much value, in particular, to force protection of the attacking force, that the civilian protection ambition of the principle becomes meaningless. So it is very tricky to strike the right balance, and I hope that during this panel we will have the opportunity to discuss some of those challenges.

Richard Gross

Thank you, Daniel. Professor?

Yoram Dinstein

Let me start off by saying that I disagree sharply with several statements made here. First and foremost, the idea that the *jus ad bellum* has anything to do with the *jus in bello* notion of proportionality is a fallacy. Contrary to what has been suggested by Janina Dill, the ''justice'' (or more correctly, the ''lawfulness'') of a cause pursuant to the *jus ad bellum* is totally irrelevant to the function of proportionality under the *jus in bello*. Indeed, a major premise of the entire spectrum of the *jus in bello* (proportionality included) is that it applies equally to all belligerent parties, regardless of their respective standing in light of the *jus ad bellum*. In other words, the aggressor and the party fighting in self-defense are bound by the self-same rules in the conduct of hostilities. Had that not been the case, the configuration of the *jus in bello* would have been one-sided and thoroughly unworkable.

I am not sure that I understood the assertion about the close connection between proportionality and military necessity. If anything, proportionality in the *jus in bello* is a limitation on military necessity. The way the *jus in bello* is structured is that military necessity allows attacks against lawful targets, namely, military objectives and combatants (including civilians directly participating in hostilities). However, proportionality curtails that freedom. Attacks against lawful targets must be avoided or aborted if the ensuing collateral damage to civilians or civilian objects—that is to say, the incidental injury or harm inflicted on them—deviates from the legal norm.

Unlike German law that has been cited here, no overarching principle of proportionality exists in international law. The principle of proportionality plays a very important role in the *jus in bello*, but it is inapplicable to combatants or military objectives. These may sustain

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catastrophic losses without proportionality ever coming into the picture. The principle of proportionality is exclusively designed for the protection of civilians or civilian objects. Indeed, proportionality in the *jus in bello* is in essence an extrapolation of the principle of distinction.

I want to stress that civilians are almost always present at or near lawful targets during hostilities. If an attack against a lawful target does not take place in mid-ocean, in the desert, or on the ice cap, you can bet that at least some civilians will be around. In fact, even in mid-ocean merchant vessels or fishing trawlers may be sailing not far from armadas of warships; in the desert some civilian nomads may be roaming within range of artillery guns; and on the ice cap indigenous peoples may be hunting seals in areas adjacent to military stations. To protect civilians in the vicinity of lawful targets, the *jus in bello* has come up with the concept of proportionality.

General Gross read out the formulation of the principle of proportionality in Article 51 of Additional Protocol I. Similar language appears in Article 57, but the salient point is that this principle is universally acknowledged to be an integral part of contemporary customary international law. What the principle denotes is that, before an attack is launched against a lawful target, the attacker is required to ensure that the expected collateral damage to civilians or civilian objects would not be "excessive" in relation to the anticipated military advantage.

Three key terms should be highlighted: "excessive," "expected," and "anticipated." "Excessive," rather than "disproportionate"—which is less emphatic—is the adjective resorted to in the Protocol's formula. Then, evaluation of proportionality is a matter of expectation (of the collateral damage) and anticipation (of the military advantage). What counts, in the final analysis, is not hindsight but foresight. And foresight can only be predicated on intelligence available at the time of action. The commander in charge has to assess the situation reasonably in light of the data at his disposal. But he is not judged by *a posteriori* consequences: he is judged by *a priori* expectations and anticipations.

There is an exception to the customary character of the formula of proportionality appearing in Additional Protocol I. This relates to the omission from the text of the crucial expression "overall" when referring to "the concrete and direct military advantage anticipated." The imperative need to read this expression into Additional Protocol I was the subject of many reservations appended upon ratification of the instrument (preeminently, by the United Kingdom). The omission has been rectified in the subsequent Rome Statute of the International Criminal Court. What "overall" tells us is that the anticipated military advantage has to be appraised not piecemeal but holistically. In air warfare, for instance, military advantage has to be gauged not with respect to every single sortie, but as regards the operation in its totality.

Richard Gross

Thank you. With that, let's get into the fact patterns. Again, I want to reiterate that these are fictional countries. Lorania and Dystopia are engaged in an international armed conflict to which Additional Protocol I applies. In November, Dystopia torpedoed a cruise ship operated from Lorania, killing 800 civilians. Dystopia argued that one of its stock of historic Tigerfish torpedoes had misdirected, and that it had instead intended to strike a nuclear submarine owned by Lorania's navy. Is this a disproportionate attack?

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DANIEL CAHEN

I'm not entirely sure that this is a proportionality issue here. I think it really depends on the weapon that is at issue. If it's so old and so bad that you know it's going to misfire and it's not even capable of hitting the target that you're aiming for, then I would say it's a weapon that's indiscriminate by nature. So I think if it's that bad, you shouldn't have it in your inventory.

RICHARD GROSS

Professor?

YORAM DINSTEIN

It's a no-brainer.

[Laughter]

The issue to be addressed is very simple: Was there or wasn't there a technological malfunction or human error? At the root lies a test of credibility or, if you prefer, plausibility. Differently phrased, the question is whether one believes or disbelieves the Dystopian claim of "misdirection" of the torpedo. Assuming that the cruise ship was struck as a result of a genuine mistake or malfunction, this would be the end of the story. A precedent may be found in the well-known incident of the attack on Saddam Hussain's bunker in Baghdad in 1991. You will recall that the United States unintentionally killed in that attack several hundred civilians. Nobody has seriously taken the U.S. to task for the unfortunate incident, since there was no doubt about the credibility of the claim of an erroneous interpretation of the data available. A technological malfunction is in the same category. If the Dystopians honestly tried to take out an enemy nuclear submarine, they are not in breach of the *jus in bello* when a torpedo malfunctions (unless such malfunctions occur regularly and could therefore be foreseen).

However you look at this portion of the scenario, it does not hinge on proportionality as such. Nor is there any reason to proceed down the road of indiscriminate attacks. Such attacks presuppose indifference on the part of the attacker as to whether lawful targets or civilians are struck. There is no indication in the script that the Dystopian armed forces did not really care whether a nuclear submarine or a civilian cruise ship would be sunk by the torpedo. Of course, the legal position would shift dramatically if it were factually established that the Dystopians acted callously or if the "misdirection" claim turned out to be a mere pretext.

JANINA DILL

I would like to highlight that one of the most significant benefits of international criminal jurisprudence is that the subjective mental state of the attacker before the attack is no longer the sole yardstick for whether or not the legal demands of Article 51(5)(b) of Additional Protocol I were met. Proportionality hinges not on what the attacker actually did or did not foresee, but on what the attacker could have, possibly even should have, foreseen.

