

# The effect of Security Council mandates on the proportionality analysis in humanitarian interventions

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## 1 Introduction

In March 2011 the United Nations Security Council took an unprecedented step in response to the increasingly brutal repression of protests in Libya.<sup>1</sup> It issued resolution 1973, authorising military intervention in line with the Security Council's 'determination to ensure the protection of civilians and civilian populated areas and the rapid and unimpeded passage of humanitarian assistance'.<sup>2</sup> Under this mandate, NATO carried out 9 700 strike sorties.<sup>3</sup> The notion of military intervention to protect civilians may well be hailed as an important step toward realising the responsibility to protect, however it poses significant difficulty to military planners when calculating what targets to strike and what force is proportional. If one is intervening purely to protect civilians, then potentially any civilian casualty is unacceptable as it would amount to killing one civilian to save another. The very notion of an humanitarian intervention therefore, poses crucial questions for the application of humanitarian law.<sup>4</sup>

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<sup>1</sup>The intervention marked the first time the UN Security Council had authorised the use of force to protect civilians in a country against the wishes of the government of that country. Bellamy and Williams 'The new politics of protection? Côte d'Ivoire, Libya and the responsibility to protect' (2011) 87 *International Affairs* at 825.

<sup>2</sup>UN SC res 1973 (17 March 2011).

<sup>3</sup>'Operation Unified Protector final mission stats' NATO 2 November 2011 available at [http://www.nato.int/nato\\_static/assets/pdf/pdf\\_2011\\_11/20111108\\_111107-factsheet\\_up\\_factsfigures\\_en.pdf](http://www.nato.int/nato_static/assets/pdf/pdf_2011_11/20111108_111107-factsheet_up_factsfigures_en.pdf) (accessed 15 March 2012).

<sup>4</sup>Holzgrefe and Keohane *Humanitarian intervention: Ethical, legal and political dilemmas* (2003) at 18, define humanitarian intervention as 'the threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied'. It is beyond the scope of this paper to address the debate on

The Geneva Conventions<sup>5</sup> call for the application of the principles they contain without any distinction based on the nature of the conflict.<sup>6</sup> However, this paper proposes that humanitarian interventions require a different approach to proportionality than that applied to a standard military operation. In particular, the test in humanitarian missions should place greater weight on the protection of civilians when carrying out the proportionality analysis against anticipated military advantage. This paper therefore examines the effect of UN Security Council resolutions on the calculation of proportionality in military operations. It first sets out the historical development of proportionality and its current form in Additional Protocol 1 to the Geneva Conventions. It then examines its application in the context of Operation Desert Storm and Operation Unified Protector to ascertain whether the nature of the mandate affected the application of proportionality in the conflict.

## 2 Definition of proportionality

### 2.1 History of proportionality

When examining the proportionality principle it is useful to draw a distinction between its two primary areas of application. The first area arises before the conflict, where it may be used to determine whether a resort to armed force is proportionate to the provocation or harm sustained. The second area is where, once a war has begun, proportionality must be applied to each attack, to determine whether the harm caused by the attack is proportional to the military advantage gained. This distinction has its origins in the distinction between *jus ad bellum* and *jus in bello*.<sup>7</sup> Despite a long standing distinction in law between the two, in practice there has often been an overlap. This is particularly poignant in the interplay between the mandates issued by the Security Council and the calculation of proportionality in combat.

The notion of proportionality – both before and during a conflict – has developed along with the changing nature of the *jus ad bellum*. The ‘just war’ theory, developed in 12th and 13th centuries, rejected the previous notions that the outcome of the war was evidence of the justice of the cause. Instead, it held that war is only just if it is for a just cause, such as self-defence<sup>8</sup> or to

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whether humanitarian interventions may occur without Security Council authorisation. This paper merely seeks to examine the effect of the mandate where it is authorised.

<sup>5</sup>Geneva Conventions (1949).

<sup>6</sup>Preamble to Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts [Additional Protocol I] 8 June 1977.

<sup>7</sup>Benvenisti ‘Rethinking the divide between *jus ad bellum* and *jus in bello* in warfare against non-state actors’ (2009) 34 *Yale JIL* 541 at 543.

<sup>8</sup>Bowett *Self defence in international law* (1958) at 4.

punish the wicked.<sup>9</sup> The test for proportionality when entering the war was, therefore, whether the war was proportionate to the attack requiring self-defence, or proportionate to the punishment required. This notion carried through into the conduct of the war, as the means and methods available to an army waging a just war were thought to be less limited. This was because if the war in itself is just, then the parties may use whatever means they have available to achieve the just cause.<sup>10</sup> In this way, proportionality for *jus ad bellum* and *jus in bello* were inextricably linked. The obvious difficulty with such a notion, is that both sides are likely to consider their cause just.

