

PROPORTIONALITY IN THEORY AND PRACTICE: AN ANALYSIS OF THE CONCEPT OF PROPORTIONALITY BROADLY AND IN APPLICATION TO THE 2010 NZ DEFENCE FORCE OPERATION BURNHAM

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The following paper holds twofold objectives. A detailed overview of the concept of proportionality in the laws of armed conflict. The origin, relevant considerations, and legal test to be applied. Essentially asking for a calculable balance between military advantage and civilian impact, the concept requires detailed analysis to understand how two disparate and incalculable variables can be weighed against one another.¹

In addition, this study aims to utilise a case study as to the 2010 Operation Burnham, a New Zealand Defence Force (NZDF) operation conducted in Afghanistan as viewed through the lens of the proportionality principle. An operation that exists not without controversy – allegations of war crimes and indiscriminate attacks have given way to a Government Inquiry almost a decade after the event.² With the conclusion of the Inquiry approaching, now is the time for an independent and academic review of the available and declassified material coming to light.³

I. THE CONCEPT OF PROPORTIONALITY

A. *Legal Framework*

The *Protocol Relating to the Protection of Victims in International Armed Conflicts* (“Protocol I”) of the Geneva Conventions contains the most structured and definitive understanding of the protection of civilians in armed conflict.⁴ Whilst the Protocol itself is only applicable to international armed conflicts, the majority of the provisions contained within are reflective of customary international law.⁵

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1 International Criminal Tribunal for the former Yugoslavia (ICTY) *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (Advisory Opinion)* (2000) at 48.

2 N Hager and J Stephenson *Hit & Run: The New Zealand SAS in Afghanistan and the meaning of honour* (Potton & Burton, Nelson, 2017) at 39.

3 Inquiry into Operation Burnham “Minute no 22 of Inquiry” (25 February 2020) <www.operationburnham.inquiry.govt.nz>.

4 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict* (Protocol II) 1125 UNTS 609 (8 June 1977).

5 Jean-Marie Henckaerts “Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict” (2005) 87 IRRC 175 at 188.

The law pertaining to non-international armed conflicts, Additional Protocol II, outlines at art 13(1) that civilians are entitled to “general protection against the dangers ... [of] military operations”.⁶ This encompasses customary international law and therefore proportionality applies to both non-international and international armed conflicts.⁷ As a result, this research will consider the relevant provisions of the more detailed Protocol I despite the non-international nature of the Afghanistan Conflict at the time of Operation Burnham.⁸

The provisions in the New Zealand Defence Force Manual of Armed Forces Law effectively mirror that of customary international law.⁹ The New Zealand approach tends to conflate actions in IACs and NIACs.¹⁰ This is useful for context, but the relevant law is that of the international protocols.¹¹ Despite this, many international military manuals take a similar approach.¹²

1. Proportionality

The principle of distinction is one of the primary tenets of International Humanitarian Law (IHL) whereby a military commander is obligated to distinguish military objectives from civilian persons and objects.¹³ This principle is underpinned by the concept of proportionality. Barber identifies that proportionality arises from the prohibition of ‘indiscriminate attacks’ in Protocol I.¹⁴ Article 51(4) and the subsequent discussion in art 51(5)(b), provide that an attack is indiscriminate where it:¹⁵

... may be expected to cause incidental loss to civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

To consider this in the inverse, an attack holds military legitimacy under the principle of proportionality where *anticipated military advantage* is greater than *expected civilian loss*.

In the *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* (“the Report”) discusses the practical application of proportionality in detail. Crucially, it identifies that “the main problem with the principle of proportionality *is not whether it exists, but what it means and how it is to be applied*”.¹⁶

6 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict (Protocol II) 1125 UNTS 609 (8 June 1977).

7 Henckaerts, above n 5, at r 14.

8 R J Barber “The Proportionality Equation: Balancing Military Objectives with Civilian Lives in the Armed Conflict in Afghanistan” (2010) 15(3) *Journal of Conflict & Security Law* 467 at 474.