However, I think the question raised by this scenario is not what the attacker in the specific situation could reasonably have foreseen, i.e., the information she should have acquired and

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taken into account. The scenario shines the light on the more fundamental question of what it means to expect or anticipate military gain or harm to civilians, in the first place. We have here an attack with two possible outcomes: either zero military advantage and considerable collateral damage, or no collateral damage and a significant military advantage. To determine whether the attack was reasonable, we would normally want to know which of those two outcomes was the more likely. Yet that is not what the law asks. Article 51(5)(b) enjoins the attacker to weigh the magnitude of expected harm against the significance of a sought military advantage. The law is silent on the question of probabilities. In other words, international humanitarian law implicitly conceives of expectation and anticipation as binary concepts: either a collateral damage is to be expected or not; either a definite military advantage is anticipated or not.

In practice, an attacker's projections of future developments will range from tentative to "as good as certain." At what likelihood should a decisionmaker change the status of a civilian casualty from "remote possibility" to "expected side effect," and when is incidental harm to civilians so unlikely that it may legitimately be left out of the proportionality calculus? Similar questions arise with regard to the anticipation of a military advantage. A projected military advantage is not supposed to be purely hypothetical, but at what probability of not achieving it should an attack that is also expected to harm civilians be canceled? Should the commander simply weigh the magnitude of harm and the significance of the desired advantage according to their respective probabilities? Such an obligation to determine both the magnitude/significance and the probability of harm/advantage, of course, further raises the epistemic burdens placed on the conscientious attacker, which are already rather high. Moreover, weighing civilian casualties according to their probability further solidifies the law's suggestion that a numerical value can express the value of a human life.

Let me briefly address the question of discrimination that was raised in the context of this scenario earlier: a torpedo is obviously not a "means of combat which cannot be directed at a specific military objective." Nonetheless, this scenario raises the interesting question of whether it is enough that a class of weapons meets the requirement of being capable of discrimination or whether also the individual weapon should be evaluated in light of its propensity to operate indiscriminately. In other words, should an attacker consider the age and wear of her weapon and its corresponding likelihood to misfire? Article 51 not only prohibits attacks with weapons that cannot be deployed discriminately (Article 51(4)(b)), but also those that employ a means of warfare "the effects of which cannot be limited as required by th[e] Protocol" in Article 51(4)(c). The reference in the same provision to "in each such case" suggests that a textual interpretation creates an obligation to test the *individual* weapon. In addition, not accounting for the age and wear of a weapon certainly falls foul of Article 57, specifically its general and unreserved call to take "constant care" to spare the civilian population in paragraph 1.

If Lorania had alternative, i.e., more modern, torpedoes in its arsenal and it could have known about the propensity of the historic torpedoes to misfire, then it would arguably under Article 57(2)(a)(ii) also have an obligation to use those more precise available means in order to minimize expected collateral damage. After all, further reducing the expected harm to civilians would have been feasible in that case. It is sometimes argued that such an interpretation of the duty to take constant care puts at a disadvantage belligerents that allocate resources to the acquisition and upkeep of a modern weapons stock. *That* is what I would call a red herring. Modern militaries have a strong interest in achieving a desired military advantage with the least harm to civilians possible, to avoid the ever steeper reputational

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costs associated with harming civilians. The law would thus not in fact impose a burdensome limit on a well-equipped belligerent's choices.

In addition, and more importantly, any possible disadvantage that well-equipped belligerents nonetheless incur by the prescription to obviate the use of their "dumber" or "worn" weapons would be outweighed by the longer term advantage that the consistent use of the smartest available weapons would create for them. Using only the smartest available weapons would contribute to raising public expectations of collateral damage avoidance. This, in turn, would make it impossible for other belligerents that fail to acquire modern means of warfare to attack certain targets without incurring significant reputational costs, targets that the well-equipped belligerent can attack without this penalty.

Richard Gross

All right. Good discussion. Let's go to the next hypothetical. Lorania begins high-altitude bombing of Dystopia's military bases and transport infrastructure. Lorania plans to bomb munitions factories where 500 civilian workers are thought to be employed, a military base which has an on-site kindergarten and grade school, and a bridge used by civilian commuters, which Dystopia's army logistics corps uses intermittently. What factors affect the proportionality of these chosen strikes?

Janina Dill

The most interesting of the presented cases is the munitions factory because it is the classic case that evokes the specter of the "quasi-combatant." A munitions factory is, of course, a military objective by nature, and the legality of the attack thus turns on proportionality. There may be a military advantage of attacking this particular production plant beyond the immediate erosion of the adversary's capabilities, but if the advantage is just that—one less munitions factory for the other side—500 expected civilian casualties arguably make this a "manifestly disproportionate" attack. The only way in which a belligerent or commentator could construe this attack as legal is to fiddle with the status of the workers, arguing that somehow they do not count quite as much as "normal" civilians. Yet there is nothing in the law that suggests that civilians are not all created equal when it comes to the determination of expected incidental harm.

I respectfully disagree with Professor Dinstein's important discussion of the matter in his book on the conduct of hostilities, which rejects the concept of a quasi-combatant, but allows that munitions workers lose their immunity from attack while they are at work. I disagree on several grounds. First, as I already mentioned, the law contains no basis for the notion that civilian immunity is at all affected by an individual's presence in a military objective (unless it indicates direct participation in hostilities, to which I will return in a minute) or their professional occupation—unless it entails incorporation into the armed forces, in which case the individual is a combatant in the first place, not a civilian with a somehow impaired status. The law distinguishes between the military and the civilian in different ways where persons and objects are concerned. The status of persons under the law is binary: either someone is a civilian or he/she is a combatant. The only way in which civilians can lose their immunity from attack and therefore not enter into a proportionality calculus is through their direct participation in hostilities. The controversy that befalls this concept notwithstanding, it is quite clear that munitions workers indirectly rather than directly participate in hostilities.

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Besides the absence of a legal basis, there is a moral issue associated with weighing civilian lives differently. The argument that a munitions worker is not quite as worthy of protection as a teacher in the kindergarten next door has intuitive appeal as the comparison evokes radical divergences in vulnerability, responsibility, innocence, etc. The moral status of a munitions worker and that of the kindergarten teacher may differ. Yet it is impossible to determine their actual individual liability to being harmed incidentally. In the absence of the requisite information to determine an individual's moral status and given the lack of an intersubjective measure for the differential weight an individual life should have in the proportionality calculus, allowing or asking the belligerent to differentiate among civilians is the mother of all slippery slopes. For this crucial pragmatic reason law needs to diverge from morality and conceive of civilians as prima facie equally worthy of protection.

