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Humanitarian Regulation of Hostiles: The Decisive Element of Context

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Humanitarian Regulation of Hostilities: The Decisive Element of Context

Geoffrey S. Corn*

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I. INTRODUCTION

War and human suffering have always been inextricably intertwined. In the past century, the bulk of that suffering has shifted from armed forces or other organized armed groups—those who engage in hostilities—to civilians. As a 2001 article titled *People on War* published by the International Committee of the Red Cross (ICRC) noted:

Modern wars have become conflicts without limits. Civilians have—both intentionally and by accident—been moved to center stage in the theater of war, which was once fought primarily on battlefields. This fundamental shift in the character of war is illustrated by a stark statistic: in World War I, nine soldiers were killed for every civilian life lost. In today's wars, it is estimated that ten civilians die for every soldier or fighter killed in battle.¹

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1. Stanley B. Greenberg & Robert O. Boorstin, *People on War: Civilians in the Line of Fire*, PUB. PERSP., Nov.–Dec., 2001, at 18.

While statistics vary among studies, there is no question that beginning with World War II, the ratio of civilian to military casualties in war has steadily increased. Many experts believe that today 90 percent of casualties are civilian.²

It is therefore unsurprising, as well as critically important, that international legal experts continue to focus on how international humanitarian law, or the law of armed conflict (LOAC), can best be implemented and, in some cases, developed to mitigate the risks civilians confront during war. However, it is equally critical that these efforts are undertaken with a genuine appreciation for the balance between military necessity and humanitarian constraints that lies at the core of LOAC conflict regulation. The credibility and efficacy of efforts to enhance civilian protections depend on such an appreciation.³ Ultimately, LOAC implementation will always be enhanced when the rules align with military logic⁴ and will be stressed when combatants perceive the rules as attenuated from the realities of the missions they must execute.

2. See Graça Machel (Expert of the U.N. Secretary-General), *Impact of Armed Conflict on Children*, ¶ 24, U.N. Doc. A/51/306 (Aug. 26, 1992); MARY KALDOR, *NEW AND OLD WARS: ORGANIZED VIOLENCE IN A GLOBAL ERA* 8 (1999); HOWARD ZINN, *TERRORISM AND WAR* 78 (Anthony Arnove ed., 2002).

3. See G.A. Res. 2675 (XXV), *Basic Principles for the Protection of Civilian Populations in Armed Conflict*, ¶ 3 (Dec. 9, 1970) (“In the conduct of military operations, every effort should be made to spare the civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to civilian populations.”); U.S. DEP’T OF DEF., *LAW OF WAR MANUAL* §§ 2.2.2.2, 5.2.3 (2016) (noting that parties to a conflict should comply with obligations in a manner consistent with military necessity and take feasible precautions to reduce harm to civilians); Matthew J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 *AM. UNIV. J. INT’L L. & POL’Y* 419, 426–27 (1987) (“We support the principle that all practicable precautions, taking into account military and humanitarian considerations, be taken in the conduct of military operations to minimize incidental death, injury, and damage to civilians and civilian objects, and that effective advance warning be given of attacks which may affect the civilian population, unless circumstances do not permit.”).

It is important to note, however, that legal compliance should not be considered the only measure to mitigate civilian risk in the context of contemporary armed conflicts. To the contrary, all efforts to reduce the incentive for nonstate armed groups to gravitate towards urban and other densely populated areas should be pursued. This must include more credible efforts to hold leaders of such groups accountable for ordering or encouraging tactics that increase the risk to civilians, most notably the use of civilians and civilian property to shield their military assets from attack. Additionally, states should seek to increase the effect of strategic messaging to contribute to a more credible public discourse on the responsibility for civilian casualties.

4. See Geoffrey Corn, *The Invaluable Civilian Risk Mitigation Contribution of Recognizing the Value of Precautionary Measures* (forthcoming 2018) (on file with author) [hereinafter Corn, *The Value of Precautionary Measures*] (arguing that the “prioritization of precautions as a critical targeting principle will often be better aligned with instinctive military logic than the more amorphous proportionality rule”).

Successful LOAC implementation requires more than a general recognition that military operational interests⁵ must play a role in defining what is and is not permissible civilian risk during hostilities.⁶ Instead, what is required is an understanding of the relationship between the nature of military operations and the concept of reasonableness—the common touchstone of compliance with almost all LOAC targeting rules.⁷ Unlike many other humanitarian-oriented LOAC rules, such as rules related to the protection of the wounded and sick,⁸ military medical facilities,⁹ or prisoners of war,¹⁰ conduct of hostilities rules rarely function in absolute terms. Thus, unlike the absolute prohibition against directing attacks against the wounded and sick rendered *hors de combat*, most “targeting”-related civilian protection rules do not speak in absolutes. Instead, they require assessment of competing operational and humanitarian interests and a reasonable attack judgment based on balancing these interests. Even the most absolute of these rules, the distinction obligation,¹¹ requires a *prima facie* judgment of whether a person or object is or is not a military objective.

Reasonableness is by its very nature context dependent: what may be reasonable in one context may be completely unreasonable in another.¹² Preserving the fundamental logic of conduct of hostilities rules therefore requires a constant emphasis on the relationship between context and reasonableness. Nothing could be more corrosive to the logic of reasonableness than the continued gravitation towards “effects-based condemnations”¹³ based primarily—if not exclusively—

5. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I] (“In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”).

6. The bulk of this is defined in Protocol I, *supra* note 5.

7. *Id.* art. 57.

8. See generally Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention]; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 85 [hereinafter Geneva Convention II].

9. See Geneva Convention, *supra* note 8, art. 33.

10. See generally Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135.

11. See Protocol I, *supra* note 5, art. 50.

12. For example, the destruction of a bridge that is heavily trafficked by military units would make it a reasonable military target. However, the same bridge may not clearly be a target if it is only traveled by civilians.

