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THE PROPORTIONALITY PRINCIPLE IN THE HUMANITARIAN LAW OF WARFARE: RECENT EFFORTS AT CODIFICATION

The development of the law of warfare in the twentieth century has been characterized by an increasing concern for the plight of civilians in armed conflicts. The various codifications of the law of warfare, most notably the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (hereinafter, Civilians Convention),¹ contain an elaborate set of rules governing civilian protection.² However, these codifications do not expressly include proportionality—the notion that the civilian losses resulting from a military act should not be excessive in relation to the anticipated military advantage—as a principle of civilian protection. The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (hereinafter, Diplomatic Conference), which is being held in Geneva, is considering articles which would codify the principle of proportionality for the first time.³

1. IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, [1955] 3 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287. The Civilians Convention is one of four 1949 Geneva Conventions. The others are the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, [1955] 3 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, [1955] 3 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; and Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, [1955] 3 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135. While these latter three conventions were revisions of previous Geneva conventions, the Civilians Convention was an entirely new codification. For a discussion of the provisions of the Civilians Convention, see COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (J. Pictet ed. 1958) [hereinafter cited as COMMENTARY, IV GENEVA CONVENTION].

2. Codifications such as the Geneva Convention have been criticized for failing to provide actual protection for civilians. Critics have emphasized that since the adoption of the Conventions in 1949, belligerent nations have often violated the Conventions and refused to acknowledge the applicability of the Conventions to particular conflicts. See Baxter, *Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law*, 16 HARV. INT'L L.J. 1, 4 (1975). The Civilians Convention has also been characterized as inadequate in a number of specific areas; for example, it fails to prescribe rules governing aerial bombardment. *Id.* at 2-3.

3. For a discussion of the background to the Diplomatic Conference, see Baxter, *supra* note 2. See also F. KALSHOVEN, *THE LAW OF WARFARE: A SUMMARY OF ITS RECENT HISTORY AND TRENDS IN DEVELOPMENT* (1973); Hewitt, *Respect for Human Rights in Armed Conflicts*, 4 N.Y.U.J. INT'L L. & POL. 41 (1971).

This Note will address the issue of whether proportionality is a workable principle of civilian protection. After addressing the threshold question of when the proportionality principle is applicable, the Note will discuss the means by which the proportionality principle can be incorporated into military decision-making. To the extent that clear-cut criteria can be developed for predicting the consequences of military acts upon the civilian population, a commanding officer will be able to assess the proportionality of military acts under consideration. His willingness to do so, however, may depend largely on whether effective sanctions can be developed to deter and punish violations of proportionality. The issue of enforcement of the principle will be discussed in the latter part of the Note.

The basic sequence of events leading to the Diplomatic Conference was as follows. In 1971 and 1972 the International Committee of the Red Cross (ICRC) held conferences of government experts to update the 1949 Geneva Conventions. On the basis of these conferences the ICRC then prepared and submitted to the Swiss government two draft protocols to the 1949 Geneva Conventions, one of which dealt with international conflicts and the other with non-international conflicts. The Swiss government in turn convened the Diplomatic Conference to consider these protocols. The first session met from February 20, 1974, to March 29, 1974, and the second session met from February 3, 1975, to April 18, 1975. One hundred and twenty-five states participated at the first session, and one hundred and twenty-one states took part in the second session. The United States, the Soviet Union, and other major powers with the exception of the People's Republic of China were present at these sessions. In addition, a number of national liberation movements, such as the Palestine Liberation Organization, participated in the Conference. The results of these sessions are reported in REPORT OF THE UNITED STATES DELEGATION TO THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, SECOND SESSION, FEB. 3—APR. 18, 1975 (report submitted to the Secretary of State, July 18, 1975) [hereinafter cited as REPORT].

This Note will focus on Protocol I, which concerns international conflicts. Unless otherwise specified, all references to articles concern those in Protocol I. Protocol II, which involved non-international conflicts, is less elaborate and does not explicitly codify the proportionality principle. However, Article 24(2) of Protocol II provides, "Constant care shall be taken, when conducting military operations, to spare the civilian population, civilians and civilian objects. This rule shall, in particular, apply to the planning, deciding, or launching of an attack." *Id.* at 85. The existing law of civilian protection in non-international conflicts is much less elaborate than the law applicable to international conflicts. The 1949 Geneva Conventions' rules concerning non-international conflicts are concentrated almost entirely in Article 3, which is common to all four conventions. This article contains a number of general provisions, such as prohibitions against "outrages upon personal dignity." For critiques of Article 3, see Bond, *Protection of Non-Combatants in Guerilla Wars*, 12 WM. & MARY L. REV. 787 (1971); Farer, *The Laws of Warfare 25 Years After Nuremberg*, INTERNATIONAL CONCILIATION, No. 583 (1971); Note, *Civilian Protection in Modern Warfare: A Critical Analysis of the Geneva Civilian Convention of 1949*, 14 VA. J. INT'L L. 123 (1973). See also Farer, *Humanitarian Law and Armed Conflicts: Toward the Definition of "International Armed Conflicts"*, 71 COLUM. L. REV. 37 (1971), which, in addition to discussing the deficiencies of Article 3, addresses the problem of distinguishing between international and non-international conflicts.

I

BACKGROUND

A. PROPORTIONALITY AS A GENERAL PRINCIPLE

Although proportionality has yet to be codified as a principle of civilian protection, the idea that military means should be proportionate to their anticipated ends is widely recognized as a basic norm of the law of warfare.⁴ Proportionality is closely related to other underlying principles of the law of warfare, such as military necessity and discrimination between combatants and non-combatants.⁵ For example, a military act cannot be proportionate unless there is some military necessity for the operation in the first place. Similarly, if an act fails to discriminate between civilians and military targets, it may cause civilian losses that will be disproportionate in relation to the military advantage.

B. EXISTING CODIFICATIONS AND PROPORTIONALITY

The two major existing codifications of the law of warfare which deal with civilian protection are the 1907 Hague Convention on Land Warfare⁶ and the 1949 Civilians Convention previously noted.⁷ These conventions have somewhat different orientations; while the basic concern of the Hague Convention is the means of conducting warfare, the Civilians Convention emphasizes the treatment of civilians in warfare, *e.g.* civilian detention.⁸ Despite their failure to explicitly incorporate proportionality, both conventions contain provisions which touch upon the proportionality principle. The Hague Convention contains a clause which provides that the signatory nations shall observe the general principles of warfare recognized by civilized nations.⁹ In addition, this Con-

4. See J. PICTET, *HUMANITARIAN LAW* 31 (transl. 1975). Pictet states the principle as follows: "[B]elligerents shall not inflict on their adversaries harm out of proportion to the object of warfare, which is to destroy or weaken the military strength of the enemy." *Id.*

5. See Falk, *Richard A. Falk*, in *LAW AND RESPONSIBILITY IN WARFARE: THE VIETNAM EXPERIENCE* 40 (P. Trooboff ed. 1975) [hereinafter cited as TROOBOFF]. See also Farer, *The Laws of War 25 Years After Nuremberg*, 583 *INTERNATIONAL CONCILIATION* 16 (1971).