9 New Zealand Defence Force (NZDF) *Manual of Armed Forces Law, Volume 4: Law of Armed Conflict* (New Zealand Defence Force, Wellington, 2017).

10 Alexander Gillespie “Operation Burnham: inquiry underway to determine any wrongdoing by New Zealand troops in Afghanistan” (19 September 2019) *The Conversation* <www.theconversation.com>.

11 Gillespie, above n 10.

12 Ian Henderson and Kate Reece “Proportionality Under International Humanitarian Law: The “Reasonable Military Commander” Standard and Reverberating Effects” (2018) 51(3) *Vand J Transnatl L* 835 at 839.

13 Barber, above n 8.

14 Barber, above n 8.

15 Additional Protocol I, above n 4, at 51(4), 51(5)(b).

16 ICTY, above n 1, at 49 (emphasis added).

The Report outlines clear cut hypothetical applications of this rule – identifying:

... bombing a refugee camp is obviously prohibited if its only military significance is that people in the camp are knitting socks for soldiers. Conversely, an air-strike on a munitions dump should not be prohibited merely because a farmer is plowing a field in the area.

The Report laments that it is easier to discuss proportionality in such general hypotheticals than to apply the rule to specific circumstances. In part because the circumstances of a specific action will differ in each application, and to a greater degree because the test requires weighing of values and quantities that are very difficult to assign comparable values to. The crux of the difficulty arises because by nature the test requires apportioning comparable values to two drastically different concepts – the value of human life compared to that of a military objective.

Ultimately, the Report identifies the unresolved questions that will need to be addressed when considering proportionality.¹⁷ This guidance has been taken to be the starting point for proportionality analysis by many academics.¹⁸

It is worth including these questions as posited by the report in full:¹⁹

The questions which remain unresolved once one decides to apply the principle of proportionality include the following:

- a) What are the relative values to be assigned to the military advantage gained and the injury to non-combatants and or the damage to civilian objects?
- b) What do you include or exclude in totaling your sums?
- c) What is the standard of measurement in time or space? and
- d) To what extent is a military commander obligated to expose his own forces to danger in order to limit civilian casualties or damage to civilian objects?

The Report goes on to detail the issues that arise in application, identifying that it “may be necessary” to resolve answers on a “case-by-case basis” reflecting that the answers must arise from understanding of the specific circumstances from which they arose.

2. *Reasonable military commander standard*

To what standard must the evaluation of military advantage and civilian impact be made? There are three possible standards: subjective (what that specific person believed in the specific moment); objective but unqualified (the reasonable person); or objective but qualified (the reasonable doctor).²⁰

The report suggests the scope, stating: “determination of relative values must be that of the “reasonable military commander”.”²¹ This has been accepted as the appropriate standard.²²

17 ICTY, above n 1, at 49 (emphasis added).

18 Barber, above n 8, at 476; and Henderson and Reece, above n 12, at 841.

19 ICTY, above n 1, at 49.

20 Henderson and Reece, above n 12, at 841.

21 ICTY, above n 1, at 50 (emphasis added).

22 *Prosecutor v. Galić, (Judgment)* ICTY Appeals Chamber IT-98-29-T, 5 December 2003 at 170. See also Henderson and Reece, above n 12, at 841.

The obligation to assess military advantage against expected civilian casualties requires understanding of the nature of military advantage. The training and experience necessary to attain command is suited to recognition and assessment of such advantage.²³ Military commanders are those most able to infer military gain by virtue of experience and training.²⁴ That is not to say that appointment to command automatically results in proportionate actions, but rather to stress the importance of analysis from the military viewpoint rather than a non-military perspective. It was for these reasons that the report made a “deliberate decision to not adopt a “reasonable person” standard”.²⁵

The “reasonable military commander” standard therefore becomes the lens through which the weighing of military advantage and civilian casualties must be viewed. Article 57(2)(a)(iii) is clear that the decisions to be evaluated are those of “those who plan or decide upon an attack, or those who execute an attack”, and as such the reasonable military commander is not the person to whom the obligation to comply with proportionality belongs, but rather the standard against which decisions must be measured.²⁶

The International Criminal Tribunal for the former Yugoslavia (ICTY) discussed this concept in *Galić*, approaching proportionality from the perspective of “a reasonably informed person in the circumstances of the [actual decision maker], making reasonable use of the information available”.²⁷ Reflecting the “reasonable military commander” standard, but crucially imputing a requirement to consider actual circumstances.