Lastly, I reject the permissibility of according less protection to munitions workers even if that is the only way to bring munitions factories into the realm of legitimate targets of attack, because such an ad hoc exception challenges the compromise between humanitarian and military concerns upon which the very idea of legal regulation of warfare crucially depends. That the law knows only two categories of persons in war often works to the advantage of the attacker and furthers military pragmatism rather than humanitarian concerns. I have already mentioned that law, as a result, permits the incidental harming of presumably innocent kindergarten teachers (military pragmatism trumps humanitarianism). The binary conception is also at work when law maintains that deliberately killing a combatant is a legally privileged course of action even if that combatant was coerced into assuming this role. In the spirit of compromise, the strict distinction between combatants and civilian then sometimes works to further military goals and sometimes it works to uphold humanitarian ideals, as in the case of the munitions factory, where it interferes with the important military goal of destroying the enemy's weapons production capabilities. In order not to undermine the law's compromise character, we need to preserve the integrity of the distinction between combatants and civilians in both cases.

Yoram Dinstein

I am afraid that once more I disagree with much of what has been said by Janina Dill. We have to parse the factual outline, analyzing separately each of the three targets listed. Let's start with the munitions factory. Such a factory constitutes a military objective by nature. The civilian laborers—albeit not quasi-combatants—have put themselves in harm's way while working in a military objective. The question is whether the expected civilian casualties, caused by an attack against the factory, would be viewed as "excessive" collateral damage. The answer may depend on the type of weapons or ordnance manufactured there. Are we talking about bullets for M-16 rifles or about F-16 fighter aircraft? If we are talking about run-of-the-mill bullets, the number of 500 incidental civilian deaths sounds unusually high to me. But if what is at stake is the pivotal production of F-16 fighter aircraft, the loss of 500 civilians is by no means "excessive." I would regard the deaths of employees when such a munitions factory is attacked as an acceptable *risque du métier*. The civilians in question have opted to work in a high-value military asset in wartime, and their lives would be forfeit if they were caught in the crossfire.

One caveat: under the principle of proportionality, the attacker must always try to minimize the expected collateral damage to civilians. Therefore, if the F-16 munitions factory shuts off at night, the airstrike should be conducted (if possible) when most of the employees are away. On the other hand, in wartime, factories of this vital nature often operate around the

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clock in three shifts, so it may not matter whether the bombing is carried out at 2:00 a.m. or at 2:00 p.m. The high altitude from which the airstrike is launched is not germane, provided that the attacking aircraft are equipped with modern electronics enabling them to identify targets and to avoid indiscriminate carnage.

Next, the bridge. We are told that it is used by both civilians and combatants. But dual use does not diminish the characterization of an object as a military objective. A bridge serving combatants for logistical purposes is certainly a military objective. I believe that every major bridge qualifies as a military objective. If not by nature, then by use, by location, or by purpose.

The fact that a bridge is a military objective does not settle the matter. The dialectics of proportionality now get center stage. But we do not have sufficient information about this particular bridge. We do not even know what the bridge is spanning—a river? A canal? A highway? We need to know more about the military advantage to be gained from destroying the bridge. Otherwise, we cannot determine whether the expected civilian casualties would taint the attack with an "excessive" stigma.

Third, the question of the kindergarten located on a military base. I am using virtually the same illustration in my *Conduct of Hostilities* book. This was triggered by a visit that I had made to the immense Marine Corps compound at Camp Lejeune, North Carolina. In Camp Lejeune, the distance between one gate and another is dozens of miles. When you travel from one gate to another, what you see is not just military paraphernalia, including armor and air units. In between, there are a Burger King outlet, various civilian support facilities, and a day-care center for children of the Marines.

Are civilians and civilian objects, located within a military base, protected from attack? My position is fairly simple. I believe that it all depends on the mode of attack. If the enemy attacks a large military base (like Camp Lejeune) with an ICBM from across the ocean, suffice it to direct the ICBM to the approximate center of the target. Should a day-care center or a kindergarten within the base be destroyed, that is the cost of war: the children should have been evacuated from the military facility before at the outbreak of hostilities. On the other hand, if an enemy F-16 or drone is overflying the base, and it is possible to identify specific objects prior to releasing a missile or a bomb, the day-care center or kindergarten must be spared. The difference, to my mind, is between an attack beyond visual range and an attack conducted with eyes wide open to what is going on below.

The main consideration is always the need to weigh the expected collateral damage to civilians as against the anticipated military advantage. Admittedly, there is no algorithm available: no mathematical equation can be drawn up to facilitate the balancing act. It is a matter of subjective human judgment, which is obviously fallible. Nevertheless, there is an indispensable requirement of reasonableness. This condition of reasonableness is open to review by a court of law at a later stage.

Richard Gross

Daniel?

Daniel Cahen

Just two quick points. On the definition of a military objective under Article 52(2) of Additional Protocol I, I think we have a fundamental difference on bridges, for instance, and even on the concept of a dual-use object. I would consider a dual-use object to be an

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object that's constantly used by both civilians and the military. If an object is used only intermittently by the military, then it cannot be a dual-use object. So a bridge, for instance, cannot be a military objective at all times. It becomes a military objective when it makes an effective contribution to military action, but at other times, I really think it remains a civilian object.

On the school within the base, I think, as an ICRC lawyer, I would also like to talk about precautionary obligations not on the side of the attacking party, but on the side of the party that's coming under attack. There is also an obligation to minimize the risks of young civilians in a non-conflict situation. In a case like the conflict between Lorania and Dystopia, if you really have a full-blown international armed conflict between two states, it's simply a very silly idea to have a school within a base, and I would certainly recommend that the school be moved out of what is clearly a large military objective. That said, if the school is not located elsewhere, it does not relieve the attacking party of its obligations under the proportionality principle. So there are really obligations that have to play out on both sides in this type of armed conflict.

Richard Gross

Okay. Our next fact pattern explores the temporal nature, or temporal scope of proportionality. During a ground invasion of Dystopia, Lorania fires tank shells into residential areas where snipers and artillery from Dystopia are thought to be located. Lorania lays cluster munitions, and destroys the water and sanitation system in Dystopia's second city in an attempt to gain ground from Dystopia's forces. Two hundred and fifty civilians are killed in the initial onslaught, while in the year that follows, 45 children are injured from cluster munition bomblets, and polio re-emerges, killing 80 children and leaving 300 with disabilities. What is the temporal scope of the proportionality calculus?