As international law developed, the notion of waging war for a just cause remained, however the nature of the justice shifted from religious or moral justification, to legal justification.<sup>11</sup> States did not assert a blanket or unlimited right to go to war, but sought to substantiate the waging of war – at least superficially – by relying on a legal justification.<sup>12</sup> This change allowed a far clearer line to be drawn between *jus ad bellum* and *jus in bello*.

As legal justifications became more important in *jus ad bellum*, various events in the 1800s introduced the notion of law to *jus in bello*. In 1859 Henry Dunant witnessed the battle of Solferino, which would later lead him to establish the International Committee of the Red Cross ('the ICRC'). By 1864 the ICRC had persuaded various states to sign the first Geneva Convention.<sup>13</sup> During the same period, the United States issued the Lieber Code,<sup>14</sup> and the nations of Europe agreed on the Saint Petersburg Declaration.<sup>15</sup> These both set out various limitations for the conduct of warfare. The Saint Petersburg Declaration stated that

*the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;*

*That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;*<sup>16</sup>

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<sup>9</sup>Chesterman *Just war or just peace?: Humanitarian Intervention and international law* (2001) at 10.

<sup>10</sup>Gardam 'Proportionality and force in international law' (1993) 87 *American JIL* 391 at 395.

<sup>11</sup>Evans *Just war theory: A reappraisal* (2005) at 4.

<sup>12</sup>There was, however, no legal prohibition against the resort to force. While the justifications offered by states were phrased in legal terms, their purpose was to provide a political excuse for the use of force. De Aréchaga *International law in the past third of a century* (1979) at 96-97.

<sup>13</sup>International Committee of the Red Cross 'History of the ICRC' 29 October 2010 available at <http://www.icrc.org/eng/who-we-are/history/overview-section-history-icrc.htm> (accessed 20 March 2012).

<sup>14</sup>Instructions for the Government of Armies of the United States in the Field (Lieber Code) 24 April 1863.

<sup>15</sup>Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg (Saint Petersburg Declaration) 29 November/11 December 1868.

<sup>16</sup>*Ibid* (emphasis added).

The Leiber Code further confirmed the limitation of means available in war and endorsed the notions of distinction and proportionality by providing that

as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, *the distinction between the private individual belonging to a hostile country and the hostile country itself*, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor *as much as the exigencies of war will admit* (emphasis added).

It is notable that neither the Leiber Code, nor the Saint Petersburg Declaration, makes mention of the justification of the war. They therefore demonstrate a separation of proportionality in *jus ad bellum* and *jus in bello*. Similarly, the first and second Geneva Conventions provide for equal protection of combatants, regardless of the reason for the conflict. From an humanitarian perspective, the primary benefit of keeping *jus ad bellum* separate from *jus in bello* is that it allows for equal treatment of combatants irrespective of which side they support.<sup>17</sup> Neither side could claim any advantage by being the party waging the just war, so it made no difference to the treatment of combatants which side the person was on.

The creation of the United Nations marked another important step in the legal regulation of warfare. Under the UN Charter, states renounce any right to resort to war unless the situation falls within the exceptions set out in the Charter. For war to be lawful, the situation must either qualify as self-defence under article 51, or it must be authorised by the Security Council in terms of its chapter VII powers.<sup>18</sup> The modern international system, therefore, has distinct laws in place both for *jus ad bellum* and *jus in bello*.

## 2.2 Proportionality under the Geneva Conventions

The development of the division between *jus ad bellum* and *jus in bello* meant that proportionality for *jus ad bellum* was now regulated by the United Nations, and the proportionality test applied in combat (*jus in bello*) fell primarily under international humanitarian law. Proportionality for *jus in bello* is specifically dealt with in Additional Protocol I<sup>19</sup> to the Geneva Conventions,

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<sup>17</sup>Gardam n 10 above at 393-394.

<sup>18</sup>Charter of the United Nations.