6. For a detailed discussion of the Hague Convention, see W. HULL, *THE TWO HAGUE CONFERENCES AND THEIR CONTRIBUTIONS TO INTERNATIONAL LAW* (1908, reprinted 1970).

7. See note 1 *supra*.

8. See PICTET, *supra* note 4, at 16-17. Pictet divides the law of warfare into two branches: "the law of The Hague," which "determines the rights and duties of belligerents in the conduct of operations and limits the choice of the means of doing harm," and the "law of Geneva," which is "intended to safeguard military personnel placed *hors de combat*, and persons not taking part in hostilities." *Id.*

9. This clause, known as the Martens Clause, has generally been viewed as ineffectual.

vention is permeated by the concept of military necessity, which is closely related to proportionality.¹⁰ Similarly, Article 53 of the Civilians Convention prohibits destruction of property by an "Occupying Power" "except where such destruction is rendered absolutely necessary by military operations."¹¹ Nevertheless, the shortcomings of the two conventions with respect to the proportionality principle are substantial. For example, while Article 18 of the Civilians Convention provides that civilian hospitals may not be the object of attack, it adds that "[i]n view of the dangers to which hospitals may be exposed by being close to military objectives, it is recommended that such hospitals be situated as far as possible from such objectives."¹² The existing codifications fail to address many of the problems involved in reconciling the recognition of legitimate military objectives with the desire to provide adequate protection to civilians.¹³

C. THE DIPLOMATIC CONFERENCE AND PROPORTIONALITY

The Diplomatic Conference's proposed codification of the proportionality principle is an attempt to fill one of the gaps in civilian protection left by previous codifications. Article 50 of the Conference's Protocol I provides in part that a party shall not launch attacks which may be expected to cause civilian losses that would be excessive in relation to the concrete and direct military advantage anticipated.¹⁴ Article 50(3) provides that "when a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that which may be expected to cause the least danger to civilian lives and property."¹⁵ In addition, Protocol I contains other provisions that are related to proportionality, notably the requirement under Article 51 that parties take feasible precautions to protect civil-

Nations have regarded its provisions as mere "signposts" to nations at war, as applying only to parties to the Convention, as providing only fragmentary protection of a few basic freedoms, and as failing to prescribe any enforcement mechanisms. See Note, *Civilian Protection in Modern Warfare: A Critical Analysis of the Geneva Civilian Convention of 1949*, 14 VA. J. INT'L L. 123, 126 (1973).

10. See G. DRAPER, *THE RED CROSS CONVENTIONS* 96 (1958). Article 23(g) of the 1907 Hague Convention on Land Warfare makes an express allowance for military necessity.

11. IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, art. 53, [1955] 3 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287. The Civilians Convention does not permit the military necessity defense to the extent that the Hague Convention does. See DRAPER, *supra* note 10, at 97.

12. IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, art. 18, [1955] 3 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

13. See DRAPER, *supra* note 10, at 33.

14. These articles can be found in REPORT, *supra* note 3.

15. REPORT, *supra* note 3, at 69.

ians against the effects of attacks,¹⁶ Article 47(2)'s requirement that parties strictly limit their attacks to military objectives, the prohibition in Article 46(3) against indiscriminate attacks,¹⁷ and the prohibition in Article 49 against attacks on works or installations which contain dangerous forces (such as nuclear power plants and dams), where such attacks may cause severe civilian losses, even if such works are otherwise legitimate military objectives. These articles have been adopted by a committee of the Conference¹⁸ and await approval by the entire Conference and subsequent ratification by the signatory nations.

II

ANALYSIS OF PROPORTIONALITY

A. WHEN IS THE PROPORTIONALITY PRINCIPLE APPLICABLE?

The proposed codification of proportionality has been a source of considerable controversy at the recent Geneva conferences on the law of warfare. At the 1972 "Conference of Experts," which was the predecessor of the Diplomatic Conferences, some delegates maintained that proportionality derogated from the prohibitions against outright civilian attacks by providing a legal justification for some military acts which cause civilian damage.¹⁹

The proportionality provision was, however, intended to complement rather than detract from the articles banning civilian attacks. A distinction can be made between attacks which are aimed primarily at civilians, such as terror bombings,²⁰ and attacks which involve legiti-

16. These include endeavoring to remove the civilian population and civilian objects under a party's control from the vicinity of military objectives.

17. Article 46(3) recognizes that the principle of discrimination which it codifies will overlap with the proportionality principle. It provides that "Among others, the following types of acts are to be considered as indiscriminate: . . . (b) An attack of the type prohibited by Article 50(2) (a)(iii)," *i.e.*, an attack in which the probable civilian losses will be excessive in relation to the concrete and direct military advantage anticipated. REPORT, *supra* note 3, at 65. See note 4 *supra* and accompanying text.

18. In addition to being responsible for consideration of the articles on civilian protection, this committee (Committee III) was also responsible for the Articles on methods and means of combat and a proposed new category of prisoners of war. Committee I dealt with the general provisions of Protocol I (international armed conflicts), and Committee II considered the articles on the wounded, sick, and shipwrecked, on civil defense, and on relief.

19. See CONFERENCE OF GOVERNMENT EXPERTS ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE TO ARMED CONFLICTS, 2D SESS., REPORT ON THE WORK OF THE CONFERENCE 153 (1972) [hereinafter cited as CONFERENCE].

20. Terror bombings are prohibited by Article 46(1), which provides that "the civilian population as such, as well as individual civilians, shall not be made the object of attack.

mate military objectives.²¹ Obviously, the laws of warfare could not categorically prohibit the latter without treating warfare as illegal per se. Thus, while the articles of the Diplomatic Conference completely proscribe attacks aimed at civilians or civilian objects, they permit attacks involving legitimate military objectives under certain circumstances, e.g. if the act is not disproportionate or indiscriminate.²²

This distinction between the two different types of military acts is, then, crucial in determining when the proportionality principle is applicable. In some instances it is difficult to categorize a military act in this manner. This is especially true of guerilla warfare,²³ where the

Acts or threats of violence which have the primary object of spreading terror among the civilian population are prohibited." REPORT, *supra* note 3, at 65.