13. See, e.g., Rep. of the Indep. Comm’n of Inquiry on the 2014 Gaza Conflict, ¶ 77, U.N. Doc. A/HRC/29/52 (June 24, 2005) (noting the Israel Defense Force’s “use of

on the infliction of civilian casualties and destruction of civilian property.¹⁴ Such an approach penalizes commanders¹⁵ whose good-faith efforts to implement civilian risk mitigation measures fail to produce the desired outcome;¹⁶ rewards commanders who disregard civilian protection legal obligations yet produce outcomes that fortunately do not manifest themselves in actual civilian harm;¹⁷ incentivizes enemy efforts to expose civilians to the risks of combat and thereby increase the probability that friendly civilian risk mitigation efforts will have minimal effect;¹⁸ and undermines respect for the law by those entrusted with its implementation by creating an unrealistic “zero-civilian casualty” expectation.¹⁹

One need only consider a commander whose substantial and good-faith efforts to mitigate civilian risk by complying with LOAC targeting obligations fails to produce her desired outcome. It is simply an unfortunate reality of war that such a delta between the intended and actual outcome of an attack is sometimes unavoidable. Condemning such a commander based on attack effects will inevitably risk diluting respect for the law. Unless the commander is judged based on the information reasonably available when the attack decision was made, the law will be perceived as imposing a strict liability standard; a standard that is attenuated from the reality of warfare and therefore unrealistic and unattainable. This may lead commanders to question the value of investing the time and effort required to comply with the law.

artillery and other explosive weapons with wide-area effects in densely populated areas”) (emphasis added).

14. See Philip Bump, *War is Ugly: Kerry Defends Israel's Incursion into Gaza*, WASH. POST (July 20, 2014), https://www.washingtonpost.com/news/post-politics/wp/2014/07/20/war-is-ugly-kerry-defends-israels-incursion-into-gaza/?utm_term=.d4397d1e98dc [https://perma.cc/9X3K-2Q7R] (archived Feb. 4, 2018).

15. The term “commander” is used throughout this article to denote an individual making a tactical decision to employ combat power. While this may often be a person in a position of formal command, this will not always be the case.

16. For example, U.S. commanders were condemned for accidentally killing over two hundred Iraqi civilians by bombing a bunker that was covertly being used as a shelter, even though they made a reasonable assessment that the target was valid and would not expose civilians to unjustified risk. Indeed, the 1993 cruise missile strike on the suspected headquarters of the Iraqi Intelligence Service was carried out between 1 and 2 a.m. in order to prevent civilian harm. REUBEN E. BRIGATY II, *ETHICS, TECHNOLOGY, AND THE AMERICAN WAY OF WAR: CRUISE MISSILES AND US SECURITY POLICY* 130 (2007).

17. For example, a commander who fails to consider any of their LOAC responsibilities in carrying out an attack, but does not kill any civilians.

18. See generally Human Rights Council, Rep. of the U.N. High Comm’r for Human Rights on the Implementation of Human Rights Council Resolutions S-9/1 and S-12/1, U.N. Doc. A/HRC/28/80/Add.1 (Dec. 26, 2014) [hereinafter Human Shields Report].

19. See *Rules Of Engagement Are A Dilemma For U.S. Troops*, NPR (Dec. 11, 2009), <https://www.npr.org/templates/story/story.php?storyId=121330893> [https://perma.cc/QGQ8-SBTJ] (archived Feb. 19, 2018) (discussing that the impact of General Stanley McChrystal’s rules of engagement on the decisions American troops).

Nowhere are these risks of overlooking context in the assessment of reasonableness more prevalent than in the relation to the type of military operations falling within the general characterization of “combined arms maneuver.” These operations involve the employment of the full spectrum of combat capabilities—what US commanders call combined arms operations—to facilitate ground operational missions. These combined arms ground maneuver operations are usually conducted to “close with and destroy” enemy units and gain control of enemy territory, even if only temporarily. Ideally, such operations would occur in areas with little to no civilian presence—the classic “force on force” engagement. But that ideal is unrealistic today.

Today, isolated force-on-force battles are considered a relic of the past. Instead, armed forces must expect to conduct combined arms maneuver operations in and around civilians and civilian population centers.²⁰ And this expectation is only increased when anticipating operations against enemies who see embedding their vital assets in densely populated areas as a force multiplier. This perception is based on not only the inherent tactical advantages of embedding assets among civilian population centers (such as ready access to logistics and lines of communication), but also their recognition that the complexity of conducting operations against these assets in a legally compliant manner will inhibit the efforts of their state opponents.²¹

All of this points towards the importance of a more comprehensive understanding of targeting reasonableness—an understanding based on the tactical situation that frames attack decisions and the nature of the combat operation in which those decisions are made. This latter aspect of assessing attack reasonableness will be enhanced by considering not only whether an attack decision is deliberate or dynamic/time-sensitive²² but also the impact of the “mission-type”²³ context of operations. As this Article will explain, because operations conducted pursuant to mission-type orders involve inherently decentralized attack decisions, the expectation of what is or is not reasonable is different than in the context of deliberate attack decisions. Because of this, those

20. For example, targeting ISIS in Raqqa, Hezbollah in Southern Lebanon, and Hamas in Gaza, or US attacks in Falluja.

21. See Human Shields Report, *supra* note 18, ¶¶ 31, 66.

22. The dynamic or time-sensitive attack process sees military personnel, regardless of training in the LOAC, required to make a split second decision in the field regarding a possible attack. They may be lacking in military intelligence or proper understanding of the military objective, and have to act on a moment's notice. Strict advice and planning under the LOAC is next to impossible.

23. The mission-type attack process relies on subordinate leaders at every level to exercise tactical initiative to collectively achieve a broadly defined commander's intent.

responsible for implementing LOAC obligations and assessing compliance with these obligations should lead to a prioritization of the rule of precautionary measures as the focal point for civilian risk mitigation.

II. REASONABLENESS AS A CONTEXTUAL CONCEPT

Almost all LOAC experts agree that “reasonableness” is the touchstone of compliance with judgment-based LOAC targeting rules.²⁴ These rules frame the assessment of what qualifies as a lawful military objective, what amounts to an indiscriminate attack as the result of excessive civilian risk (commonly called the proportionality rule),²⁵ and when implementing certain enumerated precautions in the attack is or is not feasible.²⁶ Compliance with each of the LOAC rules ultimately turns on the objective reasonableness of the assessment.

The notion of reasonableness as a legal standard has always been related to the “reasonable man” concept.²⁷ This standard is central to assessing personal liability in the context of tort law, criminal responsibility for crimes defined in terms of recklessness or negligence, and many other areas of law, such as assessing compliance with the Fourth Amendment of the US Constitution. In all these contexts, reasonableness is the standard used to assess the validity of individual judgments. This standard is inherently objective in nature: Was the individual’s judgment consistent with that which would have been made by the hypothetical “reasonable person”?²⁸ However, in all these contexts, reasonableness is assessed *ex ante* based on the circumstances that existed at the time of the decision.²⁹

24. See Geoffrey S. Corn, *Targeting, Distinction, and the Long War: Guarding against Conflation of Cause and Responsibility*, 46 ISR. Y.B. ON HUM. RTS. 1 (2016) [hereinafter Corn, *Targeting*] (stating that “military forces will always seek tactical and operational advantages in the conduct of hostilities, and such advantage will often be derived from tactics that rely on the use of civilian property or exploit proximity to civilian population centers”).