Consideration is not only to be given to the actual information that the decision maker had, but also to the information they could reasonably be expected to have had. The deliberate use of the words “available to him or her”, and discussion as to information “reasonably available to them” in the judgment confirms this.²⁸

This includes, per art 57(3) of Protocol I, consideration of different objectives with similar levels of military advantage.²⁹ This can also mean different approaches to the same objective – for example, capturing instead of neutralising an insurgent leader.

(a) Relevant considerations

Once the standard has been set, what considerations must the standard be applied against? The test itself asks only for a balance of “expected military advantage” and “anticipated civilian impact”, therefore in application, an understanding of the extent to which these concepts are defined is crucial.

(b) Anticipated military advantage

Noting the word anticipated, the actual results of an attack are irrelevant. Barber notes that weapons or plans for insurgent attacks found during an attack are not relevant to anticipated advantage

23 Henderson and Reece, above n 12, at 845.

24 At 845.

25 At 841; ICTY, above n 1, at 49, 50.

26 At 840.

27 *Galić*, above n 22 at 58. Note: omitted word was “perpetrator” as this was a criminal case – amendment made to reflect analytical rather than criminal interpretation.

28 At 58 and n 110.

29 Additional Protocol I, above n 4, at 57(3).

unless they were outcomes envisaged prior to the operation itself.³⁰ Whilst such findings may confer military advantage, they cannot be considered in the application of a test for proportionality unless they were *anticipated*.

In the process of ratifying Protocol I, many states made declarations that “anticipated military advantage” referred to the military advantage gained (or rather, anticipated) from the attack as a whole – not isolated parts thereof.³¹

Military advantage must come from military objectives. This is identified in art 52(2) which identifies military objectives as being:³²

... limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

Direct interpretation of the term military advantage from a legal standpoint, discussed by Beran identifies that:³³

“Military” as a legal term means “pertaining to war or to the army; concerned with war.” “Advantage” is “superiority of position or condition; benefit, gain.” Taken together, “military advantage” should be defined as a “more favourable position pertaining to war.”

As such, the anticipated military advantage, which may be gained through total or partial destruction, capture or neutralisation of legitimate military objectives, must result in a more favourable position pertaining to the conflict itself.³⁴

This interpretation of art 52(2) is reflective of International Customary Law, and therefore applicable to the situation in Afghanistan to which this research refers.³⁵

Prima-facie, the wording of art 52(2) identifies objects, but military objectives also include armed forces, their members, buildings and supplies.³⁶ So too are logistical routes or production facilities which by their very nature are able to provide military benefit to combatants, provided that they are verifiable as a military objective.³⁷

The Report identifies that the definition is designed to provide a mechanism through which the observers (and thereby decision makers) in a conflict, are able to discern whether a particular

30 Barber, above n 8, at 486 in reference to; Michael Callan *Executive Summary of AR 15-6 Investigation into the New Information Relative to Civilian Casualties from Engagement by US and Afghan Forces on 21-22 AUG 2008 in Azizabad, Shindand District, Herat Province, Afghanistan* (US Central Command, 2008).

31 Barber, above n 8, at 481.

32 Additional Protocol I, above n 4, at 52(2).

33 Commander Matthew L Beran “The Proportionality Balancing Test Revisited: How Counterinsurgency Changes Military Advantage” [2010] 8 Army Law at 7. Definitions from BA Garner, and HC Black *Black’s Law Dictionary* (6th ed, West Publishing Company, St Paul MN, 1990) at 7, 8.

34 At 7.

35 Henarkets, above n 5, at r 14.

36 Bruno Zimmermann and others, Yves Sandoz, Cristophe Swinarski, Bruno Zimmerman (eds) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff Publishers, Geneva 1987) at 620 stating: “obviously military objectives also include, indeed principally so, the armed forces, their members, installations, equipment and transport”.