Not only have terror bombings been condemned on the ground that terrorization and demoralization of the enemy civilian population are not legitimate military objectives, but such bombings have been characterized as militarily ineffective as well. The enemy is often able to prevent demoralization through its propaganda machinery; this is particularly true of totalitarian powers such as Nazi Germany. Also, terror bombings tend to provoke anger and resentment among the enemy's civilian population rather than demoralization, thereby strengthening the adversary's will to fight. See Adler, *Targets in War: Legal Considerations*, 8 HOUSTON L. REV. 1, 40-42 (1970); Carnahan, *The Law of Air Bombardment in Its Historical Context*, 17 AIR FORCE L. REV. 39, 50-51 (1975).

It is extremely difficult to distinguish between a terror bombing and a bombing of civilian areas intended to coerce the enemy into a political settlement, since terrorization can serve as a means of coercing the enemy. Also, the nature of the attack will be the same regardless of the underlying intent. Article 46(1) forbids any such attack against civilians.

21. See KALSHOVEN, *supra* note 3, at 60; Adler, *supra* note 20, at 30. See also Article 43 of the Diplomatic Conference, which provides that "in order to ensure respect and protection for 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." REPORT, *supra* note 3, at 64.

22. See Article 43, REPORT, *supra* note 3, at 64. See also Article 46, concerning general protection of the civilian population, and Article 47, concerning general protection of civilian objects. Article 50, which codifies proportionality, also addresses the problem of distinguishing between attacks on civilians and acts based on military objectives; Article 50(5) provides that "no provision of this article may be construed as authorization for any attacks against the civilian population, civilians, or civilian objects." REPORT, *supra* note 3, at 70.

23. Article 1, section 2 of Protocol I (international conflicts) extends the scope of Protocol I's applicability to many guerilla conflicts by providing that the protocol shall cover armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. This provision generated considerable controversy at the Diplomatic Conference. See REPORT, *supra* note 3, at 4.

counter-insurgent often finds it difficult to distinguish the guerillas from the population at large and resorts to extreme military tactics, such as the destruction of entire hamlets, to isolate the guerilla forces.²⁴ In such cases the military objectives are closely intermingled with civilians or civilian objects.²⁵ However, in those situations where such ambiguities are the greatest, the act would likely be illegal even if the proportionality principle were applicable, since the civilian damage would be excessive.²⁶

B. WEIGHING THE MILITARY ADVANTAGE AGAINST THE CIVILIAN DAMAGE

Proportionality can only be a viable principle of civilian protection if it can be applied at the time military decisions are being made. It will be ineffective if it is merely a hindsight principle.²⁷ A decision as to the proportionality of a military act will involve weighing the anticipated military advantage against the probable civilian losses that will result from a particular military act.

1. *Meaning of "Military Advantage"*

An initial question which must be addressed in applying the propor-

Another provision of Protocol I which addresses the problems of civilian protection in guerilla warfare is Article 45(3), which states, "The presence, within the civilian population, of individuals who do not fall within the definition of civilians does not deprive the population of its civilian character." REPORT, *supra* note 3, at 64. Also, Article 45(4) provides that "in case of doubt as to whether a person is a civilian, such person shall be considered to be a civilian." REPORT, *supra* note 3, at 64. Articles 25(3) and 25(4) of Protocol II (non-international conflicts) are almost identical to Articles 45(3) and 45(4) respectively.

24. See Falk, in TROOBOFF, *supra* note 5, at 44. See also T. TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 145 (1970).

25. The Hungarian delegation to the 1971 Conference of Experts sought unsuccessfully to include a provision that "no military advantage may justify an operation in which it is impossible to make a clear distinction between military and non-military objectives." See CONFERENCE OF GOVERNMENT EXPERTS ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE TO ARMED CONFLICTS, 1ST SESS., REPORT ON THE WORK OF THE CONFERENCE 82 (1971). However, the substance of this proposal is reflected in the prohibition against indiscriminate attacks in Article 46(3).

26. The United States' Christmas bombings of North Vietnam in 1972, for example, have been criticized both on the basis of proportionality and on other grounds. Telford Taylor has argued that the bombings inflicted civilian losses that were disproportionate to the military advantage, whereas others have maintained that the bombings were unlawful because they were not primarily designed to weaken the enemy militarily but rather to coerce the enemy into a political settlement. See DeSaussure & Glasser, *Hamilton DeSaussure and Robert Glasser*, in TROOBOFF, *supra* note 5, at 137-39.

27. See DeSaussure, *Hamilton DeSaussure*, in TROOBOFF, *supra* note 5, at 71. See also KALSHOVEN, *supra* note 3, at 66-67.

tionality principle is the proper interpretation of the term "military advantage." This term can be construed either on a "case-by-case" or on a "cumulative" basis; the former refers to the specific tactical objective of a particular action, whereas the latter refers to the manner in which the action will contribute to the belligerent's overall strategic goals.²⁸ Whether an action satisfies the proportionality test will depend on which interpretation of "military advantage" is used for analytical purposes.

The most notable example of this dilemma in modern warfare was the bombings of Hiroshima and Nagasaki by the United States in 1945. These attacks were the culmination of an extensive fire-bomb campaign by the United States which was intended to inflict heavy damage on the Japanese war industry, thereby pressuring the Japanese into surrender.²⁹ The Americans argued that the military advantage gained from the bombings was sufficiently strong to justify them, as evidenced by the prompt Japanese surrender which eliminated the necessity of an Allied invasion of Japan which would have inflicted heavy casualties on both sides.³⁰ Not surprisingly, the Japanese took a very different view of the meaning of "military advantage." In *Shimoda v. State*,³¹ a Japanese court held that the use of the atomic bomb was illegal under the laws of warfare³² since "aerial bombardment with an atomic bomb, even if its target is confined to military objectives, brings about the same result as a blind aerial bombardment because of the tremendous destructive power of the bomb."³³ Thus, the court focused on the particular military advantage resulting from the destruction of specific military objectives, as opposed to the "cumulative" approach taken by the United States.

More recently, the "military advantage" issue has arisen in a number of guerilla conflicts. For example, the United States pursued a strategy in Vietnam of devastating areas of the countryside where guerillas were

28. See Farer, *supra* note 5, at 16-17.

29. The United States' reliance on incendiary bombing was due to the extreme inflammability of Japanese building materials, the failure of attacks using high-explosive bombs, and the fact that Japanese industry was highly dispersed. See Carnahan, *supra* note 20, at 56.

30. The Allies estimated that United States casualties from an invasion of Japan would have amounted to some 500,000 dead. *Id.* at 57.