<sup>19</sup>While a number of states have not ratified the Additional Protocols, proportionality has been found to be binding as a rule of customary international law (see rule 14 in ch 4 'Proportionality in attack' in Henckaerts and Doswald-Beck (eds) *Customary International humanitarian law* vol 1 (2005) at 46 available at [www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf](http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf)). See also 'International Commission of Inquiry' (2005) Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004, Geneva, 25 January 2005 at par 166.

under the Precautions in Attack. Article 57 provides the fundamental protection that care should be taken to spare civilians and civilian objects. This protection is set out in a three-step process. First, the military must distinguish between civilian and military targets (the principle of distinction).<sup>20</sup> Secondly, when attacking military targets, the attacker must take all feasible precautions in its methods and means of attack to minimise incidental injury to civilians or damage to civilian objects (the restriction of methods and means).<sup>21</sup> Thirdly, it may not launch any attack where, despite the means and methods chosen, the incidental harm to civilians or civilian objects is excessive in relation to the military advantage gained (the principle of proportionality).<sup>22</sup>

Proportionality may be defined as ‘a rational and reasonable exercise of means towards achieving a permissible goal, without unduly encroaching on protected rights’.<sup>23</sup> The conflict that arises between achieving the permissible goal and not unduly affecting the rights of innocent parties, requires commanders to engage in a careful balancing exercise.<sup>24</sup> The inherent difficulty with the principle is that it relies on the discretion of the decision makers in weighing up the potential harm to civilians, against the military advantage to be gained. The rule accepts that some loss to civilian life or damage to property is acceptable,<sup>25</sup> but requires that commanders weigh that harm against the importance of the military objective. The US Air Force calculates proportionality so as to avoid ‘the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes’.<sup>26</sup> This places the emphasis primarily on the need to accomplish the military purpose. Proportionality is dealt with as a moderating factor in the pursuit of that end. The weighing of proportionality from the perspective of a humanitarian intervention may, therefore, be quite different from that of the military perspective, as the goals sought to be achieved are so different. For the military commander, the goal is to secure a military advantage, which is moderated by concerns of proportionality. In contrast, in humanitarian interventions the goal is the protection of civilians, and the use of force is merely a means to achieve that goal.

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<sup>20</sup>Additional Protocol I art 57(2)(a)(i).

<sup>21</sup>Additional Protocol I art 57(2)(a)(ii).

<sup>22</sup>Additional Protocol I art 57(2)(a)(iii).

<sup>23</sup>Crawford ‘Proportionality’ *Max Plank encyclopedia of public international law* (May 2011) par 1 available at [http://www.mpepil.com.ezproxy.leidenuniv.nl:2048/subscriber\\_article?script=yes&id=/epil/entries/law-9780199231690-e1459&recno=3&searchType=Quick&query=Crawford%2C+Emily](http://www.mpepil.com.ezproxy.leidenuniv.nl:2048/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e1459&recno=3&searchType=Quick&query=Crawford%2C+Emily) (accessed 16 March 2012).

<sup>24</sup>*Id* at par 2.

<sup>25</sup>McCormack and Mtharu ‘Expected civilian damage and the proportionality equation’ (November 2006) *Asia Pacific Centre for Military Law* at 3 available at [http://www.apcml.org/documents/un\\_report\\_exp\\_civilian\\_damage\\_1106.pdf](http://www.apcml.org/documents/un_report_exp_civilian_damage_1106.pdf) (accessed 20 March 2012).

<sup>26</sup>US Department of the Air Force ‘International law – the conduct of armed conflict and air operations’ 1-5-6 Pamphlet 110-31, 1976.

The difference in perspective between the military and other decision makers, becomes particularly clear when goals other than gaining a military advantage are called for by the mandate. In a standard military action the goal is to weaken the forces of the enemy.<sup>27</sup> However, the goals sought to be achieved through humanitarian intervention operations may be substantially different. These may not envision weakening the enemy, but may merely seek to establish safe areas or no-fly zones. If one therefore changes the goal<sup>28</sup> against which proportionality is balanced, it may well affect whether the actions remain proportionate in achieving the goal. In this way the *jus ad bellum* once again impacts on the *jus in bello*.

The Preamble of Additional Protocol 1 holds that its protections must be applied ‘without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties’.<sup>29</sup> The wording of the preamble does not, however, entirely preclude distinction as the words ‘adverse distinction’ allow for the possibility that a distinction may be a positive one. In this sense, the Geneva Conventions leave scope for the notion that the nature of some armed conflicts, such as humanitarian intervention, may impose a higher standard, even if this standard applies only to one of the parties to the conflict.

### 2.3 *The role of the United Nations*

The UN system was designed to ensure collective security by monopolising the legitimacy of the resort to force. This had two particular effects on humanitarian law. Firstly the UN determines when it is lawful to resort to force, or what would constitute a proportionate response to any harm. This suggests a return to a paradigm similar to that of the just war theory, under which one party is fighting a just war, sanctioned by international law, against an unjust aggressor. Secondly, through the wording of the mandate, the Security Council is able to impose obligations and objectives. These directly affect the scope and goals of the military action, thereby influencing the calculation of proportionality in achieving these goals.