37 M Bothe, KJ Partsch and WA Solf (eds) *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Convention of 1949* (Martinus Nijhoff Publishers, Geneva, 1982) at 311326 2.5.1.

objective is a legitimate military objective.³⁸ This is a key element to the forward facing aspect of this rule – on the one hand, academic assessment made, often years later, is able to conclude if a single instance falls within this principle, but on the other, the rules do not exist for the purposes of an “ivory tower” assessment - they exist to protect civilians in armed conflicts. Consequently, there must exist a mechanism where those on the ground are able to make assessments as to whether an objective is legitimate based on the information they reasonably have. Especially more so in non-international armed conflicts where identification of those directly involved in conflict is more difficult.³⁹

When considering the underpinning principle of this aspect of International Humanitarian Law is limitation of the effects of combat on the civilian population, a test which can only be successfully applied ex-post-facto undermines the ability to offer protection.

(c) Intangible military advantage

The above identifies military advantage in the tangible. Measurable through understanding what the objective is and the advantageous outcome that successful destruction, capture, or neutralisation will be reasonably expected to bring.

Military advantage can too be determined from the intangible. For example, it has been established that security of the attacking force can be accounted for but in discussion on art 51, Bothe and others address that security of the attacking forces may also be considered specifically regarding the military advantage of an operation.⁴⁰

In counterinsurgency operations, the overall objective turns not to “partial or complete submission of the enemy”, as in conventional warfare, but to the provision of safety and security to the local population.⁴¹ In July 2009, ISAF Commander General Stanley McChrystal issued a tactical directive identifying that the ISAF role in Afghanistan at that time was a counter insurgency operation, and that operations must “scrutinise and limit the use of force like close air support (CAS) against residential compounds).⁴²

As a result, a key component of counterinsurgency is to ensure the safety of civilian population as well as preserve the trust of that population in the ability of the military force to provide such security.⁴³ Protection of civilian lives, buildings and livelihoods can therefore be viewed not only as a balancing factor *against* military advantage, but rather a military advantage unto itself.⁴⁴

38 ICTY, above n 1, at 37.

39 New Zealand Defence Force (NZDF) *Legal Brief: Law of Armed Conflict Rules of Engagement Other Legal Issues* (31 August 2010) at 5, 7, 10.2 from <www.operationburnham.inquiry.govt.nz>.

40 Bothe, above n 37, at 36.

41 Beran, above n 33; At 33, at 4, 5.

42 General Stanley McChrystal *Tactical Directive 6 July 2009* (Headquarters, International Security Assistance Force 2009).

43 McChrystal, above n 42.

44 Beran, above n 33, at 6; see also David Galula *Counterinsurgency Warfare: Theory and Practice* (2006, Praeger Security International, Westport, Connecticut) at 4, which states: “The population, therefore, becomes the objective for the counterinsurgent as it was for his enemy. Its tacit support, its submission to law and order, its consensus ... have been undermined by the insurgent’s activity.”

(d) Expected civilian impact

Once again, the *actual* impact is irrelevant when assessing proportionality. If an attack causing destruction of a school resulted in no casualties because it was empty, *but command was unaware of that fact* and believed it to be occupied, the lack of casualties would not automatically result in a finding of proportionality.

The proportionality principle ought not to be treated as an equation where an objective can be taken if the possible civilian casualties drops below a set number, but rather where a proposed attack is likely to be disproportionate, alternate options to achieve the same objective must be considered.⁴⁵

Possible civilian deaths naturally fall under the notion of civilian casualties or impact.⁴⁶ Factors that increase such possibilities even more so. An attack on a military compound has a lower risk of incurring civilian casualties, whereas an attack on a village with mixed civilian and enemy forces will have a greater impact on civilians.