25. Protocol I, *supra* note 5, art. 57(2)(a)(iii).

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

27. Geoffrey S. Corn, *Targeting, Command Judgment, and a Proposed Quantum of Information Component*, 77 BROOK. L. REV. 437, 442 (2012) [hereinafter Corn, *Command Judgment*].

28. *Id.* See also John J. Merriam, *Affirmative Target Identification: Operationalizing the Principle of Distinction for U.S. Warfighters*, 56 VA. J. INT’L L. 83, 129 (2016) (noting that “[r]easonableness is not a threshold; rather, it is an attribute of decision-making that can be judged only in context. A targeting decision based on a particular degree of certainty about a target may be entirely reasonable in one context, but unreasonable in another.”).

29. See Merriam, *supra* note 28, at 129.

Reasonableness has also been recognized as the essential touchstone for compliance with LOAC targeting law.³⁰ Thus, commanders are expected to make reasonable judgments when implementing the rules of distinction, proportionality, and when assessing when certain civilian risk mitigation precautionary measures are feasible. This standard is also central to the assessment of individual responsibility pursuant to international criminal law when a commander is alleged to have violated one or more of these LOAC targeting obligations.³¹

Context is equally critical to the LOAC reasonableness assessment. This reasonableness touchstone is therefore by its very nature dependent on the totality of the tactical and operational considerations confronting the attack decision maker. No objective test for compliance with a legal rule or principle can function rationally if it is divorced from such context. While it is virtually impossible to define—beyond the most blatant violations of targeting rules—what is or is not reasonable in the abstract, how reasonableness is assessed in any given attack situation has proven a vexing dilemma. Indeed, in *Prosecutor v. Gotovina*,³² perhaps the most significant international criminal trial implicating the reasonableness of attack judgments, the Trial Chamber's effort to adopt a *per se* test for when an attack becomes unreasonable (the now infamous “200 meter” rule) was rejected by the Appeals Chamber. While the *per se* approach may have provided greater predictability in the implementation of and accountability for the law related to attack judgments, the Appeals Chamber was wise to recognize that the inherent variables associated with such judgments necessitate a more nebulous notion of reasonableness.³³

As I argued in a prior article,³⁴ perhaps the most important question related to implementation of LOAC targeting rules is the quanta of information needed to render an attack judgment reasonable. Without answering this question, the assessment of

30. INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 ¶ 1931 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS].

31. Rome Statute of the International Criminal Court, art. 8(2)(b), *opened for signature* July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002). Specifically, the International Criminal Court statute prohibits directing an attack against civilians or civilian property during an international armed conflict (IAC); launching an attack when the “perpetrator knew that the attack would cause incidental death or injury to civilians or damage to civilian objects . . . and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated” during an IAC; or directing an attack against a civilian or the civilian population during a non-international armed conflict (NIAC). *Id.* art. 8(2)(b)(iv)(3).

32. *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-A, Appeal Judgment, ¶ 49 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012).

33. *Id.* ¶ 29.

34. *Corn, Command Judgment*, *supra* note 27, at 441.

attack legality and, more importantly, imposition of criminal responsibility for alleged unlawful attacks will remain inherently arbitrary. Accordingly, I proposed an analogy to US search and seizure jurisprudence, arguing that the nature of the tactical situation should dictate a sliding scale of required information to render an attack judgment reasonable.³⁵ Other experts in the field reject that approach, advocating instead that the generalized notion of reasonableness is sufficient to account for the wide array of tactical targeting situations.³⁶ However, the common thread that runs through both these approaches is the essential role of situational context in the assessment of reasonableness.

Most LOAC experts agree with this: that a commander's compliance with the law must be assessed based on the facts reasonably available at the time.³⁷ The "reasonably" qualifier to this standard prevents a claim of immunity based on activity that amounts to willful blindness—commanders may not deliberately or even recklessly avoid reasonably available information in order to justify what would be recognized by a reasonably diligent counterpart as an unlawful attack.³⁸ However, even when qualified by this "available information" principle, assessing what is or is not a reasonable attack judgment is both highly contextual and highly amorphous. Indeed, the inherent uncertainty associated with the notion of attack reasonableness has, at least in the opinion of this author, led to an increasingly common tendency to look to attack effects as the dispositive indicator of LOAC compliance.³⁹

I have called this phenomenon *effects-based condemnation* and argued frequently that this tendency is fundamentally inconsistent with the reasonableness touchstone of LOAC targeting law.⁴⁰ While there is no question that attack effects are *probative* on the question of whether a commander complied with the LOAC when the attack judgment was made, effects can never be *dispositive* of this question. Allowing this assessment trend to continue risks transforming the standard of reasonableness into one of strict liability: commanders will be condemned for decisions that were reasonable when made whenever the effects of the attack inflict a level of civilian harm

35. *Id.* at 460–94.

36. See, e.g., Merriam, *supra* note 28, at 129; see also Gregory S. McNeal, *Targeted Killing and Accountability*, 102 GEO. L.J. 681, 738 (2014).

37. Protocol I, *supra* note 5, art. 57; see also Robert D. Sloane, *Puzzles of Proportion and the "Reasonable Military Commander": Reflections on the Law, Ethics, and Geopolitics of Proportionality*, 6 HARV. NAT'L SEC. J. 299 (2015).

38. *Trial of General Tomoyuki Yamashita*, in 4 U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 1 (1948).