If it is accepted that only the UN may lawfully authorise the use of force, by corollary any state using force without the consent of the UN is *prima facie* acting wrongfully.<sup>30</sup> This paper does not attempt to examine the proportionality

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<sup>27</sup>Saint Petersburg Declaration n 15 above.

<sup>28</sup>In such instances both the long-term strategic goals, as well as the more immediate tactical goals may differ from standard military operations.

<sup>29</sup>Additional Protocol 1 Preamble.

<sup>30</sup>For the purposes of this paper it is not necessary to examine whether legally it is possible to resort to force without the consent of the UN, it suffices that the UN approval gives a certain moral sense of justice which may be relevant when examining proportionality.

analysis undertaken by the UN when deciding to authorise military intervention. Rather it theorises that the legitimacy given by the UN mandate affects the calculation of proportionality when the UN- mandated force is carrying out its instructions.

### **3 'Just war' in Operation Desert Storm**

UN Security Council resolution 678,<sup>31</sup> read with resolution 660,<sup>32</sup> authorised states to intervene in Kuwait to repel the Iraqi invasion. This marked a new period of activity for the Security Council after the Cold War, and may serve as a case study for how states interpreted this new form of mandate in their proportionality analysis. Under resolution 660 the Security Council condemned the Iraqi invasion of Kuwait and demanded that Iraq withdraw all of its forces immediately and unconditionally. Resolution 678 authorised

Member States co-operating with the Government of Kuwait ... to use all necessary means to uphold and implement resolution 660 (1990) and ... to restore international peace and security in the area;<sup>33</sup>

The classic position stated in the Saint Petersburg Declaration, is that the only legitimate purpose in war is to weaken the forces of the enemy. However, this mandate did not call for the weakening of the Iraqi forces, instead it only required states to ensure the Iraqi forces withdrew from Kuwait. In line with this mandate, and the principles of proportionality, there is no doubt that Iraqi military units in Kuwait could legitimately be targeted. However, two incidents in particular illustrate the conflict between the standard notion of proportionality and that which may be implied from the mandate.

#### *3.1 The effect of being declared the aggressor*

Despite the mandate only calling for withdrawal from Kuwait, the strikes were not limited to Iraqi forces in Kuwait. As Iraq was seen as the aggressor,<sup>34</sup> it was considered legitimate to direct strikes against Iraq as a whole. The priorities set out in plan Instant Thunder, listed Iraq's political and military leadership (command and control) and Iraqi supply lines, as first and third respectively. The destruction of the Republican Guard in Kuwait, and the liberation of Kuwait City were only the fifth and sixth priorities.<sup>35</sup> Targeting enemy command and control, as well as their supply lines, are common practice in war. For such attacks to be proportionate, the military need only

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<sup>31</sup>UN SC res 678 (29 November 1990).

<sup>32</sup>UN SC res 660 (2 August 1990).

<sup>33</sup>UN SC res 678 par 2.

<sup>34</sup>Gardam n 10 above at 393-394.

<sup>35</sup>Lewis 'The law of aerial bombardment in The 1991 Gulf War' (2003) 97 *American JIL* at 3, 481, 448.

ensure that there is not disproportionate harm to civilians in such strikes. The question posed by the mandate, however, is whether striking targets outside of Kuwait, with the concomitant danger posed to civilians, can be justified. It should be recalled that the Geneva Conventions require Iraqi and Kuwaiti civilians to be given an equal level of protection.<sup>36</sup> One, therefore, cannot endanger civilians in Iraq to protect civilians in Kuwait.

As noted above, the US Air Force defines proportionality in relation to the necessity of achieving the military goals.<sup>37</sup> The goal defined by the mandate was to ensure the withdrawal of Iraqi forces from Kuwait. The coalition forces (predominantly those of the US) considered that attacks inside Iraq were necessary to achieve this goal, despite the danger to Iraqi civilians. This seems to have been based on a strategic decision to use air strikes to cut off support to the Iraqi forces, thereby reducing their ability to resist the ensuing ground campaign in Kuwait.<sup>38</sup> From the perspective of the military, this would decrease the risk to coalition ground forces; however it also increased the risk to Iraqi civilians. It is inappropriate to comment on the reasonableness of such a strategy given the limited information available. However, the willingness to risk Iraqi civilian casualties to spare coalition military casualties may suggest that Iraq being classified as the aggressor made it more acceptable to target such assets despite the risk to civilians.<sup>39</sup> If those conducting the proportionality analysis for the strikes did indeed consider it more favourable to risk Iraqi civilians than coalition forces, this may be a violation of Additional Protocol 1, as the Iraqis would be subject to an adverse distinction based on their status as the aggressor.