Choice of approach must also be considered to mitigate casualties or impact, for example a high-altitude bombing run on village at night will increase that chance.⁴⁷ These possible deaths, injuries and forms of property damage to civilians are immediate or “first order” effects.⁴⁸

The reality of warfare must be considered. Operating from mixed civilian and insurgent villages was a staple tactic for insurgents, creating an ever-present risk of possible civilian casualties, which must therefore have been accounted for in the planning of operations in the wider context of the deployment.⁴⁹

The question of knock on, or “second order” effects may also be required to be considered.⁵⁰ The UK Manual of Armed Conflict posits a scenario about an attack on an enemy fuel depot, with risk of burning fuel flowing into neighbouring civilian areas. Such indirect effects need to be counted in the assessment of collateral damage.⁵¹

Reverberating effects that are reasonably foreseeable in the eyes of the reasonable military commander should therefore be a factor. These “second order effects” become important in the context of growing interconnectedness of military and civilian infrastructure.⁵² Many international warfare manuals discuss in their doctrinal definitions of collateral effects that second order effects should be considered.⁵³ Of course doctrine does not always reflect accurately the totality of the law, but as a point of consideration it is worth noting. Acceptance of indirect effects in the training of military commanders reflects acceptance that they be considered as part of the “civilian impact” aspect of the proportionality equation.

45 Additional Protocol I, above n 4, at 57(3).

46 Henderson and Reece, above n 12, at 847.

47 Barber, above n 8, at 489.

48 Henderson and Reece, above n 12, at 848, 849.

49 Thomas Johnson and Chris Mason “Understanding the Taliban and Insurgency in Afghanistan” (2007) 51 1 *Orbis* 71 at 87.

50 At 87.

51 United Kingdom Ministry of Defence *The Manual of the Law of Armed Conflict* (2004, Ministry of Defence, London) at 5.33.4.

52 Henderson and Reece, above n 12, at 847.

53 Beran, above n 33, at 4; and UK Manual of Armed Conflict above n 51.

Yet there must exist a limit as to what extent an effect can be considered a reverberating effect and therefore a factor in totalling these sums. Remoteness becomes the touchstone at this point – an impact cannot be counted as a reverberating effect where too remote or not reasonably foreseeable.⁵⁴ The standard for this, as always, becomes impacts that are not remotely foreseeable by the reasonable military commander in the position of the decision maker.

(e) Weight to be given to safety of friendly forces

When considering alternate courses of action to achieve a military advantage, how far must a commander go to protect civilians when weighed against their own forces? Barber's analysis of NATO's 1999 bombing campaign in Kosovo, a campaign which resulted in zero own-side casualties – and one that "many regarded as violating the proportionality rule" identifies that "it is generally agreed that complying with the proportionality equation requires a willingness to accept *some* own-side casualties".⁵⁵

Much analysis on this topic turns to bombing campaigns, how low an aircrew is expected to fly in order to minimise the risk to civilians with the understanding that each foot an aircraft descends, the proportion of risk to the aircraft and crew increases.⁵⁶ The reality of warfare in Afghanistan, with a high level of mixed civilian and insurgent targets, in conjunction with the shift towards counter-insurgency operations leans away from bombing as a primary strategic option.⁵⁷ This can be seen as a willingness to expose troops to further risk.

(f) Scope

Once the components of the test are understood, consideration can be given to the point at which the test is to be applied. As the test speaks to "anticipated" and "expected" outcomes, it is not ex-post-facto, but how far removed must analysis be?

Fenrick discusses that the appropriate measurement "must be one that is practicable to use in advance".⁵⁸ It is not a measurement that must be conducted after a war or long campaign, yet so too is it impractical to apply the test for proportionality on a "bullet-by-bullet basis".⁵⁹ Barber considers that the approach must be somewhere in the middle.⁶⁰ Reflecting the case-by-case basis for assessing proportionality in the ICTY Report.

There is a difference between decisions made in the planning phase of an operation, and those decisions made on the ground. The question that arises is – does the test for proportionality recognise this distinction? Can the "fog of war" be accounted for?

54 Program on Humanitarian Policy and Conflict Research at Harvard University (2013) "Commentary to the HPCR Manual on International Law Applicable to Air and Missile Warfare" In *HPCR Manual on International Law Applicable to Air and Missile Warfare* (Cambridge, Cambridge University Press, 2013) 104 at r 14.