Professor Dinstein, I'm going to start with you this time.

Yoram Dinstein

There are two issues here. The first is whether the tank shells are fired indiscriminately at the residential areas where snipers and machine-gun nests are active. If lawful targets and civilians are struck indiscriminately, without an attempt at distinction between them, this by itself will suffice to turn the attack into a breach of the *jus in bello*. Conversely, if the tank shells are directed specifically at the snipers and machine-gun nests, we get to the second issue of collateral damage and proportionality. Much depends on the accuracy of the fire and the possible use of precision-guided munitions (PGMs). When the attacker has PGMs at its disposal, the attack can be surgical and the collateral damage may be expected to be exceedingly limited—certainly not "excessive."

Recourse to cluster bombs raises the question whether Lorania is a contracting party to the Dublin Convention, which prohibits their use. If Lorania (like the U.S.) is not a contracting party, it is not bound to abstain from employing cluster bombs. That is the case, inasmuch as customary *jus in bello* does not preclude the use of such bombs as a means of warfare. Cluster munitions are actually a very effective weapon against tanks. If civilians become victims of cluster bombs, this takes us back to collateral damage.

We are told that 250 civilians were killed in the onslaught, although we do not know what killed them, whether it was tank shells, cluster bombs, or any other ordnance. In fact, the munition causing death is neither here nor there, provided that its use does not entail a breach

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of a binding prohibition. The central point is that civilians died while snipers and machine-gun nests were targeted. Absent a finding of indiscriminate attacks, the dilemma is whether the large number of civilian casualties was expected to be "excessive" compared to the military advantage anticipated.

As for the children who were injured by cluster bombs a year later, this is linked to the question of explosive remnants of war (ERW). A relatively recent Protocol (Number V) to the Convention on Certain Conventional Weapons deals specifically with ERW. I do not want to go into details, but in reality not much—other than mapping—is required from contracting parties during hostilities. Mostly, the Protocol is about clearance and removal of the ERW once the fighting is over.

The polio portion of the scenario opens the door to knock-on effects of warfare. Largely speaking, this is a theoretical issue characteristic of academic discourse. In practice, long-term effects are ignored in the general practice of states. Under the existing *jus in bello*, causal proximity is indispensable. Long-range costs looming a year or two after a military clash go beyond what can be expected, and they are simply excluded from the calculus of proportionality.

Richard Gross

Daniel, how about taking second round?

Daniel Cahen

I think saying that you really have to look at immediate consequences is not a proper reading of the plain text of the treaty, because it really talks about incidental civilian harm, and that clearly includes all foreseeable reverberating effects. So, basically, if you attack a power grid, which might be a particularly legitimate military objective, it remains that you have to take into account the knock-on effects on the civilian population, even if it's not immediate, and the same goes if you attack water purification facilities, for example. It's obvious that there will be a risk of waterborne disease that will arise out of that attack, and that has to be factored in when the planning of the attack is being carried out. And if there is excessive harm that is anticipated, then the attack simply cannot take place, even if it's polio one year down the road.

Janina Dill

Two questions must be addressed to determine the role of so-called reverberating or knock-on effects in the proportionality calculus. First, to what extent were they foreseeable? Second, what is the role of intervening agency in the causal chain from the attack to the materialization of the effects in question? It would be disingenuous for an attacker to claim ignorance of the reverberating effects of cluster munitions, specifically of those that do not have a self-destruct mechanism. Similarly, Operation Desert Storm provided ample insight into the knock-on effects of destroying the infrastructure of a modern industrialized society. Foreseeability of the reverberating effects in question obtains in the case at hand.

What about intervening agency? Can the attacker not reasonably expect the attacked party to do their bit in mitigating those foreseeable knock-on effects? It may be true that in the scenario at hand the attacked side could have prevented or limited the severity of the polio outbreak had it repaired the sanitation system immediately. The argument that the attacked

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party has a duty to mitigate the side effects of military operations on civilian infrastructure is certainly valid. Yet it may not be feasible to repair vital infrastructure once destroyed while hostilities are ongoing. Knock-on effects that are both foreseeable and hard or impossible to mitigate during combat operations should absolutely form part of a proportionality calculus.

The attack on the sanitation system in this scenario is first and foremost a challenge to the obligation to distinguish. It is not obvious what the definite military advantage of destroying a water sanitation system could be. There is an ongoing controversy of how to define definite military advantage, specifically with regard to the point of reference for the determination of what it means to achieve progress in war. If the goal with regard to which the attacker strives to achieve an advantage is to overcome the opposing military forces, then I do not see how the water sanitation system of a belligerent could be reckoned a military objective. I have always argued that destroying civilian infrastructure with a view to "inconveniencing" the civilian population is beyond the law.

Richard Gross

Thank you. A rebuttal?

Daniel Cahen

Not a rebuttal but a precision, because we've been talking about the attacks on the water plants. There is a specific provision in the Additional Protocol I that deals with this issue of attacks on objects that are indispensable for the survival of the populations. So it's subject to proportionality tests, but that's even stricter than the general tests. It's 54(2).

Richard Gross

Excellent. We're going to move now into discussion about the interplay between international humanitarian law and international human rights law. I'm going to throw the first fact pattern up to Janina. Following the war with Lorania, Dystopia is fraught with political divisions. Anarchists hold violent protests, and the authorities suspect a riot or insurrection. Dystopia's police officers are still armed with machine guns issued to them when they were called up as reservists during the war with Lorania. Machine gun *fire* is used on the demonstrators, killing 56.

Your thoughts?

Janina Dill

The threshold neither for Article 3 nor indeed for the applicability of the First Additional Protocol is met in this scenario, so that human rights law prevails. That does not mean international humanitarian law is completely irrelevant. The ICRC maintains that, specifically, if human rights are suspended or derogated from during emergencies, IHL provides guidance as to whether the standard upheld by the state can be deemed acceptable.

But let's look at human rights law. The question is: Could it possibly be necessary for the state to kill 56 demonstrators in order to restore public order? Necessity in human rights law is much stricter than in international humanitarian law. The concept of military necessity underlying the principle of distinction in IHL just requires a reasonable connection of the attack to the goal of military victory (meaning it was not *un*necessary to attack a specific

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object because it did not make a contribution to military operations). Attacking the object in question does not have to be the only possible way of achieving a certain military advantage for that object to be reckoned a military objective. In human rights law that is exactly what necessity means: there was no other way. The infringement of individual rights was the mildest means to safeguard a very important public interest or competing right. In the scenario, the police forces could presumably have used milder means such as rubber bullets or water cannons. We do not even need to enquire into commensurability: using live munitions against demonstrators is a violation of necessity in human rights law.