31. 32 I.L.R. 626 (District Court of Tokyo, Japan 1963). This case involved a suit by several persons injured in the bombings of Hiroshima and Nagasaki against the government of Japan for failing to assert a claim on their behalf against the United States for the "illegal" bombing of the two cities.

32. The plaintiffs' claims, however, were denied on other grounds.

33. 32 I.L.R. at 632.

reported to be operating. The United States justified these actions on the grounds that their cumulative effect was to keep the enemy forces constantly on the move and to separate the guerillas from their base of support.³⁴ These actions were, however, widely condemned on the basis that the civilian losses greatly outweighed the guerilla casualties resulting from particular military operations.

The Diplomatic Conference appears to favor the "case-by-case" approach, as is indicated by the use of the phrase "concrete and direct military advantage" in Article 50.³⁵ Certainly, a "case-by-case" interpretation of "military advantage" is more consistent with the Conference's desire to provide more stringent protections to civilians than have heretofore existed. In view of the Conference's outright prohibitions against attacks on the civilian population, it is extremely unlikely, for example, that the bombings of Hiroshima and Nagasaki would be legitimate military acts under the Conference's provisions, regardless of their cumulative military advantages. The "cumulative" approach has been defended on the basis that taking civilian lives now will save more lives later.³⁶ Yet this approach would greatly weaken the specific protections accorded civilians under the laws of warfare. Also, the standard for measuring the legality of an act would become vague and elusive, due to the difficulty of assessing how, if at all, an act prevented undesirable future events and of determining how serious the adverse consequences would have been.³⁷ Therefore, both policy factors and the language of the Conference's articles support a "case-by-case" interpretation of "military advantage."

2. Means of Conducting Warfare

The probable civilian damage, the second variable in the proportionality equation, will depend on the particular weapons and techniques of warfare that are employed. In this context, one of the most important characteristics of a weapon or technique is its controllability—the extent to which the damage resulting from its use can be limited to a specific military target. Telford Taylor has contrasted aerial bombard-

34. See Farer, *supra* note 5, at 16-17. Such cumulative effects, however, may be more difficult to ascertain than more immediate effects such as battle casualties. Information on movement of guerilla forces, for example, may not be readily available, especially in view of the furtive nature of guerilla warfare.

35. REPORT, *supra* note 3, at 69. This phraseology also indicates that there has to be a reasonable basis for anticipation of a military advantage; a vague expectation of military benefit would be insufficient.

36. See Carnahan, *supra* note 20, at 57.

37. See note 34 *supra*.

ment and ground warfare in this regard, stating that it is generally more difficult to distinguish between combatants and non-combatants with the former method.³⁸ Nuclear weapons have been condemned largely because of their uncontrollability as regards both incendiary and radiation damage.³⁹ Similar criticisms have been directed against biological and chemical warfare,⁴⁰ although distinctions have been drawn between various types of biological and chemical weapons, such as epidemic and non-epidemic weapons, on the basis of their degree of controllability.⁴¹ In ascertaining a weapon's controllability, it is necessary to examine not only the immediate destruction wrought by its use but also the more long-range effects such as environmental damage caused by crop destruction or defoliation.⁴² Such damage is often more difficult to justify on proportionality grounds than immediate destruction, since it bears a "less proximate and more remote"⁴³ relationship to the military advantage that was initially sought.

In addition to controllability, the special military benefits which a weapon or technique offers also have a significant bearing on proportionality. If a certain weapon or technique provides a uniquely or especially effective means of attaining a particular military advantage, this would tend to countervail (for the purposes of assessing proportionality) the greater civilian damage that could result from its use. On this basis, it has been suggested that the proportionality principle might even permit the use of a weapon such as napalm, despite the severe civilian damage which has resulted from its use in Vietnam and elsewhere.⁴⁴ The special

38. See Taylor, *supra* note 24, at 142-43. This would involve the principles of discrimination as well as proportionality.

39. As Farer points out, tactical nuclear weapons "have yields up to and even exceeding those which obliterated Hiroshima and Nagasaki . . ." Farer, *supra* note 5, at 22. See also N. SINGH, *NUCLEAR WEAPONS AND INTERNATIONAL LAW* 220 (1959).

40. Farer draws the following comparison between chemical and biological warfare and nuclear weapons:

Both are likely to have indiscriminate effects; there is danger in both cases of long-term injury to the target population. And, in addition, there is danger in both cases to the citizens of neutral states, and, indeed, of the states employing these means. Finally, in neither case can the available technology of defense accomplish more than a moderation of the potential devastation.

Farer, *supra* note 5, at 23.

41. See A. THOMAS & A.J. THOMAS, JR., *LEGAL LIMITS ON THE USE OF CHEMICAL AND BIOLOGICAL WEAPONS* 208 (1970).

42. *Id.* at 210.

43. *Id.*

44. Farer has observed, "The depressing reality . . . is that napalm appears to be a grimly effective and, if military authorities are to be believed, not easily replaceable weapon for attacking fortified positions, particularly underground bunkers." Farer, *supra* note 5, at 22. See also Remarks by George H. Aldrich in *Human Rights and Armed*

benefits argument may, however, violate the directive of Article 50(3), which provides:

When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that which may be expected to cause the least damage to civilian lives and to civilian objects.⁴⁵

If the word "similar" is construed broadly, it would be difficult to justify use of a special military benefit. The intent of the Diplomatic Conference to strengthen the law of civilian protection would seem to support such a broad construction.⁴⁶

It has been argued that a more stringent standard of proportionality should govern the use of weapons in a limited war as compared to a general war.⁴⁷ One authority has suggested, for example, that while only a few types of non-epidemic and non-lethal biological and chemical weapons would meet the standards of proportionality in a limited war, a wider range of such weapons would be permissible in a total war.⁴⁸ However, by using the phrase "concrete and direct military advantage," the Diplomatic Conference reduces the importance of the overall military context as a direct factor in proportionality, although it retains its importance insofar as it determines or shapes the specific military advantage that is anticipated.

The above factors raise the issue of whether any weapon or technique of warfare is inherently violative of the proportionality principle. Nuclear weapons are the most obvious candidates for such a classification.⁴⁹ Although a case for proportionality could perhaps be made to justify the use of a tactical nuclear weapon against a major military target far removed from the civilian population, even here the fallout level could cause considerable civilian damage.⁵⁰ Additionally, a nuclear

Conflicts: Conflicting Views, 1973 AM. SOC'Y INT'L L. PROC. 141, 148. *But see* Remarks by Frits Kalshoven, *id.* at 160.

45. REPORT, *supra* note 3, at 69.

46. *See* note 35 *supra* and accompanying text.