55 Barber, above n 8 at 482.

56 APV Rogers "Zero-casualty Warfare" (2000) 837 Int Rev Red Cross 165.

57 McChrystal (ISAF), above n 42.

58 WJ Fenrick "Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia" (2001) 123 EJIL 489 at 499. It is worth noting that Fenrick was Senior Legal Advisor, Office of the Prosecutor for the ICTY and was instrumental in posing the questions used in the ICTY Final Report to the Prosecutor (above n 1) relied upon heavily in this analysis.

59 At 499.

60 Barber, above n 8.

The “reasonable military commander” standard, objective though it is, is taken to be in the position of the actual decision maker with access to all information they have or reasonably should have had.⁶¹ Available information and ability to consider alternate options at length is far greater in a meeting room than in a command helicopter.

Discussing the principle of proportionality, Georg Nolte raises the point that at its core, the rule exists to proactively protect the rights of civilians in war, and where too many considerations enter the analysis of proportionality, the calculability aspect is lost – undermining the ability of the rule to protect.⁶²

The solution, Nolte contends, is the concept of “thin or thick” proportionality.⁶³ In this way, consideration is able to be given to *actual* circumstances. Where decisions are made in an adapting battlefield scenario, the considerations of the test reflect that reality. This allows the rule to be consistently applied in the context of requiring the standard to be assessed from the position of the actual decision maker and avoids imposing too abstract considerations upon military commanders where decisions must be made in timely situations under pressure.

The distinction between the two is described as:⁶⁴

The thick version is appropriate if the question can be asked; What is necessary to ... [discern] a ‘right’ outcome? The thin version must be used if it can only be asked; What is necessary to [determine] that a particular outcome is the best possible, given the presumed differences of opinion concerning the possibility to verify certain facts and agree on specific standards?

It may appear that these are separate questions, but in application they can be viewed as two ends of a spectrum – the closer a decision is made under battle conditions or the greater the “fog of war” is, the thinner the analysis may be.

3. *The test*

As such, the test for establishing the legitimacy of an attack in accordance with this principle of international humanitarian law is:

In the eyes of the *reasonable military commander*, with accord to *all information reasonably available* to them at the time of planning or undertaking the attack, *anticipated military advantage* must exceed *expected civilian casualties or impact*.

II. CASE STUDY: OPERATION BURNHAM

A. *Background and Overview*

New Zealand Defence Force (NZDF) troops were deployed in the Bamyán Province of Afghanistan in August 2003 as a part of the Provincial Reconstruction Team (PRT).⁶⁵ The goal of which was to provide training and support to Afghan forces and increase security in that province.

61 *Galić*, above n 27, at 58 and footnote 110.

62 Georg Nolte “The Principle of Proportionality and International Humanitarian Law” (2010) 42 LEHR 244.

63 Nolte, above n 62.

64 Nolte, above n 62.

65 Cabinet Paper *Proposal to Continue New Zealand’s Contribution to Afghanistan Army Training* (11 June 2018) at 16 (Obtained under Official Information Act 1982 Request to Minister of Defence, Ministry of Defence).

On 3 August 2010, Lieutenant Tim O'Donnell, a member of the PRT was killed on routine patrol by a roadside bomb.⁶⁶ The first combat death in Afghanistan for New Zealand forces.

The NZDF considered that this was a “major success” for insurgent forces operating in the area and that they would be “well positioned to [attack] again”.⁶⁷ This insurgent group had previously attacked Afghan Security forces and well as German and Hungarian PRT's.⁶⁸ Further, they considered that the NZ PRT were not positioned to deal with this level of insurgency, and that the threat level to NZDF and allied forces was high due to the location of the insurgent forces.⁶⁹ Operation Burnham was conceived as a means to deal with this growing security risk.