RICHARD GROSS

Professor?

YORAM DINSTEIN

Whereas human rights lawyers seem to be bent on constantly poaching in the field of the law of armed conflict, the reverse is not true. I for one am happy to let them handle the problem, which I do not regard as belonging to the matrix of armed conflict. Not only is the inter-state armed conflict over, but the violence does not meet the lowest threshold of an intra-state armed conflict. What we have is an isolated civil disturbance, and that comes under the radar of a non-international armed conflict.

There are three conditions that must be met for violence to be classified as a non-international armed conflict: (1) the violence must have a modicum of organization; (2) it must be protracted; and (3) there must be a certain level of intensity. In case of isolated and sporadic acts of violence, there is no armed conflict. Absent an armed conflict, human rights law applies. I applaud.

AUDIENCE MEMBER

No-brainer.

YORAM DINSTEIN

Right, it's a no-brainer, again. The next paragraph in the scenario is more intriguing. The violence might now qualify as a non-international armed conflict, but Dystopia denies it. Well, if Dystopia denies it, this may have a boomerang effect. Instead of being subjected to the law of armed conflict, Dystopia must bear the full brunt of human rights law. The best illustration of this turn of events can be found in the famous decision of the European Court of Human Rights rendered in the *McCann* case, relating to use of lethal forces by a British military unit against members of the IRA in Gibraltar. Since the UK had never considered the struggle against the IRA as a non-international armed conflict, human rights law governed the field. When human rights law applies, the use of lethal force can only be undertaken as a last resort. Under the law of armed conflict, lethal force against adversary fighters can be used as a first resort. However, the UK was estopped from relying on that law. Hence, it paid the price in those proceedings.

RICHARD GROSS

Daniel, I'm going to start with you on this one. Again, we're still exploring the interplay between IHL and human rights law. After the slaughter of protesters, terrorist cells form in

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Dystopia, and within a year the bombings occur in all provinces, and not merely sporadically. Dystopia denies the existence of an armed conflict, despite the deployment of its troops to areas known to sympathize with the terrorists. Dystopia begins a policy of targeted killings, killing terrorist leaders when they are at home with their families. Up to eight family members have been known to die in a single attack. The policy is strictly controlled in densely populated areas, where arrest operations are preferred, but if arrests prove impossible, army snipers will fire into the terrorist leader's home.

Daniel Cahen

In this fact pattern we are discussing targeted killings, and the state of armed conflict is denied. I completely agree with Professor Dinstein that if this is the case, then you are just bound by the body of law that you agree to be bound by, so here it would be human rights law.

But assuming IHL applies, obviously there is nothing wrong with what's currently called individualized warfare, and really targeting attacks against specific individuals. As long as the principle of distinction is respected, that's absolutely fine. Here, the real question is how much collateral damage is acceptable, taking into account the value of the targets. Here the only comment that I can make is that in my view it's extremely difficult to have a mathematical approach, and to say that if the leader is of importance X, then Y number of civilians can die.

Richard Gross

Janina, how about you next?

Janina Dill

Well, I think we have discussed the human rights standard quite sufficiently, so I would go back to the thought experiment that Daniel started: What if this were a non-international armed conflict? Then the question would arise as to whether the targeted individuals are directly participating in hostilities or whether they also have a continued combat function? Only in the latter case could a terrorist be attacked in their home. If there is a prima facie permission to attack the individual in question, then the controversial aspect of the ICRC study on direct participation in hostilities becomes relevant: Is there a capture-rather-than-kill obligation under international humanitarian law? I applaud academic efforts of finding such an obligation in international humanitarian law, but I think there is none, at the moment. *Lex lata* is unsatisfying here. That belligerents may kill an individual whom they could have captured is somewhat out of touch with the standard of humanitarianism towards which international humanitarian law has developed over the last couple of decades. Sometimes we don't find in the law what we think should be there.

Richard Gross

Thank you. Professor?

Yoram Dinstein

Actually, I jumped the gun in my earlier reference to the *McCann* case. I have thereby already answered the question. But allow me to add that there have been attempts, some

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time ago, by a group of experts chaired by Judge Meron, the current President of the residual ICTY, to establish a body of law in between human rights law and the law of armed conflict. This is the so-called Turku Declaration of Minimum Humanitarian Standards. But the Turku text has encountered some opposition, and it has decidedly not acquired enough traction to be on its way to becoming binding law. It must always be kept in mind that what counts is not the opinions and recommendations of scholars. Both customary international law and treaty law are the products of the practice of states.

Assuming that the law of armed conflict applies to the case, targeted killings of adversary fighters would entirely pass muster. There is no ambiguity in this respect in the general practice of states, although some human rights scholars might wish to introduce such ambiguity. The law of armed conflict is the *lex specialis*, and it prevails over any clashing of human rights law. Yet, as in all other instances of targeting, proportionality must be observed: the expected collateral damage to surrounding civilians must not be "excessive" compared to the anticipated military advantage.

Richard Gross

All right. We're going to turn now to non-international armed conflict and the principle of proportionality. The situation in Dystopia is now classed as a non-international armed conflict (NIAC). Military attacks are carried out by air and ground troops. In one ground engagement, five soldiers feared coming under fire from a terrorist armed group when they heard a heavy door slam ahead of them. They fired with automatic weapons in the windows of the house and around them in the street. A pregnant woman is killed inside the house and two elderly men playing chess die in the street. If any terrorists were present, they flee before investigators arrive. Daniel?

Daniel Cahen

It's true that in looking at the customary status of the rule in non-international armed conflict, it seems confusing at first that it's not in Additional Protocol II. I have asked my colleagues and I've done a bit of research on this. We have never encountered the states denying the applicability of the principle in non-international armed conflict. So, really, looking at state practice, I think it's unanimous. I would be very interested to hear if people in the room have heard otherwise from various states, but it seems that it's unanimous.

Richard Gross

What about the fact pattern? Neither of you addressed the fact pattern.

Janina Dill

I'll talk about it. Of course, proportionality is applicable in non-international armed conflict. What the scenario raises is the question whether precautions in attack mean the same in non-international armed conflict as they do in classic inter-state wars. The countervailing imperative to precautions in attack is often the protection of the attacking forces. The risk to herself an attacker has to assume is not without limits. Yet this is clearly an example of exaggerated force protection at the expense of precautions in attack. To respond to a perceived threat by shooting into a house without positive identification would challenge even common

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understandings of legitimate peace-time self-defense. Combatants, of course, do not have a right to self-defense. Under international humanitarian law this conduct is clearly impermissible. Their shooting in the street does not even effectively respond to the threat that the forces in the scenario face.