47. *See* A. THOMAS & A.J. THOMAS, JR., *supra* note 41, at 208-10.

48. *Id.*

49. *See* notes 39 and 40 *supra*.

50. Proportionality would depend in part on whether a case-by-case or cumulative approach were used. *See* note 28 *supra* and accompanying text. However, as noted above, Article 50 leans towards the case-by-case approach. *See* note 35 *supra* and accompanying text. Also, if the reason for using nuclear weapons rather than conventional weapons is to pressure the other side into an early political settlement, it would probably not be regarded as a legitimate military objective. *See* notes 20 and 26 *supra*. Finally, the fact that civilian damage from fallout is a less immediate and more long-range type of destruction would militate against the view that the use of nuclear weapons is proportionate in some

weapon would not necessarily be that much more effective than conventional weapons in destroying an isolated military base or target. Thus, even if nuclear weapons are not per se disproportionate, they would satisfy the proportionality requirement only in the most extreme circumstances. The same could be said of other highly uncontrollable methods of warfare such as lethal and epidemic biological and chemical warfare.⁵¹

3. *The Military Target*

In order to predict the civilian losses which will result from a particular military act, it is necessary to assess the nature of the military target as well as the method of warfare. The officer will typically have less information about the military target than about the weapons and techniques of warfare at his disposal, since the target will be in hostile territory. However, military intelligence and information-gathering have made dramatic advances in the post-World War II era,⁵² as is illustrated by the "elint," or electromagnetic intelligence, system which the United States Air Force operates around the world.⁵³ Even in air warfare, where the target is more remote than in ground warfare, the use of various means of information-gathering enables an officer to obtain

circumstances. See note 42 *supra* and accompanying text.

Some observers have suggested that even if nuclear weapons were not permissible in the first instance, their use as a means of reprisal could be justified. A reprisal is a measure contrary to law which is taken in retaliation against a prior illegal act by the enemy in order to deter such acts in the future. At the very least, the reprisal would have to be proportionate to the prior act; thus, nuclear weapons probably could only be used as retaliation against the prior use of nuclear weapons by the adversary. See SINGH, *supra* note 39, at 220.

Even if the reprisal were proportionate, however, it would be difficult to justify such acts under the law of warfare. Article 33 of the Civilians Convention prohibits reprisals against "protected persons" and their property ("protected persons" as defined in Article 4 are those persons not protected by the other Geneva Conventions who find themselves in the hands of a Party to the conflict or an Occupying Power of which they are not nationals). Furthermore, Articles 46 and 47 of the Diplomatic Conference provide respectively that civilians and civilian objects shall not be made the objects of reprisals.

During the Vietnam War the United States often claimed the right to engage in reprisals against alleged military provocations. For example, after allegations of attacks by North Vietnamese torpedo boats in August, 1964 (the Gulf of Tonkin incident), the United States destroyed several villages in which boats were based. Also, the bombing of North Vietnam in February, 1965, was justified as a reprisal for a successful Viet Cong attack on two American air bases. See Falk, *International Law and the United States Role in the Vietnam War*, 75 YALE L.J. 1122 (1966). See also TAYLOR, *supra* note 24, at 144-45.

51. A. THOMAS & A.J. THOMAS, JR., *supra* note 41, at 210.

52. See J. TOMPKINS, *THE WEAPONS OF WORLD WAR III* 292-303 (1966).

53. *Id.* at 293.

elaborate and highly sophisticated data about a prospective military target.⁵⁴ This information aids decision-making in at least four respects vis-à-vis proportionality. First, it identifies the precise location of the target, which in turn shows its proximity to the civilian population. Second, it indicates whether the target contains dangerous forces, such as nuclear reactors, which could cause substantial civilian losses if the target were destroyed. Third, this information denotes the importance of the target to the other side's military capabilities and, consequently, the military advantage that would ensue from obliteration of the target. Fourth, it indicates the vulnerability of the target to destruction, thereby enabling an officer to gauge the likelihood of achieving such a military advantage.

Of course, much of the information on enemy targets which bears on proportionality can be obtained through less complex means than those discussed above. For example, the location of the enemy's major munitions works and the distribution of the nearby civilian population may be matters of ordinary geographical knowledge. Similarly, an officer would not need extensive intelligence data to determine that substantial civilian losses would result from bombardment of a major dike.⁵⁵ More technical or sophisticated data might nonetheless be helpful in assessing the military characteristics of the target, *e.g.* whether a factory produces a major supply of military equipment, even where other pertinent information such as proximity to civilians could be obtained through simpler means.

By utilizing all the relevant information at his disposal and considering the above factors in a systematic and thorough manner, the officer will find that his ability to apply the proportionality principle will be greatly enhanced. He will be able to evaluate alternative means of conducting warfare⁵⁶ against a particular target and assess the trade-off in

54. *Id.* at 294.

55. Generally, bombardment of a major dike or dam would be an illegal act of warfare under the provisions of the Diplomatic Conference. Article 49 prohibits attacks against "works or installations containing dangerous forces," even where these objects are military objectives, where the attack may release these dangerous forces and cause severe civilian losses. Also, many such works and installations would be dedicated to civilian purposes such as irrigation or flood control and would thus be subject to Article 47(3), which provides:

In case of doubt whether an object which is normally dedicated to civilian purposes, such as a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

REPORT, *supra* note 3, at 66.

56. Article 50(3) requires an assessment of alternative means of warfare in many instances. See notes 44 and 45 *supra* and accompanying text. See also Adler, *supra* note 20, at 31.

each case between the specific military advantage⁵⁷ and the probable civilian losses.⁵⁸ While this is not to say that the proportionality principle will not be susceptible at times to erroneous application or that ambiguous situations will not emerge, at the very least the officer should be able to recognize blatantly disproportionate acts such as saturation bombing of insignificant military targets located in large population centers. Whether the officer will refrain from engaging in such acts, however, will depend largely on the adequacy of the mechanisms for enforcement of proportionality. The remainder of this Note will address this issue.

III

ENFORCEMENT OF PROPORTIONALITY

A. EXISTING PROBLEMS OF ENFORCEMENT

Since the military officer operates under a number of pressures which could lead him to neglect the proportionality principle, such as time constraints and orders from superiors, it is crucial that strong sanctions against disproportionate acts be developed. One of the major deficiencies of the Diplomatic Conference is its failure to provide adequate enforcement mechanisms for violations of proportionality.⁵⁹ Article 5 does attempt to strengthen the Protecting Power system, whereby neutral states or international organizations such as the Red Cross send representatives to the site of the conflict in order to supervise the belligerents' compliance with the laws of warfare.⁶⁰ However, this

57. See notes 35-37 *supra* and accompanying text.

58. Situations may arise in which it becomes apparent to the officer, after he has decided to launch an attack, that the action would cause disproportionate civilian losses. Article 50(b) requires the officer to cancel the attack in such instances. Several delegates to the 1972 Conference of Experts felt that it would be unrealistic to expect a commander to halt an attack once it had begun. CONFERENCE, *supra* note 19, at 152.