39. Corn, *Targeting*, *supra* note 24, at 21.

40. See, e.g., Corn, *The Value of Precautionary Measures*, *supra* note 4, at 3–4; see also Geoffrey Corn, *Attack Decision-Making: Context, Reasonableness, and the Duty to Obey* (forthcoming 2018) (on file with author) [hereinafter Corn, *Attack Decision-Making*].

considered unacceptably high. This will not only be inherently inequitable for the commander but also incentivize the worst practices of belligerents who seek to exploit the presence of civilians by deliberately exposing them to collateral consequences of attacks to complicate enemy attack decisions.⁴¹

It is understandable why the objective nature of the effects-based approach to LOAC compliance assessment is so seductive: it is simply easier (because it is based on publically available information) than the far more nuanced method of the *ex ante* reasonableness assessment (which often requires access to sensitive information). Indeed, even those who recognize the dangers of effects-based assessments and reject this trend must acknowledge that little guidance exists on what factors should define this *ex ante* approach.⁴² Ultimately, a “totality of the circumstances” methodology is probably the best answer to this question. Perhaps the most common articulation of this totality approach is found in the text of Additional Protocol I’s (AP I) military objective rule, which indicates that the assessment of a military objective is based on “the circumstances ruling at the time.” Specifically, Article 52 provides:

Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, *in the circumstances ruling at the time*, offers a definite military advantage.⁴³

Interestingly, the ICRC Commentary associated with this provision of the Protocol provides no meaningful explanation of what “circumstances” are relevant in this military objective assessment equation.⁴⁴ Instead, it simply reaffirms that “circumstances” are essential for making such an assessment. Nonetheless, as the rule is focused on the *ex ante* decision-making process during combat operations, it is only logical to assume that the relevant circumstances include all aspects of the tactical situation the commander confronts.

Hence, the common response to the question of what a commander must consider when making the military objective assessment, as well as assessments related to the implementation of proportionality and precautions in the attack, is “the information

41. See *supra* notes 16–21.

42. See generally Corn, *Targeting*, *supra* note 24.

43. Protocol I, *supra* note 5, art. 52.

44. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 30, ¶ 2037 (“[I]t remains the case that the text adopted by the Diplomatic Conference largely relies on the judgment of soldiers who will have to apply these provisions. It is true that there are clear-cut situations where there is no possibility of doubt, but there are also borderline cases where the responsible authorities could hesitate. In such circumstances the general aim of the Protocol should be borne in mind.”).

reasonably available to the commander at the time." While this is undoubtedly accurate, it is also undoubtedly underinclusive. Why? Because it is not just the available information that frames the assessment of reasonableness, but also the tactical and operational *context* in which attack decisions are made. Understanding the nature of a military operation will, in fact, provide the framework for assessing when and how reasonably available information should influence attack judgments. Unfortunately, as I have noted in a forthcoming chapter, sixteen years of counterinsurgency operations with attack decisions defined by a deliberative process with the benefit of information dominance may be contributing to a false expectation that attack decisions in all types of combat operations involve an analogous quality of time, information, and deliberation.⁴⁵ Such a false expectation risks distorting credible legal analysis almost as much as an effects-based approach. Instead, defining and understanding what is or is not a reasonable attack judgment must begin with an understanding of the nature of the combat operation in which that judgment is nested.

III. COMBINED ARMS OPERATIONS AND THE NATURE OF DECENTRALIZED ATTACK DECISIONS

As noted above, recognizing that reasonableness is the genuine touchstone of implementing the LOAC targeting rules is the starting point, and not the end point, of effective implementation. Operational context provides the essential foundation for assessing what is or what is not reasonable. This is not to suggest the standard is subjective. Indeed, it would nullify the protective intent of LOAC targeting rules to allow commanders to simply decide by fiat what does or does not qualify as a lawful attack. Furthermore, accountability would be substantially compromised if the ultimate question was not whether a commander made a reasonable decision based on the circumstances prevailing at the time, but whether the commander *subjectively believed* his decision was reasonable.

Instead, effective application of the reasonableness touchstone in relation to the conduct of hostilities requires an understanding that the objective critique must be based on the contextual perspective of the commander at the time of the decision. Without considering such context, commanders would be held to an unrealistic standard of perfection. Framing the reasonableness assessment on prevailing context, in contrast, demands of a commander that his judgment fall within a range of appreciation consistent with that of the hypothetical reasonable commander faced *with the same situation*.

45. Corn, *Attack Decision-Making*, *supra* note 40.

This contextual foundation for assessing reasonable targeting decisions is central to the enumeration of the most important LOAC targeting rules. As noted above, Article 52 of Additional Protocol I enumerates the test for determining what qualifies as a military objective and indicates that the assessment of anticipated military advantage is based on the “circumstances ruling at the time” of the military objective determination.⁴⁶ The International Committee of the Red Cross Commentary to this provision also notes that “those ordering or executing the attack must have sufficient information available to take this requirement into account.”⁴⁷ The proportionality rule, enumerated in Article 51 of AP I, characterizes as indiscriminate, and therefore prohibited, any “attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”⁴⁸ While the rule does not use the same “circumstances ruling at the time” terminology of Article 52, the use of the term “anticipated” indicates that application of the rule is inherently predictive in nature. Such predictions—the *anticipated* civilian risk and the *anticipated* military advantage—are obviously contingent on reasonably available information, the essential foundation for the objective reasonableness of the ultimate attack judgment.

Civilian risk mitigation precautionary measures, enumerated in Articles 57 and 58, also indicate the critical role of context in their implementation.⁴⁹ Several of the enumerated precautions are contingent on feasibility, which requires consideration of a wide range of contextual factors. Advance warnings are required unless the “circumstances do not permit,” indicating that an analogous range of contextual considerations dictates the reasonableness of a decision not to issue such warnings.⁵⁰ Article 57 also includes its own version of the proportionality rule, and like the enumeration in Article 51, the inherently predictive nature of the assessment indicates that context is decisive in its implementation.⁵¹ Furthermore, Article 57 imposes an obligation on those executing an attack to “cancel or suspend” the attack if, during execution, it becomes *apparent* that the attack will result in a proportionality violation.⁵² It is self-evident that what is or is not *apparent* is totally context dependent. Similarly, Article 57 imposes an obligation to select the method or means of attack resulting in the lowest degree of anticipated civilian risk when a choice between multiple attack options offers the “same or similar

46. Protocol I, *supra* note 5, art. 52.

47. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 30, ¶ 2024.

48. Protocol I, *supra* note 5, art. 51(5)(b).

49. *Id.* art. 57.

50. *Id.*

51. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 30, ¶¶ 2204–07.

52. Protocol I, *supra* note 5, art. 57.

military advantage.”⁵³ The comparison of multiple attack options for assessing their relative equality of military advantage must depend on the prevailing tactical and operational contexts.

Article 58 enumerates what are best understood as “passive” precautionary measures, obligating commanders to mitigate the risk that civilians will be victimized by enemy attack by avoiding, *to the maximum extent feasible*, commingling of military assets among the civilian population.⁵⁴ Furthermore, commanders are obligated to take other necessary precautions to mitigate civilian risk, but again, this is qualified by feasibility considerations.⁵⁵ What is or is not feasible is not—and cannot be—defined, because of the obvious impact of situational context.