Early on 22 August 2010, the New Zealand Special Air Service (NZSAS), in conjunction with the Afghan Crisis Response Unit (CRU) conducted an operation in the Tirigan Valley, Afghanistan.⁷⁰ The operation included coalition air assets in the form of transport Chinooks, a command helicopter, and close air support (CAS) provided by two Apache helicopters and an AC-130.⁷¹ The operation, broadly under the banner of the International Security Assistance Force (ISAF) was known as Operation Burnham.⁷²

Formally, operations of this kind were conducted with an understanding that the CRU leads such operations, but the ISAF (including in this instance NZSAS) would provide “personnel, intelligence gathering and planning”.⁷³

Practically, the operation was planned by NZDF receiving approval from the Chief of the Defence Force (CDF) and the ISAF. The operation was led by a Ground Force Commander (GFC), an NZSAS Major “responsible for the conduct of the operation and, in particular, providing clearance for any engagements”.⁷⁴

The primary objectives of Operation Burnham were two insurgent commanders, Abdullah Kalta (Objective Burnham) and Maulawi Naimatullah (Objective Nova).⁷⁵ Neither were located during the operation.⁷⁶

66 Derek Cheng “NZ Soldier in Afghanistan Named” (4 August 2010) New Zealand Herald <www.nzherald.co.nz>.

67 New Zealand Defence Force (NZDF) *Speech Notes for Press Conference on Operation Burnham* Chief of Defence Force Lieutenant General Tim Keating (27 March 2017) at 1 from <www.nzdf.mil.nz>.

68 New Zealand Defence Force (NZDF) *Unclassified Unreferenced Account of Events at Issue* (7 November 2018) at 5. Hungarian, German and Afghan PRT members had been killed.

69 Above n 67, at 1.

70 New Zealand Defence Force (NZDF) *Operation Burnham Information Pack* (August 2018) at 9, from <www.nzdf.mil.nz>.

71 New Zealand Defence Force (NZDF) *4 x contacts during Obj BURNHAM* (6 March 2018) at 6, from <www.operationburnham.inquiry.govt.nz>.

72 NZDF, above n 68, at 3.

73 NZDF, above n 68, at 3.

74 NZDF, above n 68, at 7 para 3.

75 Inquiry into Operation Burnham “Public accounts of events during Operation Burnham and Operation Nova given by the New Zealand Defence Force and the authors of *Hit & Run: A comparative analysis*” (17 May 2019) at 4 from <www.operationburnham.inquiry.govt.nz>.

76 Interview with Jon Stephenson, co-author of *Hit & Run* (Corin Dann and Susie Ferguson, Morning Report, Radio New Zealand, 20 June 2019). Available from <www.stuff.co.nz> “Insurgent leaders admit they were in Afghanistan village raided during NZSAS’s Operation Burnham”.

1. *Civilian casualties*

During and after the operation, NZDF members maintained that there had been no civilian casualties.⁷⁷ After civilian allegations that such casualties had occurred, a joint ISAF and Afghan investigation was initiated on 25 August.⁷⁸

The investigation determined that one of the gunsights on an Apache 30mm Autocannon was misaligned, and that rounds falling short from this weapon hit a building and likely caused civilian casualties.⁷⁹

Despite this, NZDF press releases continued to call allegations of civilian casualties “unfounded” – in a later document, the NZDF would contend that this referred to allegations that *NZDF personnel* were directly responsible for casualties.⁸⁰ That same document confirms that the NZDF accepts the findings of the ISAF investigation.⁸¹

2. *Hit & Run*

In 2017, investigative journalists Nicky Hager and Jon Stephenson released *Hit & Run*, a book alleging that the events of Operation Burnham were drastically different to the NZDF account.⁸² The book suggests the operation was a revenge attack for the death of Lt O’Donnell, and that neither Objective Burnham or Objective Nova were present at all.⁸³

The book suggests that the attack was excessive and indiscriminate – conducted without regard for civilian lives. Going so far as to allege war crimes had been committed.⁸⁴

Hit and Run identifies that the Operation took place in the villages of Naik and Khak Khuday Dad, whereas NZDF documents refer to a village identified as Tirigan. However, the operation took place in Tirigan Valley and the term in the context of such documents refers to the two villages collectively. Both the NZDF and the authors have since accepted that they are in agreement as to the location of Operation Burnham.