59. Article 70(2) merely provides that "the High Contracting Parties . . . shall give orders and instructions to ensure observance of the conventions and the present Protocol and shall supervise their execution." REPORT, *supra* note 3, at 74.

60. Under the 1949 Geneva Conventions, the Protecting Power system could only come into effect if the adversaries agreed to the selection of a Protecting Power or international organization. Since the 1949 Geneva Conventions, Protecting Powers have been appointed in only three conflicts: the Suez War of 1956, the 1961 Goa conflict, and the 1971-72 Indo-Pakistan War (in the latter conflict the Protecting Power exercised a diplomatic role rather than engaging in the supervisory activities contemplated by the Geneva Conventions). Nor have substitute organizations such as the International Committee of the Red Cross been appointed in any conflicts. A number of reasons have been suggested for the failure to use the Protecting Power system; for example, nations may believe that the presence of a Protecting Power at the site of a conflict would unduly restrict their military

system is more oriented toward matters involving the continuing treatment of civilians (*e.g.* occupations of a territory), which lend themselves to ongoing supervision, than to the discrete military acts such as aerial attacks which are addressed by the proportionality provisions.⁶¹ Moreover, the actual enforcement powers of Protecting Powers are minimal; while they can investigate alleged instances of noncompliance and attempt to persuade the party to refrain from such acts in the future, they do not have the authority to punish violations of the law of warfare.⁶²

A stronger sanction would be to treat violations of proportionality in the same manner that "grave breaches" are treated under the 1949 Geneva Conventions.⁶³ Under Article 146 of the Civilians Convention (similar provisions are found in the other Geneva Conventions), signatory nations are required to enact legislation "necessary to provide effective penal sanctions" for grave breaches and to search for and pro-

operations, and they may fear that appointment of a Protecting Power or substitute organization would amount to recognition of the adversary. See ПИТЕР, *supra* note 4, at 66-67.

Since the establishment of the 1949 Geneva Conventions, various proposals have been made to strengthen the Protecting Power system. One such proposal is that in case the parties on each side of a conflict fail to promptly designate a Protecting Power, the Protecting Power function would automatically be assumed by a neutral international organization. See THE FOURTEENTH HAMMARSKJÖLD FORUM, WHEN BATTLE RAGES, HOW CAN LAW PROTECT? 68 (1971). Article 5(4) of the Diplomatic Conference does not go this far, but it provides that if the adversaries fail to initially designate a Protecting Power and subsequent efforts by the International Committee of the Red Cross to find a mutually acceptable Protecting Power are unsuccessful, then the parties "shall accept without delay" an offer made by the ICRC or similar organization to act as a substitute. However, the Article adds:

The functioning of such a substitute is subject to the consent of the Parties to the conflict; all efforts shall be made by the Parties to facilitate the operation of a substitute in fulfilling its tasks under this Convention and this Protocol.

REPORT, *supra* note 3, at 45.

61. See THE FOURTEENTH HAMMARSKJÖLD FORUM, *supra* note 60, at 66-67.

62. See COMMENTARY, IV GENEVA CONVENTION, *supra* note 1, at 86-87.

63. Under Article 147 of the Civilians Convention the following acts constitute grave breaches:

. . . wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

The last act—destruction and appropriation of property—only applies to property actually held by an occupying power. See COMMENTARY, IV GENEVA CONVENTION, *supra* note 1, at 596-97.

secute⁶⁴ all persons alleged to have committed, or to have ordered to be committed,⁶⁵ grave breaches, regardless of their nationality.⁶⁶ Parties are also required under Article 146 to "take measures necessary for the suppression" of other breaches; such measures could take forms other than penal legislation, such as administrative sanctions.

If the grave breach sanction were imposed for violations of proportionality, an initial question would arise as to whether all such acts should be classified as grave breaches. The grave breaches listed under Article 147 of the Civilians Convention are all willful acts.⁶⁷ However, in view of the need to increase the protection of civilians in warfare, there is good reason to include negligent as well as intentional and reckless violations of proportionality under the grave breach category. Then signatory nations would be required to treat negligent violations of proportionality as war crimes, although they would be free to punish negligent behavior less severely than intentional and reckless acts. Violations which are neither willful nor negligent would be categorized as regular breaches which the signatory nations could treat by means other than penal legislation.⁶⁸

Although a negligence standard would place added burdens upon the officer by holding him to a standard of due care, time constraints and other pressures on the officer would bear upon the determination of whether the officer exercised reasonable care. The scienter test would focus on the facts and circumstances as they appeared to the officer at the time the act was taken, rather than on hindsight evaluation. This would accord with the standard enunciated in the *Hostages* case,⁶⁹ where

64. Article 146 also provides that a Party may, if it prefers, and in accordance with its own legislation, hand persons over for trial to another concerned High Contracting Party, if such other High Contracting Party has made out a prima facie case that the individual is liable.

65. The Convention does not impose liability for failure to intervene to prevent a breach by another person. The signatory nations are free to deal with this issue as they see fit. See COMMENTARY, IV GENEVA CONVENTION, *supra* note 1, at 591-92.

66. Most signatory nations have not fully complied with the requirement that they enact special penal legislation. Many countries, including the United States, do not provide for prosecution of foreign nationals for violations of the Geneva Conventions. See Rubin, *Legal Aspects of the My Lai Incident*, 49 ORE. L. REV. 260, 269 (1970). Great Britain, on the other hand, has fully exercised its responsibility in this regard; its legislation, in accordance with Article 147 of the Civilians Convention, permits prosecution of foreign nationals within Britain's jurisdiction for alleged war crimes committed on foreign soil. The Geneva Conventions Act, 5 & 6 Eliz. 2, c. 52, § 1 (1957).