### 3.2 *Proportionality of strikes on military targets complying with the mandate*

In contrast, the second incident relates to a situation where the Iraqi military ought to have benefited from a positive distinction based on the nature of the mandate. This is the basis for a great deal of controversy relating to the ‘highway of death’. Reports on the incident are inconsistent,<sup>40</sup> but it is clear

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<sup>36</sup>Preamble to Additional Protocol 1.

<sup>37</sup>Pamphlet no 110-131.

<sup>38</sup>Gardam n 10 above at 404.

<sup>39</sup>Estimates suggest between 1 000 and 3 500 Iraqi civilians were killed (see Larson and Savych ‘Misfortunes of war: Press and public reactions to civilian deaths in wartime’ (2007) *RAND Project Airforce* at 22). This may be compared with 293 US military casualties (see ‘The Operation Desert Shield/Desert Storm Timeline’ US Department of Defence 8 August 2000 available at <http://www.defense.gov/news/newsarticle.aspx?id=45404> (accessed 18 March 2012)).

<sup>40</sup>See the differing reports in Chediac ‘The massacre of withdrawing soldiers on “the highway of death”’ (1992) available at <http://web.duke.edu/~asr6/HighwayOfDeath.pdf> (accessed 18 March 2012); and Shafiroff ‘Just war: Invading Iraq was legally and morally correct’ (2004) 9

that on 25 and 26 February 1991, the US Air Force engaged multiple Iraqi targets on the highway leading from Kuwait City to Iraq. The Whitehouse classified the targets as military vehicles and combatants in the process of a retreat.<sup>41</sup> Under the Geneva Conventions it is not permitted to attack combatants who have laid down their arms or are *hors de combat*.<sup>42</sup> However, withdrawing forces from Kuwait to Iraq may still be seen as a military exercise, and the combatants do not appear to have laid down their arms.<sup>43</sup> In a strict interpretation of the laws of war they were, therefore, still legitimate targets.

Despite their status as military targets, the bombing of the Iraqi vehicles on the highways has received substantial criticism. This incident again shows the difficulty in balancing the goals stated in the UN resolutions, and the goals typical in a military operation. The view of the coalition military was that they were attacking enemy units, which had not surrendered and were therefore lawful targets. In some instances there are reports of the Iraqi troops firing at coalition aircraft, showing that they were clearly still combatants.<sup>44</sup> However, the UN mandate under which the coalition troops engaged the Iraqi troops, was based on resolution 660 which called upon Iraq to withdraw its forces from Kuwait. The Iraqi withdrawal along the highway was, therefore, in accordance with the instruction of the UN Security Council. If the goal, as per the mandate, was for Iraq to withdraw, then the attack on the highway is entirely disproportionate to achieving this goal. In such a situation there is a conflict between the goals mandated by the Security Council and the goals which the military are trained to pursue in their proportionality analysis. It is consequently suggested that in such situations there needs to be a new approach to proportionality, in which the nature of the mandate under which the military engages plays a more direct role in the calculation of proportionality in the attack.<sup>45</sup>

#### **4 Operation Unified Protector**

Whereas the mandate in Operation Desert Storm focused on ending the military occupation by Iraq, the mandate in Libya was focused entirely on

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*NEXUS* at 57.

<sup>41</sup>Lopez 'The Gulf War: Not so clean' (1991) 47 *Bulletin of Atomic Scientists* 7 at 34.

<sup>42</sup>Geneva Conventions common art 3.

<sup>43</sup>Hersh 'Overwhelming force: What happened in the final days of the Gulf War?' *The New Yorker* 22 May 2000 available at <http://cryptome.org/mccaffrey-sh.htm> (accessed 16 March 2012).

<sup>44</sup>*Ibid.*

<sup>45</sup>This may to some extent be addressed in the rules of engagement, however these are at the discretion of the military rather than being a more generally applicable rule of international humanitarian law.

protecting civilians. The operative paragraph stated that member states were authorised to take all necessary measures ‘to protect civilians and civilian populated areas under threat of attack’,<sup>46</sup> but it specifically excluded any foreign military occupation of Libya. Such a mandate has two important consequences for the proportionality analysis. By stating that the goal of the intervention is solely to protect civilians, it takes an entirely different approach to the usual military goal of weakening the enemy forces. Secondly, it restricts that attacking forces (NATO in this instance) to using only air power to fulfil its mandate.