Yoram Dinstein

I definitely adhere to the view that force protection forms a cardinal ingredient of military advantage. However, this part of the scenario has nothing to do with force protection. It has everything to do with the maintenance of discipline. I do not know of a single disciplined army that would allow such behavior. What we have here is indiscriminate attack at its worst. No trained soldiers who hear indeterminate noise are allowed to respond by opening fire blindly in all directions, as well as spraying with bullets windows overlooking the street. This is manifestly an irresponsible response. The shooters should be court-martialed by their own army, irrespective of the law of armed conflict.

As for proportionality in non-international armed conflicts, I am glad to see that there is unanimity in this panel. The precedent, incidentally, is the *Galić* case of the ICTY. Since the *Galić* judgment was delivered, I do not think that there has been any serious disagreement as to the applicability of the principle of proportionality to non-international armed conflicts. The ICRC Study is a useful source, but by no means is it fail-safe; there are in fact quite a few errors in that Study. It is therefore much better to rely on the judicial precedent provided by *Galić*.

Richard Gross

All right, Janina, I'm going to start with you on this one. Again, we're still in the NIAC situation. The armed groups in Dystopia regularly lay improvised explosive devices and improvised antipersonnel mines near military checkpoints. Dystopia is a state party to Amended Protocol II to the Convention on Certain Conventional Weapons. On one occasion, an improvised explosive device detonates at a checkpoint as a group of schoolchildren are crossing, killing 15 children, their teacher, and a corporal from Dystopia.

Janina Dill

The Protocol to the CCW asks that IEDs and antipersonnel landmines be used in ways that comply with the principles of international humanitarian law, such as distinction and proportionality. I harbor fundamental doubts that IEDs or antipersonnel landmines at all allow the attacker to fulfill her obligations to minimize expected collateral damage and take all feasible precautions in attack. Influenced, of course, by where such a device is placed, it is virtually impossible to foresee its exact effects on the civilian population. I am inclined to think that the results of the explosion in the scenario are disproportionate. Just *how* difficult it is to judge *ex post* their *ex ante* foreseeability speaks to how problematic such weapons are.

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RICHARD GROSS

Daniel?

DANIEL CAHEN

I think here a lot would revolve around the weapons that are used and their characteristics. If it's a remote-controlled IED, for instance, I think that would change the whole equation, because if you actually activate the device when you see the kids coming through, then clearly it's a violation. On the other hand, if the weapon is directed at the checkpoint and it's not remote-controlled, it's victim-activated, but it's a place where no child has been because it's an area completely remote, like in the desert, and there are just no children around, and you're really targeting the checkpoint and the military objective as such, then maybe it's okay. So I would say it's fairly dependent.

RICHARD GROSS

Thank you. Professor?

YORAM DINSTEIN

The underlying issue here is whether insurgents in a non-international armed conflict are bound by the law of armed conflict. There is a vast literature out there dissecting assorted aspects of the problem, which scholars find perplexing. But it is interesting to note that no state entertains any doubt on the subject. When a new treaty concerning non-international armed conflicts is concluded, invariably it prescribes (explicitly or implicitly) that the text applies to all parties to the conflict. The framers of Common Article 3 to the Geneva Conventions did not hesitate to embed in its text the expression "Parties to the conflict," with a capital "P." The upper case was replaced by a small "p" in the subsequent Cultural Property Convention. The phrase "parties to the conflict" (in either form of spelling) was dropped out of Additional Protocol II. Still, in substance, the Protocol applies to insurgents as much as to government forces.

Undeniably, from a jurisprudential vantage point, the binding effect of treaties on insurgents is problematic—because insurgents are not, nor can they become, contracting parties—and the fundamental postulate of treaty law is that treaties are not binding on non-contracting parties. All the same, the question marks in treaty law must not be allowed to obscure the incontrovertible rule that customary international law is binding on everybody, and that includes insurgents. Inasmuch as very large segments of the law of non-international armed conflicts (embracing the principle of proportionality) are currently considered customary in nature, insurgents must comply with that law. Insurgents must do so, although they have not contributed or consented to the emergence of the custom.

This brings me to Amended Protocol II. It is immaterial whether the insurgents have agreed to the stipulations of the Amended Protocol. The instrument will bind them due to its status as a mirror image of present-day customary law. Mind you, this is not at all true of many other treaty provisions relating to non-international armed conflicts: it is not even true of all weapons treaties. Thus, in contrast to Amended Protocol II, the Dublin Convention on Cluster Munitions and the Ottawa Convention on Anti-Personnel Landmines do not, at least as yet, reflect customary international law.

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Coming to the scenario before us, we have to ask ourselves whether it leads to the inescapable conclusion that the customary law of non-international armed conflict has been breached by the insurgents. As far as the means of warfare are concerned, I am not convinced that such is the case. The facts, as set out rather briefly, do not invite an easy resolution of the conundrum. After all, not every anti-personnel landmine—and certainly not every IED—is necessarily branded as unlawful by either Amended Protocol II or customary international law.

However, there is a separate question of methods of warfare. If the explosive device was detonated indiscriminately, this would be a flagrant violation of the customary law of non-international armed conflicts. We are told that a single soldier was killed simultaneously with fifteen children and their teacher. Was the killing of the children an accident or was it foreseen? If the insurgents acted deliberately, expecting this outcome, they have broken the law.

Richard Gross

We've had at least a Master's-level discussion so far. We're going to kick it up to the Ph.D. level for our final fact pattern: the relevance or otherwise of *jus ad bellum* proportionality in just war theories. Then we'll take questions, as we have time, from the audience, but first our panelists will discuss this question. Lorania is seeking to create new *opinio juris* on the principle of proportionality. Lorania's legal advisors are influenced by just war theorists and have written a memo indicating that in cases of supreme emergency, customary IHL norms, including the principle of proportionality, can be displaced if a greater good would be served by self-defense, either of individual soldiers or of the state.

The memo further suggests that the proportionality calculus during armed conflict should be expanded temporally, so that concrete and direct military advantage is defined with reference to the goals of the military operation as a whole. How might this memo influence the effectiveness of the principle of proportionality? This is the exam question you never want to see. Professor?

Yoram Dinstein

My only advice to Lorania is to fire these legal advisors and hire new ones.