Collectively, the central characteristic of these critical LOAC targeting rules is that they do not lay down absolute prohibitions or permissions. Instead, the tactical and operational situation confronted by the commander or other attack decision makers provides the essential context for assessing when an attack, or action that could expose civilians and civilian property to the risks of an attack, is prohibited by these legal rules. Context, in turn, involves a totality assessment of a range of considerations related both to mission accomplishment and civilian risk. For US commanders, the commonly used mnemonic “METT-T-C” summarizes these considerations: Mission, Enemy, Terrain and Weather, Troops and Support Available, Time Available, and Civil Considerations. U.S. Army Doctrinal Publication 5-0, *The Operations Process*, explains the critical role of such considerations in mission planning and execution:

Commanders and staffs use the operational and mission variables to help build their situational understanding. They analyze and describe an operational environment in terms of eight interrelated operational variables: political, military, economic, social, information, infrastructure, physical environment, and time (PMESII-PT). Upon receipt of a mission, commanders filter information categorized by the operational variables into relevant information with respect to the mission. They use the mission variables, in combination with the operational variables, to refine their understanding of the situation and to visualize, describe, and direct operations. The mission variables are mission, enemy, terrain and weather, troops and support available, time available, and civil considerations (METT-TC).⁵⁶

These mission variables, however, also indicate that the relevant context for implementing LOAC targeting rules varies depending on both the mission and the nature of the operation. Effective implementation *and* credible critiques of military operations require a constant awareness of this contextual element of LOAC compliance.

53. *Id.*

54. *Id.* art. 58.

55. *Id.*

56. U.S. DEP'T OF THE ARMY, ADP 5-0, *THE OPERATIONS PROCESS* ¶ 18 (2012).

At the implementation level, commanders should constantly assess how compliance can best be effectuated in these varying operational contexts. For example, during the conduct of deliberate attacks, integrating competent legal advisors into the attack planning process can play a significant role in ensuring integration of LOAC considerations during course-of-action analysis and selection. In contrast, a commander planning for a combined arms ground maneuver operation cannot expect subordinates to have the opportunity to vet attack decisions with legal advisors or even subject them to the same type of deliberate course-of-action analysis that is available in the deliberate attack process. Accordingly, commanders must anticipate the *nature* of the attack decisions that subordinates will be required to make in such a dynamic decision-making context, and provide them with the tools they need to make these decisions consistent with LOAC obligations.

It is therefore essential that the nature of maneuver operations, or perhaps more precisely the nature of tactical use of force decisions during maneuver operations, is considered in the reasonableness equation. Unlike the type of deliberate and individualized attack decisions that have come to define counterinsurgency and counterterror military operations, attack decisions in the context of combined arms maneuver warfare will be defined by decentralized and dynamic action—the operational context that must impact assessments of attack judgment reasonableness.

As I explain in greater detail in a forthcoming book chapter that will be published by the Lieber Institute,⁵⁷ combined arms maneuver operations are normally conducted within the concept of “mission command.” Mission command, which evolved from the German military concept of *auftragstaktik*,⁵⁸ emphasizes decentralized tactical decision making and encourages subordinate leaders to exercise tactical initiative to achieve broadly defined command objectives. As one author explains,

Mission command is a command approach that is based upon the exercise of local initiative within the framework of command intent. This is enabled by an appropriate delegation of authority and responsibility that allows subordinate commanders the latitude to plan and conduct operations based upon their understanding of the local situation. A number of authors have examined the different command approaches that are available. At the heart of most of these discussions is the key issue of the extent to which command authority is held

57. Corn, *Attack Decision-Making*, *supra* note 40.

58. The concept traces its roots back to the German concept of *auftragstaktik*, which translates roughly to mission-type tactics. *Auftragstaktik* held all German commissioned and noncommissioned officers dutybound to do whatever the situation required, as they personally saw it. Thomas E. Ricks, *An elusive command philosophy and a different command culture*, FOREIGN POLY (Sept. 9, 2011), <http://foreignpolicy.com/2011/09/09/an-elusive-command-philosophy-and-a-different-command-culture/> [https://perma.cc/64DC-CGXB] (archived Feb. 14, 2018).

tightly at the organisational core or is delegated to subordinates as in mission command. The former class of command approach is commonly referred to as 'centralised' and the latter 'decentralised'. Forces that have the capability to adopt decentralised approaches, such as mission command, retain the advantage in the contemporary operating environment owing to their ability to adapt their tactical activities rapidly as situations evolve.⁵⁹

Accordingly, when military operations and, especially, combined arms maneuver operations are conducted within the broad concept of mission command pursuant to "mission-type orders," use of force decisions will rarely take the form of the type of deliberative attack decisions associated with what is commonly referred to as the "targeting cell." Instead, these operations rely on subordinate leaders at every level to exercise tactical initiative to collectively achieve a broadly defined commander's intent. These subordinate leaders are expected to synchronize the employment of the combined arms assets they control in order to maximize the effect of these assets on the enemy and accomplish the mission. At each ascending level of command, the arsenal of available combat assets increases, but the basic premise of mission command remains constant: reliance on decentralized subordinate decisions to seize and maintain tactical initiative, set the tempo of the battle, and bring the enemy into submission.⁶⁰

Identifying the best approach to implementing LOAC obligations, and assessing what qualifies as a lawful attack decision, must obviously start with an understanding of this type of operational context. The level at which the attack decision is made, the time available to consider other attack options and to assess proportionality, the availability of legal advice in the decision-making process, and the perceived importance of seizing and maintaining tactical initiative play vital roles in framing the reasonableness assessment.⁶¹ It is only logical that because each ascending level of command will normally possess both expanded combat capability and more comprehensive situational awareness, more should be expected in terms of the accuracy of attack judgments and the opportunity to mitigate civilian risk through implementation of feasible precautions. However, because execution of maneuver operations in the context of mission command relies so heavily on initiative by small unit leaders, what is or is not reasonable during mission execution will necessarily result in different margins of appreciation depending on operational

59. Keith G. Stewart, *The Evolution of Command Approach* 1, 2 (Def. Research and Dev. Can. Toronto, Paper No. 192, 2010).

60. For an overview and explanation of targeting doctrine and its relationship to LOAC implementation, see generally Geoffrey S. Corn & Gary P. Corn, *The Law of Operational Targeting: Viewing the LOAC through an Operational Lens*, 47 TEX. INT'L L.J. 337 (2012).