#### 4.1 *Protection of civilians as a military goal*

The principle of proportionality in article 57 relies on attacks taking place in the furtherance of a military objective. As explained earlier, the decision on the proportionality of the attack requires an examination of whether the harm inflicted on the civilian population is excessive in relation to that objective. It may well be argued that such an analysis becomes circular when the military goal is solely to protect civilians – the test for proportionality makes little sense when one must weigh the harm caused to civilians against the goal of protecting civilians.

Such a challenge may be answered by holding that the proportionality test does not merely look at the immediate military advantage to be gained, but rather at the overall military advantage. If one looks only at the immediate situation, then attacks would only be justified against those targets which are directly endangering civilians. To attack any target not actively harming civilians, risks incidental harm to civilians in the attack.<sup>47</sup> If, however, one considers the long term benefits of an attack, then the incidental harm to civilians would be weighed against the overall ability to protect civilians through the military advantage gained. This interpretation stems from the use of the phrase ‘military advantage anticipated’<sup>48</sup> in article 57, and suggests that the advantage gained may be longterm.<sup>49</sup> It is also supported by the wording of the Rome Statute which refers to ‘overall military advantage’.<sup>50</sup>

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<sup>46</sup>UN SC res 1973 par 4.

<sup>47</sup>This is demonstrated by the incident in June 2011 where a NATO precision guided missile appears to have malfunctioned and hit the wrong target, allegedly killing four civilians (see Hopkins ‘Libya: NATO admits civilian deaths in Tripoli air raid’ *The Guardian* 20 June 2011 available at <http://www.guardian.co.uk/world/2011/jun/19/nato-libya-strike-civilian-deaths> (accessed 19 March 2012)).

<sup>48</sup>Additional Protocol I art 57(2)(a)(iii).

<sup>49</sup>Estreicher ‘Privileging asymmetric warfare (part II)?: The “proportionality” principle under international humanitarian law’ New York University School of Law Public Law and Legal Theory, Research Paper Series Working Paper 11-32 May 2011 at 8 available at <http://ssrn.com/abstract=1837642> (accessed 16 March 2012).

<sup>50</sup>Rome Statute of the International Criminal Court (2002) art 8(2)(b)(iv).

The NATO terminology in Libya frequently used phrases such as ‘actively involved’ and ‘threatening civilians’ when referring to targets.<sup>51</sup> Although this suggests that the primary concern was preventing immediate harm, the commander of Operation Unified Protector, Lieutenant Commander Charles Bouchard, stated that the focus was ‘on the command-and-control, the logistics, the supply chain, those troops that are directly involved in killing civilians, both directly and through indiscriminate fires’. This closely resembles the strategy in Operation Desert Storm, where attacks were directed against command-and-control installations and supply lines, and then at troops posing an imminent threat. The strategy therefore seems to be based on protecting civilians by an overall weakening of the enemy.

The use of the standard military strategy of weakening the enemy as a means by which to protect civilians, suggests that the military did not change their strategy significantly as a result of the mandate. If there was a reduction in the number of civilian casualties it would, therefore, support the notion that it was not due to a different military approach, but rather that the military were merely more cautious in the proportionality test used in pursuing the same strategy. Unfortunately, examining whether such a colouration exists is difficult as NATO does not release records of the number of civilians killed by air strikes.<sup>52</sup> Estimates vary widely on what the incidental losses were due to NATO action. However, the Royal United Services Institute estimates between 50 and 100<sup>53</sup> civilians died as a result of the air campaign.<sup>54</sup> Considering that over 26 500 sorties were flown, of which 9 700 were strike sorties,<sup>55</sup> such casualty figures appear mercifully low. Casualty figures reported by Royal United Services Institute for the Kosovo campaign, are significantly higher, estimating 400-500 civilians killed.<sup>56</sup> This supports the contention that Libya was unusual in the extent to which civilians were sheltered from air operations. Indeed, some have even criticised NATO as being too tentative in their strikes.<sup>57</sup>

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<sup>51</sup>Bracken ‘Press briefing on Libya’ NATO 21 June 2011 available at [http://www.nato.int/cps/en/natolive/opinions\\_75652.htm?selectedLocale=en](http://www.nato.int/cps/en/natolive/opinions_75652.htm?selectedLocale=en) (accessed 19 March 2012).