[Laughter]

Furthermore, when hiring new legal advisors, Lorania should clarify that it is looking for advisors on law and not on philosophy or ethics. What the present so-called legal advisors purport to do is absurd. How is it possible to create a new *opinio juris* with zero state practice? Customary international law consists of general state practice supported by *opinio juris* ("accepted as law" is the terminology of Article 38 of the Statute of the International Court of Justice). The quantum of state practice may be limited, and then *opinio juris* can endorse or at least acquiesce in it. The *Nicaragua* judgment has also shown that *opinio juris* may explain apparently inconsistent state practice. That is why the prohibition of inter-state war has become part and parcel of customary international law notwithstanding the widespread incidence of war. But in this particular case, we have no state practice at all. What we apparently have is a couple of Ph.D. candidates—who do not seem to have earned, as yet, the Ph.D. . . .

[Laughter]

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. . . who pretend to be able to create something (*opinio juris*) out of nothing. They are floating on a sea of wishful thinking.

JANINA DILL

I completely agree that as the law stands, *jus ad bellum* considerations have nothing to do with *jus in bello*. I think I may earlier have been misunderstood on that point. But let me talk about the supreme emergency issue. The underlying question is whether a law can regulate its own exception. In an institutionally dense environment, in which access to the exception is subject to effective adjudication, it is possible to avoid the exception's eroding the rule. War is arguably the institutionally least dense environment in which international relations, or relations between a state and a non-state armed challenger, can be conducted. Self-defense claims are often invoked in dubious circumstances, and they only remove the stigma of being an aggressor. If a supreme emergency claim removed all legal limits to permissible conduct, belligerents would have an extremely strong incentive to invoke it every time they wage war. Any meddling with the equal application and independence of *jus in bello* weakens it, because the lowest standard that is supposedly reserved for the defender or for the belligerent facing a supreme emergency would be the only standard ever met. So, for once, we actually have a no-brainer.

The other question that this scenario brings back is: What is the appropriate point of reference for defining progress in war? Are we actually allowed to look towards our supposedly just moral aims or political goals in war when we determine whether and how much of an advantage we may expect from an attack? Of course not! It would undermine the little bit of action guidance that proportionality currently has and the justiciability it may in theory be able to afford. If any aim that a belligerent espouses could define concrete and direct military advantage, the principle of proportionality would never limit action. Connecting permissible means in war to espoused ends would amount to an invitation to escalate. At one point in most wars, one side will face defeat. If at that point expanding goals means actions that were previously illegal become permissible, which belligerent would not expand their goals?

RICHARD GROSS

Daniel?

DANIEL CAHEN

I completely agree. I think we should send those legal advisors Professor Dinstein's book, *Conduct of Hostilities*, just to help them think about the issue. The real problem is that with just war theories, you realize that you end up with people advising commanders, basically, to commit international crimes. This is something that does happen in real life.

I think that in the fact pattern another interesting question is the scope of the military advantage that you have to weigh in the proportionality calculus. Is it the tactical gain from one single attack? Is it the attack as a whole? Is it the military campaign? Is it changing political circumstances? It's very important to place the limit somewhere. It seems that the consensus in the international community now is to say that it's really the attack as a whole. So if the attack is made up of several combined attacks, then you look at the attack as a whole, but not beyond that. Otherwise, it becomes really not a direct military advantage but something that's far broader and, at times, hypothetical.

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Richard Gross

All right. With that we are out of fact patterns, and I'm going to open the floor up to questions. If you would, please identify yourself and say if your question is to the entire panel or to an individual. Go ahead, please.

Audience Member

My name is Kubo Macak, University of Exeter. I have a question for the whole panel. At various times, basically, each of you has referred to the inherent incommensurability of the quantities that the principle for proportionality compares. Then you said that it defies the creation of a mathematical equation. Then Professor Dinstein stated that civilians are everywhere, which underlines the importance of the principle of proportionality, even in the desert, even at the North Pole.

So my question to the whole panel is: Is it then possible to take the human out of the loop in making this decision, if it cannot be reduced to a mathematical equation? If civilians are indeed everywhere, would the development of automated lethal weapons mean that the principle of proportionality analysis would be impossible, and thus would the emergence of such weapons mean that they would be inherently violative of the principle of proportionality?

Richard Gross

That's a good question on autonomous weapons systems. Who would like to open that one up? Wow. Nobody? Come on. All right. I'm going to have to call on Professor Dinstein.

Yoram Dinstein

As Kubo Macak ought to know full well, I am assiduously trying to avoid coming to grips at the present juncture with the legal implications of the future introduction to weaponry of artificial intelligence (AI). I am reluctant to address future issues, especially when the future is remote and we do not really know how it will unfold. At the International Institute of Humanitarian Law, in San Remo, Italy, a group of scientists—not just lawyers but scientists—was convened, to tell us whether autonomous robots with AI are likely to appear upon the scene any time soon. The optimists among the scientists (if "optimists" is the right term) maintained that the process would take at least 10 or 15 years. The pessimists assured us that it would be closer to 25 or 30 years. With that kind of crystal ball gazing, I assume that it will be the next generation that will have to seriously worry about the legal repercussions of the technological breakthrough. So why should we spend sleepless nights at present?

Having said that, I may add that what tentatively makes sense to me is that the person who programs the AI robot will have to bear responsibility—criminal and otherwise—for the potential misdeeds of his or her creature. But perhaps once AI materializes in the future, new angles will come into focus and new technological features will have to be factored in the equation.

At the moment, we do not have genuine AI robots. What we do have is drones (and similar devices) that require the presence of a "man in the loop." The present-day drone does not have a mind of its own, and it cannot exercise discretion. The "man in the loop" may program the drone to carry out specific missions in response to a menu of alternative sets of circumstances. The "man in the loop" can also guide the drone by remote control,

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instructing it to change altitude, to move to a new location, to hibernate for a few hours, and ultimately to release a missile (assuming that the drone carries missiles). Occasionally, what we encounter is a "man on the loop" who does not guide the drone, but is capable of monitoring its action. Where necessary, he can intervene and override the machine's operation, primarily if the attack is likely to run afoul of the law. Mind you, where I come from, the "man in – or on – the loop" is frequently a woman, because women excel men in the skill of patience while watching a potential target from aloft.

From the proportionality standpoint, the advantage of relying on drones for surveillance purposes is tremendous. After all, the crux of the issue is whether civilians in large numbers are present at or near a lawful target. The entire landscape of war has been changed drastically by drones, because for the first time in history we can tell almost for sure in real time how many civilians turn up "on the other side of the hill." In the past, due to the "fog of war," military commanders had to rely on conjecture and speculation in deciding whether or not to press the button. Even an ordinary aircraft doing aerial photography cannot compete with a drone, since an aerial photograph has to be analyzed and an ordinary aircraft cannot loiter too long over the target. The inauguration of the drone has altered all that. Still, a drone is unable to think for itself. AI, when it comes, will recast the landscape anew and will pose novel questions. As I said, I would rather skip these questions at the present time.