67. See note 63 *supra*.

68. See note 66 *supra* and accompanying text.

69. United States v. Wilhelm List, XI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 759 (1948).

the Nuremberg Tribunal found General Lothar Rendulic not guilty on the grounds that the "scorched earth" destruction he carried out in a particular instance was reasonably judged to be militarily necessary at the time the action was taken.⁷⁰ The trier of fact would take into account such factors as whether the officer consulted available reports, whether he attempted to ascertain probable civilian losses, whether he considered alternative means of warfare that would inflict less damage on civilians, and whether he took steps, such as evacuating civilians after the attack had been initiated, that would minimize civilian casualties.⁷¹

Liability for disproportionate acts would not be limited to the officer who actually ordered the attack; rather, the negligence standard would encompass the failure of superior officers to take reasonable steps to prevent or punish the commission of disproportionate acts by their subordinates. Such negligence was in fact the basis of the finding of guilt in *In Re Yamashita*,⁷² where a Japanese general was convicted by a United States military commission for failing to take adequate measures to control his troops, who had committed a wide range of atrocities in the Philippines.⁷³ Many of the defendants in the *High Command* case at Nuremberg⁷⁴ were found guilty on a similar basis. In the United States, pursuant to Paragraph 501, Section 27-10, of the *United States Army Field Manual*, a commander is criminally liable for failure to take necessary and reasonable steps to ensure compliance with the laws of warfare or to punish violations thereof.⁷⁵

70. *Id.* at 1295-97. See R.E. Jordan, III, in TROOBOFF, *supra* note 5, at 57.

71. See Falk, in TROOBOFF, *supra* note 5, at 40.

72. 327 U.S. 1 (1946).

73. In discussing the charges against General Yamashita, the Supreme Court said:

It is evident that the conduct of military operations by troops whose exercises are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection.

327 U.S. at 15 (emphasis supplied).

It should be noted, however, that there is considerable controversy over whether General Yamashita was found to have actual knowledge of his troops' atrocities or whether he was held liable for actions of which he should have known. See TROOBOFF, *supra* note 5, at 33-34.

74. *United States v. Wilhelm von Leeb*, X-XI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS (1948).

75. See Taylor, in TROOBOFF, *supra* note 5, at 226. Under Paragraph 501 of the *Field Manual*, constructive knowledge may be imputed to the officer on the basis of military reports or other sources of information.

In view of this standard of actual or constructive knowledge, the judge's charge in the *Medina* case, which stated that the officer must have actual knowledge of the offenses being committed, is subject to criticism. See Gard, Jr., in TROOBOFF, *supra* note 5, at 230.

The issue has often arisen as to who should bear the ultimate responsibility for illegal acts of warfare. This problem was addressed in the *High Command* case,⁷⁶ where the Nuremberg tribunal, noting the decentralization of modern military organization and the delegation of authority by commanders to subordinates, stated that a high commander could not realistically keep informed of all the details of military operations. Therefore, liability should not attach to him merely on the basis of his superior position in the chain of command.⁷⁷ According to the tribunal, in order for a commander to be held criminally liable, "[t]here must be personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part."⁷⁸

To determine whether a high commander had ultimate responsibility for a violation of proportionality, a court or tribunal would focus on a number of factors. These would include the commander's proximity in the chain of command to the officer who committed the violation, the nature of the military units under the defendant's command (*e.g.* whether they were stable or highly mobile units), the mobility of the commander vis-à-vis units under his command,⁷⁹ the size of the commander's own staff and the comprehensiveness of its duties, and the nature of the combat situation (*e.g.* whether it was stable or fluid).⁸⁰ In many instances these issues would never be reached, since a nation might be reluctant to prosecute its own high officials or those of other countries due to the adverse political repercussions such prosecutions would have. Trials of the highest wartime military officials would most likely occur in a situation of total victory and defeat, where a completely new leadership had arisen in the vanquished nation after the war. This was the scenario in the Nuremberg Trials and the other major war crimes trials of this century.⁸¹

Besides the problem of command responsibility, the inverse issue of "superior orders" would also arise in prosecutions of disproportionate acts. In the My Lai and Nuremberg Trials, many of the defendants invoked the defense that they had no choice but to follow the orders of

76. XI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 543-44 (1948).

77. *Id.*

78. *Id.* at 543. See Parks, *Command Responsibility for War Crimes*, 62 MILITARY L. REV. 1, 43 (1973).

79. The helicopter has greatly increased the mobility of the field commander, as the Vietnam experience indicated. See Parks, *supra* note 78, at 92.

80. *Id.* at 90-95.

81. See Goldenberg, *Crimes Against Humanity 1945-1970*, 10 W. ONT. L. REV. 1, 30 (1971).

their commanding officers.⁸² The *United States Army Field Manual*, however, has limited the availability of this defense to situations in which the accused did not know, and could not reasonably have known, that the order was unlawful.⁸³ This places the officer in a dilemma, for he must decide, often in the heat of battle, whether the order is unlawful and should be disobeyed.⁸⁴ Since Article 90 of the Uniform Code of Military Justice subjects a soldier to criminal liability for failure to obey lawful orders,⁸⁵ the officer may well decide that the safer course would be to obey the order, at least in instances where the order is arguably legal.

The officer's decision would probably be heavily influenced by his perception of the relative risks of prosecution for disobeying superior orders and prosecution for committing war crimes. Judging from the experience of the past few decades, the chances of prosecution for war crimes would be relatively slight. For example, after World War II the Allies refrained from prosecuting any individuals whatsoever, even those on the losing side, for aerial bombardments causing massive civilian damage.⁸⁶ Similarly, the United States has failed to exercise its prosecutorial responsibilities under the Civilians Convention. Only a handful of those involved in the My Lai massacre were prosecuted, and they were tried for conventional crimes under the Uniform Code of Military Justice, such as murder and maiming, rather than for war crimes.⁸⁷ Also, former military personnel are generally immune from prosecution for acts committed overseas. The Supreme Court held in *Toth v. Quarles*⁸⁸ that a person discharged from the service could no longer be tried by a military court. Furthermore, ex-servicepersons cannot be tried in a federal nonmilitary court for alleged crimes committed overseas, unless the act took place within the maritime and territorial jurisdiction of the

82. The Hague and Geneva conventions do not address the issue of superior orders. See TAYLOR, *supra* note 24, at 47.

83. *Id.* at 51.

84. However, even if the officer obeys the order and is subsequently prosecuted for a war crime, fear of punishment by superiors, while not a complete defense, is a mitigating circumstance which can reduce the sentence.

85. 10 U.S.C. § 890 (1970).

86. The Allies themselves carried out such attacks to a considerable extent; in fact, some authorities have remarked that the Allies engaged in such bombing to a greater extent than the other side. See Wasserstrom, *Richard A. Wasserstrom* in TROOBOFF, *supra* note 5, at 196. It is not surprising, therefore, that the Allies did not prosecute such activities or that the 1949 Geneva Conventions failed to include prohibitions against indiscriminate aerial bombardments. See Baxter, *supra* note 2, at 2-3.