<sup>52</sup>Dardagan ‘Libya: The toll NATO didn’t count’ *The Guardian* 29 August 2011 available at <http://www.guardian.co.uk/commentisfree/2011/aug/29/libya-toll-nato-does-not-count> (accessed 19 March 2012).

<sup>53</sup>Clarke *et al* ‘Accidental heroes: Britain, France and the Libya operation’ in Mueen and Turnbull (eds) *Interim RUSI Campaign Report* (2011) at 5.

<sup>54</sup>It should be noted that estimates on civilian casualties vary widely, the Libyan health office put the number at over 1000 (see ‘Counting the cost of Nato’s mission in Libya’ *BBC News Africa* 31 October 2011 available at <http://www.bbc.co.uk/news/world-africa-15528984> (accessed 19 March 2012)).

<sup>55</sup>‘Operation Unified Protector final mission stats’ (NATO, Public Diplomacy Division (PDD) – Press and Media Section Media Operations Centre (MOC) 2 November 2011) available at [http://www.nato.int/nato\\_static/assets/pdf/pdf\\_2011\\_11/20111108\\_111107-factsheet\\_up\\_factsfigures\\_en.pdf](http://www.nato.int/nato_static/assets/pdf/pdf_2011_11/20111108_111107-factsheet_up_factsfigures_en.pdf) (accessed 18 March 2012).

<sup>56</sup>Clarke *et al* n 53 above at 5.

<sup>57</sup>*Ibid.*

#### 4.2 *Exclusive use of air power as a determinant of proportionality*

Another factor resulting from the mandate, is that NATO was prohibited from sending ground troops into Libya.<sup>58</sup> This may have played an important role in the ability of the military to err on the side of caution when deciding whether the civilian losses were proportionate. In the Gulf War, targets were attacked in preparation for, and in conjunction with, a ground assault. The military necessity of targets was therefore higher, as they had to be destroyed in order for the ground assault to be successful. The target selection in Libya was under less time constraints. This allowed military planners to be more thorough in their proportionality analysis, and opened other less time sensitive options for the attack.

The targets pursued were also different. In the Gulf War many of the strikes were designed to weaken the Iraqi government and its infrastructure as to make the ground assault easier. Many strikes were therefore directed at dual-character targets, such as power stations and chemical plants.<sup>59</sup> Such targets are often located near civilian populations and are staffed by civilians, which significantly raises the chance of incidental harm to civilians. In Libya the mandate did not call for the destruction of Gaddafi's ability to wage war or for a ground assault, it merely required that civilians be protected.

When examining proportionality in this instance, it must be noted that the characterisation of dual-character objects as military targets, remained the same in Libya as in Iraq. The difference is, because of the difference in the mandates, their importance as targets was decreased. This is relevant for the proportionality analysis because the less military advantage that can be gained from the destruction of a target, the less incidental loss will be considered proportionate when attacking it. Article 52(2) states that military objects are those which 'by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction ... offers a definite military advantage'.<sup>60</sup> Although dual-character targets made the same contribution to military action in both Iraq and Libya, they differed in the military advantage gained from their destruction. Where in Iraq they were attacked to weaken Iraq as a whole, the nature of the mission in Libya required that only the Libyan military should be weakened, not the nation as a whole. The proportionality test, therefore, weighed against attacks on dual-character targets in order to avoid harm to civilians.

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<sup>58</sup>UN SC res 1973 par 4.

<sup>59</sup>Gardam n 10 above at 408-409.

<sup>60</sup>Additional Protocol I art 52(2).

### 4.3 *Proportionality in support of armed groups*

While the exclusive use of air power in Libya may have allowed NATO to be more discerning in its choice of targets, there is a danger that this could also allow NATO to distance itself from violations of humanitarian law being committed by the rebel forces. This has two possible results: the first is that NATO may have been able to avoid striking targets with a higher risk of incidental harm to civilians by rather leaving such targets to the rebels; the second is that NATO ought to have considered the potential harm caused to civilians by the rebel forces themselves.

The death of Gaddafi may serve as an example. The facts surrounding the death of Gaddafi are limited. Early reports suggest that his convoy was halted by a NATO air strike against it.<sup>61</sup> The strike destroyed fifteen vehicles and killed numerous guards. Gaddafi escaped the attack but was captured and killed by rebel forces shortly afterwards. Reports of Gaddafi being tortured and summarily executed have also led some to speculate that the incident may have amounted to a war crime.<sup>62</sup>

NATO has stated clearly that it was not allied to the rebel forces. NATO's task was to protect civilians, not to support the military rebellion.<sup>63</sup> Nonetheless, if the accounts of Gaddafi's death are accurate, it would appear that NATO played a crucial role in his capture. Common article 1 calls on all parties to 'respect and ensure respect'<sup>64</sup> for the Geneva Conventions. The ICRC Customary Law Study reinforces this obligation in rule 144, which requires that parties may not encourage violations, and must exert their influence on other parties to stop violations of international humanitarian law.<sup>65</sup> On the plain wording of the text, this obligation is not diminished by the fact that NATO was not allied to the rebels. It remained under a duty to exert its influence on the rebels not to violate humanitarian law.