Daniel Cahen

I never understood Secretary Rumsfeld's writing about the known unknowns and the unknown unknown, and the unknown known, but what is for sure is that, when we got to autonomous weapons, there is a lot that still needs to be thought about. So the ICRC's standpoint, at this juncture, is to say that there is a lot of work to be done to understand the science, and then the legal implications. It's really the standard approach, that in the development of any new weapon, you have to make sure that the weapon is capable of respecting IHL rules, so it's the whole weapons review paradigm. Because of this, we haven't called for a complete ban on the research of autonomous weapons, because it doesn't make entire sense to ban science and research from taking place.

Audience Member

[Speaking off-mike]

Richard Gross

That's a good question. All right. Sarah Cleveland has asked if Lorania is occupying Dystopia, and now it's Lorania's forces who are armed with machine guns, and they use those machine guns against demonstrators, killing 56. How would the panel change its questions now, under occupation law?

Yoram Dinstein

In my opinion, the use of machine guns against civilian demonstrators transcends the setting of belligerent occupation. There are two basic scenarios here. Either combat is raging and civilians are intruding in the middle of the hostilities, or a civilian demonstration is a nonviolent event. If a military unit is fighting its way in the course of hostilities (in or out

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of a territory under belligerent occupation), civilians must not interfere with the military encounter. If they do, they may be regarded as directly participating in hostilities and—for such time as doing so—may be attacked. The same is true if the narrative is that of a violent uprising against an occupying power. By contrast, if civilians run a nonviolent demonstration (whether in an occupied territory or elsewhere), soldiers—whose lives are not threatened—must not become trigger-happy. Should soldiers act rashly, court-martial them!

It must be appreciated that hostilities may flare up in a territory which is under belligerent occupation. The rules pertaining to the conduct of hostilities are the same: these rules govern all hostilities, wherever they are going on, in or out of an occupied territory.

Richard Gross

I think, Professor, you're looking at 3(a). I think she's looking at 2(a). So we have occupation forces who are faced with demonstrators and protestors, and then use machine guns against the violent protestors, killing 56. So how does that change in an occupation?

Yoram Dinstein

Perhaps I overstated the incidence of hostilities because of the reference in the scenario to violence. If no hostilities are going on, and a nonviolent (or marginally violent) civilian demonstration is held in an area under belligerent occupation, the armed forces of the occupying power must not hasten to use lethal force. It is the duty of the occupying power, particularly when belligerent occupation has been going on for a while, to train military units assigned to the administration of the occupation for the eventuality of mass rallies and protests. In this respect, there is an analogy between the forces of occupation and regular law enforcement agents who occasionally have to put down a mass protest in peacetime (sometimes leading to large-scale bloodshed, as happened in Tahrir Square in Cairo or in the Maidan in Kiev).

The long and the short of it is that, in the context of belligerent occupation, the occupying power must exercise caution not to cause too much harm to nonviolent (or marginally violent) civilian protesters. A common tool for crowd dispersal is the use of nonlethal weapons. But, naturally, even with the best of training, there may be rogue behavior by some occupation soldiers. If that is the case, discipline must be imposed by the occupying power and legal action taken against the transgressors.

Richard Gross

Anyone else on the panel want to respond?

Janina Dill

I agree.

Richard Gross

All right. I have time for one more.

Audience Member

My name is Noam Wiener. I think that all the panelists, very adroitly, avoided the question of intractability and commensurability, which Professor Dill mentioned in the beginning.

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But if this is so incommensurable and so intractable and so incapable of being used, then what's the point of a legal principle we can't actually adjudicate?

Richard Gross

Janina, do you want to start?

Janina Dill

As I said, indeterminacy in the law is a double-edged sword. It may funnel human reason into the decisionmaking process or it may leave the conscientious actor forced to think beyond the law. Proportionality is clearly an example of a law that is too indeterminate. In my research I encountered numerous military professionals who spoke of genuine disagreement among reasonable and well-trained people not only about borderline cases, but disagreement about typical, if you will, standard cases. Proportionality often fails to guide action. That it largely fails to contribute to the justiciability of the conduct of hostilities is painfully obvious in the ICTY's jurisprudence on unlawful attack. That does not mean we can give up on proportionality. It offers that extra protective layer I mentioned earlier. The alternative is a law of war that only requires that incidental civilian harm be necessary. That this is, in fact, often all that the principle of proportionality is taken to mean in practice adds urgency to keeping the conversation going on how to determine when an expected loss of human life is not excessive in relation to a desired military advantage.

Yoram Dinstein

You are challenging the practicality of the principle of proportionality. But I regard the challenge itself as utterly removed from practicality. I am currently going, with several colleagues, through a series of training courses in air and missile warfare under the aegis of a project called AMPLE. We have already had 14 courses, lasting three days each, in many countries in three continents. General Jan Peter Spijk, who is present here, was involved and knows all about the courses. Let me tell you that, invariably, the construct of proportionality proves fully comprehensible to air force operators. Participants in the courses come back from tours of duty in Afghanistan, Iraq, Libya, or wherever. They fully perceive the need to weigh collateral damage to civilians on some comparative scales. Indeed, when we discuss actual and hypothetical scenarios, most of the time the balancing act leads to a consensus as to how the problems ought to be resolved. Of course, now and then we face gray areas and borderline cases where opinions differ. But is this not true of all law? Do you know of a single field of law, international or otherwise, where there are no borderline cases? In reality, that is how lawyers make a living: they thrive on borderline cases.

I want to emphasize that, in the conduct of hostilities today, the name of the game is proportionality. Many people think that the paramount task is to distinguish between combatants/military objectives and civilians/civilian objects. But, although this has to be done, distinction per se is not the key to civilian protection from attack. After all, every single object can become a military objective; if not by nature then by use, purpose, or location. Even a hospital or a school can become a military objective when a machine-gun is placed on the roof. Does that mean that it is permissible to blast off the hospital and possibly kill hundreds of patients and medical personnel? Or to destroy a school and kill hundreds of schoolchildren? The answer is negative, and once more it is a no-brainer. It is not only a

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no-brainer for lawyers: it is equally a no-brainer for military operators. The operators grasp immediately that some sort of proportionality assessment is called for. The fact that we may not agree on all the nuances of that assessment does not detract from the validity of the hard core of the principle of proportionality.

Richard Gross

Well, this has been an absolutely fantastic panel. My thanks to Elizabeth Stubbins Bates, Nicholas Rostow, and Oona Hathaway who wrote the fact patterns and put this together, and, of course, please give a big round of applause for our four panelists.

[Applause]

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