61. See generally Corn, *Command Judgment*, *supra* note 27.

context. That margin may therefore be wider at lower levels of tactical execution. Just as it is unrealistic to expect the same level of accuracy between deliberate and dynamic attack judgments, it is equally unrealistic to demand the same level of attack judgment accuracy at lower command levels than what is normally expected from higher command levels, especially in the context of mission-type operations.

Perhaps this merely confirms that it is probably impossible to define with any degree of certainty conditions that render an attack decision reasonable or unreasonable. Because context is so central to this assessment, the law must accept this inherent uncertainty. Nonetheless, understanding the operational context of decision-making can contribute to more credible implementation of the law. First, such understanding will contribute to command assessment of how to best prepare subordinate forces for the challenge of implementing LOAC obligations. For example, in the mission command context, it may be unrealistic to expect the proportionality rule to bear the same weight for complex dynamic attack decisions as it can bear for deliberate information dominant attack decision contexts.

Accordingly, a commander may logically choose to prioritize other civilian risk mitigation measures, such as placing a greater emphasis on the importance of precautions in the attack. Second, such understanding will inevitably enhance the credibility of critiques of attack decisions by informing those critiques with the true nature of the operational context in which those decisions were made. This will almost certainly make the assessment of attack decision legality more complex and more challenging than simply focusing on attack effects. This will also mean that there will be many situations where it is simply impossible to reach anything close to certitude on the question of attack decision legality. However, integrating an understanding of operational context into the assessment process will ultimately render condemnations of attack judgments more credible, which will ideally lead to enhanced respect for the law. Quite simply, the most influential critiques of military operations will be those that are embraced as credible by commanders who are genuinely committed to LOAC compliance. Integrating a genuine understanding of operational context into such critiques will inevitably contribute to such credibility.

IV. CLOSE COMBAT IN URBAN AREAS AND THE ROLE OF FIRE SUPPORT

How the assessment of reasonableness is distorted by the failure to consider the operational context of attack decisions is illustrated by the contemporary debate over the legality of using fire support assets (what the ICRC labels as weapons with “wide area effects”) in urban

or built-up areas.⁶² Such weapons may be employed in both direct fire mode—such as the use of a tank’s main gun or a shoulder-fired missile—or in an indirect fire mode—such as the use of mortars, artillery, or rockets. When used in urban areas, the destructive impact of these weapon systems almost always implicates the full spectrum of LOAC targeting rules: Is the attack directed against a lawful military objective? Will the use of the high explosive weapon have an indiscriminate effect? Will the anticipated risk to civilians and civilian property violate the proportionality rule? Are there feasible alternatives or other precautionary measures that will mitigate civilian risk?⁶³ While assessing compliance with these targeting rules is undoubtedly complicated when such weapons are employed in urban areas, why they are employed, and the operational context in which they are employed, are essential considerations in the compliance equation.

The most common criticism leveled against the use of such weapon systems in urban areas is that the harm to civilians and destruction of civilian property they inflict renders them inherently indiscriminate.⁶⁴ Unfortunately, these criticisms are often quintessential examples of the type of effects-based condemnations that distort the proper and intended function of LOAC targeting rules. Relying primarily on the images of physical destruction to civilian buildings and infrastructure, and of civilian casualties, critics are all too quick to simply assume that the party to the conflict responsible for attacks that cause such harm must be in willful violation of international law.⁶⁵ However, such critiques fail to adequately consider the military necessity side of the legality equation, or the nature of the combat operations that result in such destruction and harm. Even the *prima facie* assumption that the property damaged was civilian, and the persons harmed were immune from attack, is never as simple as these critiques suggest. Instead, a civilian object will often qualify as a lawful military

62. See IAN HENDERSON, *THE CONTEMPORARY LAW OF TARGETING: MILITARY OBJECTIVES, PROPORTIONALITY AND PRECAUTIONS IN ATTACK* 188 (2009); see also Geoffrey Corn & James A. Schoettler, Jr., *Targeting and Civilian Risk Mitigation: The Essential Role of Precautionary Measures*, 223 MIL. L. REV. 785 (2015); Eric Talbot Jensen, *Precautions Against the Effects of Attacks in Urban Areas*, 98 INT’L REV. RED CROSS 147 (2016).

63. See Int’l Law Assoc. Study Grp. on the Conduct of Hostilities in the 21st Century, *The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare*, 93 INT’L L. STUD. 322 (2017).

64. See Stephen Townley, *Indiscriminate Attacks and the Past, Present, and Future of the Rules/Standards and Objective/Subjective Debates in International Humanitarian Law*, 50 VAND. J. TRANSNAT’L L. 1223, 1260 (2017).

65. Sara Almukhtar, *U.S. Airstrikes on ISIS Have Killed Hundreds, Maybe Thousands of Civilians*, N.Y. TIMES (May 25, 2017), <https://www.nytimes.com/interactive/2017/05/25/world/middleeast/airstrikes-iraq-syria-civilian-casualties.html> [<https://perma.cc/8FJK-HZQ6>] (archived Feb. 1, 2018).

objective in the midst of urban warfare, and individuals who appear to be civilians by virtue of their dress may have in fact been lawful objects of attack, either because they were members of armed groups who failed to wear distinctive uniforms or because they were civilians directly participating in hostilities. Furthermore, it will often be the case that what appears after the fact as a civilian object was actually a military objective when it was subjected to attack, especially when fighting an adversary that deliberately embeds military assets in civilian contexts so as to avoid detection or attack.

Nonetheless, the prohibition against indiscriminate attacks certainly includes a range of employment considerations that are especially implicated by indirect fire assets, especially when employed during urban operations. Specifically, Article 51 of AP I includes within the definition of a prohibited indiscriminate attack:

- (a) Those which are not directed at a specific military objective;
 - (b) Those which employ a method or means of combat which cannot be directed at a specific military objective; or
 - (c) Those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.
- ...
- (a) 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; and
 - (b) An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.⁶⁶

Ultimately, the relationship between fire support attacks—especially indirect fires, civilian harm, and the prohibition against indiscriminate attacks—deserves careful and reasoned analysis and inquiry. This need for such reasoned analysis is perhaps most acute in the urban operations context, precisely because of the operational and humanitarian stakes involved.