When looking at the calculation of proportionality, a key question is, therefore, whether the duty to ensure other parties respect humanitarian law should play a role. If one accepts that the military goal may be a long-term goal, then logic would suggest that the harm to civilians, which forms the other side of the

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<sup>61</sup> Gaynor and Zargoun 'Gaddafi's death – who pulled the trigger?' *Reuters* 20 October 2011 available at <http://uk.reuters.com/article/2011/10/20/uk-libya-gaddafi-finalhours-idUKTRE79J5QL20111020> (accessed 20 March 2012).

<sup>62</sup> 'ICC says Muammar Gaddafi killing may be war crime' *BBC News Africa* 16 December 2011 available at <http://www.bbc.co.uk/news/world-africa-16212133> (accessed 20 March 2012).

<sup>63</sup> 'Nato answers Libya questions' *BBC News Africa* 20 August 2011 available at <http://www.bbc.co.uk/news/world-africa-14603245> (accessed 20 March 2012).

<sup>64</sup> Geneva Conventions common art 1.

<sup>65</sup> ICRC 'Customary International Humanitarian Law' at 509.

balancing exercise, may also be long term. The *Nuclear Weapons Advisory Opinion*<sup>66</sup> noted that long-term effects, such as radiation,<sup>67</sup> must be considered in humanitarian law, however it made no definitive finding in regard to the proportionality analysis. McCormack and Mtharu have suggested that the test hinges on the foreseeability of the harm, and whether the harm may reasonably be expected by the planners.<sup>68</sup> Even authors who argue that only immediate harm should be considered, have accepted that harm caused in the hours immediately after the attack should form part of the analysis.<sup>69</sup> It therefore appears that there is some support for the notion that more distant harm, such as that caused by the rebel forces, may be considered.

The events leading to Gaddafi's death raise an important issue for humanitarian interventions in the midst of civil war. By preventing one side harming civilians, care should be taken to avoid facilitating abuses by the other side. To the extent that such harm may be foreseeable when planning strikes, it should be taken into account in the proportionality analysis. The lack of information available makes it impossible to speculate whether the NATO planners could have foreseen the harm in this instance,<sup>70</sup> however, there is scope for the argument that their mandate to protect civilians should oblige them to consider the potential harm caused by forces not under their control when planning attacks.

## 5 Conclusion

The test for proportionality has evolved significantly as the nature of conflict has evolved. The separation of *jus ad bellum* and *jus in bello* initially played an important role in ensuring that all combatants would receive the same protection, regardless of whether or not the war was just. This position has been modified under the United Nations system which monopolises the legitimate use of force. It has shifted further in response to the mandates imposed by the Security Council. When states intervene under the auspices of a Security Council mandate, they have to adapt their goals to those espoused in the mandate, rather than the typical goal of weakening the enemy forces. This shift is perhaps most drastic when intervening on humanitarian grounds.

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<sup>66</sup>*Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Reports 679, 226.

<sup>67</sup>*Id* at pars 35 and 36.

<sup>68</sup>McCormack and Mtharu n 25 above at 4-5.

<sup>69</sup>*Id* at 5.

<sup>70</sup>It appears that NATO were aware that Gaddafi was in the convoy and that the rebels were the only force in the area who could capture him. Whether the harm caused to Gaddafi was proportionate to the military goal of protecting civilians, is a question beyond the scope of this paper.

As can be seen from the actions of states in Operation Desert Storm and Operation Unified Protector, the mandate can have a significant impact on the military operations. In light of situations such as the 'highway of death', where there was a clear conflict between the mandate and military objectives, or the killing of Gaddafi made possible by NATO strikes, it is suggested that a new approach needs to be taken to proportionality. The proportionality analysis undertaken in combat should be adapted to meet the new goals being set Security Council mandates, rather than the standard military objectives. Additional Protocol 1 ensures that there may not be any adverse discrimination, however shifting the proportionality analysis in favour of civilians for humanitarian interventions would result in a positive discrimination. This would be more fully in compliance with the mandate of the Security Council and the spirit of humanitarian action.