87. See Comment, *My Lai Massacre: The Need for an International Investigation*, 58 CALIF. L. REV. 703, 705-15 (1970).

88. 350 U.S. 11 (1955).

United States, *e.g.* on a military base.⁸⁹

There are a number of reasons why nations have generally failed to prosecute their own nationals, including the jurisdictional limitations discussed above, the failure to recognize the applicability of the laws of warfare to specific fact situations,⁹⁰ and the unwillingness of nations to draw world attention to their own violations.⁹¹ The latter reason reflects a somewhat myopic attitude, as a nation might improve its image in world public opinion by undertaking an active prosecution of its own nationals. Such prosecutions would put the rest of the world on notice that a nation does not intend to tolerate illegal acts of warfare by its officers.⁹²

Trials of foreign nationals for war crimes present a special problem: the danger that the prosecuting party will impose stricter standards of guilt on the defendants than on its own side for similar conduct.⁹³ This was reflected in some of the Nuremberg trials.⁹⁴ Such a problem could manifest itself in various ways in a trial of the losing side for violations of proportionality. For example, the victorious power's view of the mili-

89. See Rubin, *supra* note 66, at 270-71.

90. See note 2 *supra*.

91. See Baxter, *supra* note 2, at 4.

92. See Comment, *supra* note 87, at 722.

93. Addressing this problem, Telford Taylor has said:

But as long as enforcement of the laws of war is left to the belligerents themselves, whether during the course of hostilities or by the victors at their conclusion, the scope of their application must be limited by the extent to which they have been observed by the enforcing party. To punish the foe—especially the vanquished foe—for conduct in which the enforcing nation has engaged, would be so grossly inequitable as to discredit the laws themselves.

TAYLOR, *supra* note 24, at 38-39.

94. According to Rubin:

The instances of the victors in a war applying a harsher measure, a more rigid standard of judgment, to the vanquished than it applies to its own personnel in time of war have been often documented, particularly in the Nuremberg tribunals. An example often commented upon was the conviction of the Nazi Admirals Doenitz and Raeder after World War II of the war crimes involved in ordering unrestricted submarine warfare under circumstances in which American and British naval authorities had themselves ordered similar unrestricted submarine warfare. To my knowledge, none of the American and British naval commanders giving the illegal orders was ever brought before a tribunal.

Rubin, *supra* note 66, at 268.

In addition to noting this double standard of guilt, observers have also characterized war crimes trials as vehicles for pinning guilt on particular individuals. The Nuremberg tribunals, for example, have been described as a "measured process of fixing guilt." J. SHKLAR, *LEGALISM* 158 (1964). Thus, a nation may be motivated to conduct war crimes trials for reasons other than a recognition of its prosecutorial responsibilities under the law of warfare.

tary advantage criterion might be conditioned by the fact that it won the conflict, so that the enemy's actions would be more difficult to justify on military advantage grounds than its own actions.

B. POSSIBLE SOLUTIONS TO THE LACK OF PROSECUTORIAL ZEAL

Although traditional international sanctions such as diplomatic protests, censures, and boycotts are theoretically available to nations as means of pressuring other countries to prosecute illegal acts of warfare, nations have been quite reluctant to employ such measures for this purpose. Such sanctions would likely result in detrimental political and economic consequences, such as loss of a trading partner, that would outweigh the desired benefits of increased prosecution.⁹⁵ Moreover, there is no guarantee that such measures would actually force countries to undertake a more active prosecution of war crimes.

One possible solution to the lack of prosecutorial zeal would be to create an international criminal tribunal with jurisdiction over war crimes.⁹⁶ However, the obstacles to the formation of such a tribunal would be formidable. Such a tribunal could only operate if there were a universal penal code, agreement by member nations as to trial procedures, and an effective enforcement system.⁹⁷ Furthermore, nations would have to acquiesce to the jurisdiction of such a tribunal, and they might well be reluctant to do so for reasons such as fear of political embarrassment.

At this point in history, then, improvements in the prosecution of war crimes will have to be made at the national level. One solution which has been proposed for the United States is the creation of a special prosecuting unit for military crimes, including war crimes.⁹⁸ At present the commanding officer generally has the responsibility of deciding when a court-martial should be convened for prosecution of subordinates. This method of prosecution is highly inappropriate for war crimes, since the commander is reluctant to draw attention to his own failure to properly supervise the conduct of his subordinates.⁹⁹ The establishment of an independent prosecuting unit, responsible only to the Secretary of Defense, would alleviate this problem. The staff of such an

95. Similar political and economic considerations would impede war crime prosecutions of officials of other nations. See text immediately following note 80 *supra*.

96. For a discussion of efforts to develop an international criminal court, see Goldenberg, *supra* note 81, at 23-26.

97. See Paust, *Legal Aspects of the My Lai Incident: A Response to Professor Rubin*, 50 ORE. L. REV. 138, 151 (1971).

98. See Remarks by Tom Farer, 1972 AM. SOC'Y INT'L L. PROC. 183, 191; Note, *Command Responsibility for War Crimes*, 82 YALE L.J. 1274, 1291 (1973).

99. See Note, *supra* note 98, at 1291.

office would be comprised of civilian prosecutors and investigators attached to military units but entirely independent of command influence.

Such an office would face a number of problems. Its attachment to military units would likely create frictions between military officers and the office's staff. The officers might attempt to conceal evidence from the staff or make it difficult for the staff to visit the locale of an alleged war crime.¹⁰⁰ Additionally, the office would be subject to pressures from the Secretary of Defense and other public officials who might regard certain prosecutions or investigations as damaging to the United States. Such pressures and controls would, of course, decrease the likelihood of prosecution of those at the apex of the military hierarchy. Despite these shortcomings, however, the establishment of an independent prosecuting unit appears at present to be the most viable solution to the existing laxity in the enforcement of the laws of warfare.

CONCLUSION

Codification of the proportionality principle would constitute an important step in the development of the law of warfare by filling a sizeable gap in the existing law of civilian protection. Although the officer will at times find it difficult to apply the proportionality principle under the exigencies of warfare, he will generally be well-informed as to the desired military advantage, the means of warfare, and the military target, and this information will enable him to weigh the anticipated military benefits against the probable civilian losses. The officer should be held criminally liable for disproportionate acts resulting from his failure to exercise due care or from intentional or reckless conduct. If violations of proportionality are treated as war crimes and are actively prosecuted, there will be cause for hope that proportionality can become an integral part of military decision-making rather than an abstract principle of civilian protection.

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100. The Protecting Power, discussed at note 60 *supra*, could assist the staff of the prosecuting office in gathering evidence and investigating alleged violations of the law of warfare.