Accordingly, rejecting an effects-based approach to critiquing attack decisions in no way mitigates the importance of careful and credible assessments of whether the employment of high explosive fires in urban operations runs afoul of these restrictions. For example, what weapon systems are so inherently imprecise as to

66. Protocol I, *supra* note 5, art. 51.

violate the prohibition against using weapons that cannot be directed at a specific military objective? Using obvious examples, such as a SCUD missile that can only be directed at a very general geographic area such as a city, is of limited utility if the ultimate goal is to align the prohibition against indiscriminate attack with the specific nature of urban operations. No credible interpretation of the law would consider such an imprecise weapon as sufficiently discriminate to qualify as lawful. But at what point does the range of probability of hitting a specific target become too broad? And should this test itself be contextual, resulting in a more restrictive definition in relation to the potential risk to civilians? In other words, is the assessment of this question unitary, or does the nature of urban operations necessitate a different conclusion when a weapon system is employed in that context?

Implementation of the proportionality component of the prohibition against indiscriminate attack when employing direct and indirect high explosive fires in urban areas is equally complex. Central to this complexity is how military advantage should be calculated and what qualifies as "excessive" civilian risk.⁶⁷ These questions deserve special attention in the urban operations context. For example, how valuable is the military advantage derived from the ability to avoid close combat in urban terrain by employing fires as an alternate to maneuver, or using fires to facilitate rapid maneuver during such operations? And in this context specifically, is mitigation of civilian risk and protection of civilian property and infrastructure itself an aspect of military advantage, and if so, how does that influence the proportionality balance? And should the proportionality equation factor in only direct effects on the civilian population? Or should, as the ICRC has suggested, "reverberating" effects impact the proportionality assessment?

These are important questions in any operational context, but their importance seems elevated when assessing LOAC compliance during urban operations. There is, therefore, no doubt that these and other related questions deserve careful inquiry. However, no matter how determined the effort of such inquiry may be to find a "solution" to the "problem" of civilian suffering associated with urban operations, the blunt reality may be that the answer to the question of where, when, and how high explosive fires may lawfully be employed in urban areas may ultimately be "it depends." Why? Because that answer must turn on the question of what qualifies as a

67. See COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 30, ¶ 2216 (stating that "[the proportionality rule] provides for the punishment of those who willfully launch an indiscriminate attack gravely affecting the civilian population in the knowledge that such attack will cause loss of life, injury to civilians or damage to civilian objects, when such loss, injury or damage is excessive in the sense of this provision.").

reasonable judgment of attack legality, and answering that question is, as noted above, so inherently contextual that it may defy simple *per se* rules.

Unfortunately, the complexity of assessing the legality of employing fires in urban areas seems to have produced increasing momentum for imposition of just such a *per se* solution. The motivation for such efforts is not only obvious, but understandable: protect civilians from the devastation of high explosive fires in urban areas. Images from war-torn areas like Raqqa, Gaza, Mosul, Donestk, and other urban battlefields are unquestionably emotionally evocative. And the devastation from such combat cannot be downplayed. However, proposing a ban on fires as the solution to the humanitarian suffering associated with such combat is truly akin to proposing the solution to a math equation without knowing a critical component of the equation: "one plus I don't know equals ten." Whether fires are reasonably necessary and reasonably employed in any operational context, including during urban operations, turns on not only the destructive effect of fires but also the nature of the military objective, the time and resources available to the commander to achieve the objective, and the reasonably available alternatives to the use of fires.⁶⁸

The zeal to ban or restrict high explosive fires in urban areas suffers from an insufficient understanding of the nature of such operations. Contrary to effects-based perceptions, professional armed forces do not employ such weapons in urban or populated areas casually. Instead, civilian risk mitigation should constantly temper the assessment of tactical benefit derived from such use.⁶⁹ Indeed, as Kenneth Watkin has noted, and as is reflected in US military doctrine, in many operations civilian risk mitigation will actually itself be considered a military advantage.⁷⁰ Use of high explosive fires during such operations should, and ideally will, be measured and based on credible assessments of military necessity. And, in the urban operations context, this necessity will often be substantial, as fires provide not only critical support for ground maneuvers but also may often offer the commander the option to forego the use of ground maneuvers altogether.

These necessity considerations are magnified in the context of mission command. The traditional doctrinal aversion to ground maneuvers in urban terrain indicates that commanders tasked with executing the broad objectives of a given mission will instinctively seek to avoid the urban environment. Alternatively, if compelled to engage the enemy in such areas, commanders will use fires to

68. See Corn, *Command Judgment*, *supra* note 27, at 476.

69. See generally Kenneth Watkin, *Military Advantage: A Matter of "Value," Strategy and Tactics*, 17 Y.B. OF INT'L HUMANITARIAN L. 277, 289 (2014).

70. See *id.*

minimize friendly exposure to the risks inherent in such maneuvers. Fires provide commanders at every level with the opportunity to facilitate this avoidance by leveraging these weapons to produce a range of beneficial effects: to disrupt the enemy's use of urban terrain; to screen friendly forces maneuvering in or near urban terrain; to fix enemy forces in the urban area; and to destroy high value enemy targets in the urban area.⁷¹ When these effects may be achieved without resort to ground maneuvers and close combat in the urban environment, commanders exercising tactical initiative will logically gravitate to this option. Even when the situation compels resort to ground maneuvers in urban terrain, the dynamic nature of the tactical situation, which will often involve confronting an enemy with the defensive advantages derived from the urban environment, makes the availability of fires an important component of successful maneuvers.

This very general observation about the potential tactical and operational value of fires in urban areas merely reinforces the reality that it is the operational situation that dictates the necessity of employing combined arms capabilities. What military commanders understand is that when they are confronted with the necessity of dealing with an enemy embedded in urban terrain, the use of ground maneuvers will often be the most destructive tactical option. Such operations subject both friendly forces and civilians to immense risk, risk that may often actually be mitigated by the use of fire support either to avoid the need for ground maneuvers, or to facilitate such maneuvers when necessary.

However, what is often lost in the debate over the role of fires in this equation (in addition to exhibiting a failure to comprehend the vital and oftentimes irreplaceable nature of these means), is that banning or restricting their use will not alter the necessity of achieving tactical effects when the enemy compels action in urban environments. In fact, such efforts will likely produce the perverse effect of incentivizing enemy use of such areas to gain tactical and strategic advantage. This advantage results from two almost inevitable consequences of forcing decisive action in this environment. First, enemy forces—often less capable than their opponents—gain a natural defensive advantage from the cover, concealment, maneuverability, and access to resources in urban terrain. Second, by increasing the perception of indifference to civilians resulting from the destructive effects of urban combat, the enemy is able to exploit the civilian population in the knowledge that the infliction of casualties and the destruction of civilian property will undermine the legitimacy of the legitimate opponent's efforts.⁷²

71. See HENDERSON, *supra* note 62, at 187–88.

72. See Human Shields Report, *supra* note 18, ¶ 31 (referring to the actions of Hamas using civilians human shields as strategic deterrent from Israeli attacks); see

Ignoring this tactical and operational context inevitably attenuates the legality assessment from the reality of combat operations. It might be tempting to simply respond that such is the price of legal regulation, and that this means that combat operations must conform to whatever the law demands. Of course this is true, but such an approach to LOAC evolution would be unfortunate. The resilience of this law has always been linked to the logical relationship between the *legitimate* dictates of military necessity and the equally legitimate need to mitigate, as much as is feasible, the suffering caused by armed conflict.⁷³ This highlights the historic and constant challenge of LOAC implementation and, especially, the challenge of convincing armed forces and other organized armed groups of the value of compliance. The persuasive impact of the law is ultimately contingent on that linkage, which means the persuasive impact of the law is diminished whenever those responsible for implementing the law perceive attenuation between the law's demands and the legitimate interests of military necessity. Careful attention to this reality will prevent corrosion of confidence in the law and contribute positively to the already significant challenge of persuading armed forces to embrace the law's humanitarian constraints.

This does not mean that commanders are somehow licensed to engage in indiscriminate attacks, or that the law should tolerate indifference to civilian risk. Far from it. Instead, it means that commanders must shift their compliance efforts from the deliberate targeting context to a context where they must rely on junior leaders as the implementation focal point. This in turn should drive an honest assessment of how to best prioritize the LOAC's civilian risk mitigation targeting rules so that the civilian risk mitigation effect of the totality of the LOAC's regulatory regime is maximized.

This latter point necessitates a prioritization of effort in relation to LOAC targeting rules. As I have noted previously, the contemporary tendency to focus so substantially on the

also STATE OF ISRAEL, THE 2014 GAZA CONFLICT: FACTUAL AND LEGAL ASPECTS 73–76 (May 2015), <http://mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf> [<https://perma.cc/2EUH-2T7A>] (archived Feb. 27, 2018) (reproducing Hamas training documents directing their personnel to exploit human shields); Philip Bump, *War is Ugly: Kerry Defends Israel's Incursion into Gaza*, WASH. POST (July 30, 2014), https://www.washingtonpost.com/news/post-politics/wp/2014/07/20/war-is-ugly-kerry-defends-israels-incursion-into-gaza/?utm_term=.d4397d1e98dc [<https://perma.cc/3G53-PM4S>] (archived Feb. 1, 2018).

73. As evidenced in the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, and other subsequent tribunals or ICC actions.

proportionality rule might be distracting focus from the more important civilian risk mitigation rule of precautions. This is most acute in the context of mission-type maneuver operations. The inherent uncertainty of what does or does not violate the proportionality rule renders its relevance minimal in the context of such operations. Outside of the extreme scenarios, it is simply unrealistic to expect junior combat leaders to engage in the type of nuanced proportionality assessments that are difficult even in the context of a deliberative, high-level targeting process. The pace of operations and the perceived imperative of mission accomplishment will make it especially difficult for such leaders to engage in the type of sophisticated deliberative process associated with proportionality implementation.

In contrast, the goal of civilian risk mitigation becomes more realistic when combat leaders are trained from inception to constantly seek out and exploit civilian risk mitigation measures when those measures do not meaningfully compromise tactical effect.⁷⁴ While the assessment of feasibility in relation to precautionary measures does involve contextually driven judgments, the overall concept of precautions is simply more objective than the concept of proportionality.⁷⁵ For example, balancing the civilian risk mitigation benefit of modifying the methods, means, or timing of attack against the tactical consequence of such modification is a process that is more aligned with the decentralized decision-making model of mission command than is balancing anticipated military advantage against anticipated civilian risk. A decision to attack from a different direction, or to use a weapon with a smaller blast effect, or to delay attack to a more beneficial time, can be made in a time-sensitive environment by junior combat leaders without the benefit of legal advice. If this precautionary mentality is prioritized as the focal point of LOAC compliance during mission-type operations, it will ultimately increase the probability of an effective balance between military necessity and humanity.

V. CONCLUSION

Credible critiques of the legality of military operations must be informed not only by expertise in the law but also by an appreciation for the nature of the military operation being assessed. This latter aspect of the equation includes not only the obvious aspects of friendly and enemy situations but also an understanding of how the very nature of a given military operation impacts how the LOAC is implemented. In the context of mission command, this then

74. Corn, *The Value of Precautionary Measures*, *supra* note 4, at 6.

75. See Int'l Law Ass'n Study Grp., *supra* note 63, at 372.

illuminates the true nature of the vast majority of use of force decisions: decentralized, dynamic, and often made by junior combat leaders with little or no opportunity for legal vetting. Understanding how this context frames the assessment of reasonableness is acute in relation to urban operations, as this tactical context produces significant use of force and civilian protection complexities that, unfortunately, are often exploited by illicit armed forces and organized armed groups. In short, it is itself *illegitimate* to ignore this operational context when purporting to offer a *legitimate* assessment of LOAC reasonableness.

Instead, both commanders responsible for implementing the law and those engaged in assessing and critiquing legal compliance during combat operations should orient their efforts by viewing implementation through the lens of the mission command operational context. This focus will inevitably be somewhat different than the focus for compliance in relation to individualized deliberate targeting. In the latter context, the more centralized nature of attack decisions, coupled with the availability of time, information, legal advice, and a wide array of attack options, should inform the assessment of reasonableness. Because these factors are fundamentally different in the context of operations conducted pursuant to mission-type orders, the margin of appreciation for what qualifies as a reasonable attack judgment—to include the decision to employ various combat capabilities—is necessarily expanded.

Decision-making reasonableness cannot be divorced from context. While reasonableness is ultimately an objective assessment, failing to consider the specific context of a given decision will inevitably undermine the credibility of such assessments. LOAC targeting rules reflect this essential relationship. However, what is not always recognized is that context extends beyond the aspects of time, enemy, terrain, etc. Relevant context includes the nature of the military operation, which should be understood not only in terms of deliberate versus dynamic/time-sensitive targeting but also in terms of centralized individualized attack operations and decentralized mission command type operations. This ideally will result in a more “mission-focused” prioritization of LOAC civilian risk mitigation rules, better prepare junior combat leaders to address the civilian risk challenges of mission execution, and result in more credible critiques of attack judgments in these complex operational environments.