There are several points where the positions diverge. One notable point is that the book states that the two targets were not in the village at the time of the operation. Interviews with those men contradict that fact, identifying that they were present that night.⁸⁵ This led to one of the authors retracting the allegation.⁸⁶

77 NZDF, above n 70, at 18.

78 New Zealand Defence Force (NZDF) *Operation Watea: HQ ISAF Civilian Casualty Investigation into Operation Burnham 22 August 2010* (25 August 2010) from <www.operationburnham.inquiry.govt.nz>. Document provided to the Minister of Defence.

79 NZDF, above n 70, at 18.

80 NZDF, above n 70, at 18.

81 NZDF, above n 70, at 18.

82 Hager and Stephenson, above n 2.

83 Hager and Stephenson, above n 2, at 39.

84 Hager and Stephenson, above n 2, at 109.

85 Stephenson, above n 77.

86 Stephenson, above n 77.

3. *Inquiry*

A government inquiry (“the Inquiry”) was announced in April 2018.⁸⁷ The Inquiry comprises of Sir Terrence Arnold QC and Rt Hon Sir Geoffrey Palmer QC, both highly experienced in constitutional law and judicial proceedings.⁸⁸

The terms of reference for the Inquiry identify that it does not exist to verify or disprove the events as given in *Hit & Run*, rather to assess the conduct of the NZDF forces in conducting Operation Burnham, including at the planning stages.⁸⁹

In addition, further terms include assessment as to whether Afghan Nationals engaged as a part of the operation were legitimate targets, and the knowledge of the NZDF regarding civilian casualties.⁹⁰

This research does not aim to emulate the Inquiry, but to assess the conduct of Operation Burnham exclusively through the principle of proportionality. To conclude whether the operation complied with this requirement of the Laws of Armed Conflict – in order to do so, the above-mentioned Inquiry terms of reference will be the primary considerations.

The scope, therefore, of this research becomes: *Was the conduct of the NZDF prior to and during Operation Burnham legitimate in accordance with the principle of proportionality as contained within the larger rules of war?*

B. *Application to the Operation*

As noted by Fenrick, the scope of the proportionality assessment must be “one that is practicable to use in advance”.⁹¹ As discussed above, the scope must be a case-by-case determination.⁹²

Noting that military advantage is taken to be from the operation as a whole, not segmented and analysed in parts, the process for analysis will be to identify the military advantage as a whole – this will become the benchmark which the countervailing factors of expected civilian casualties will be weighed against. Anticipated Military Advantage becomes a “fixed” value to which the expected civilian impact will be cumulatively applied.

In order to do so, analysis of “civilian impact” factors from the planning stage and in the process of the operation will need to be made. In this case, there are two major points in time where such factors will arise, as indicated by the wording of Protocol I – at the point of planning, and at the time of execution.⁹³

1. *Anticipated military advantage*

As noted, the two primary objectives were the two Insurgent Leaders, designated as Objectives Burnham and Nova.⁹⁴ ISAF and CDF briefing documents show detailed intelligence identifying

87 Inquiry into Operation Burnham, above n 3, at “Home”.

88 Inquiry into Operation Burnham, above n 3, at “about the inquiry – inquiry members”.

89 Inquiry into Operation Burnham, above n 3, at “about the inquiry – terms of reference”.

90 Inquiry into Operation Burnham, above n 3, at “about the inquiry – terms of reference”.

91 Fenrick, above n 58, at 499.

92 Fenrick, above n 58, at 499.

93 Additional Protocol I, above n 4, at 57(2)(a)(iii).

94 International Security Assistance Force (ISAF) *Concept of Operations Operation Burnham* (6 August 2010) at 1, from <www.operationburnham.inquiry.govt.nz>.

the status of the two men and their links to other attacks including the one that resulted in the death of Lt O'Donnell.⁹⁵

Declassified GCSB emails indicate that both targets were placed on the Coalition Joint Prioritisation Effects List prior to the operation indicating their importance in the hierarchy of the insurgent forces.⁹⁶

Objectives Burnham and Nova were legitimate military objectives in line with Additional Protocol I, art 52(2).⁹⁷ Their capture or neutralisation would provide a direct military advantage to NZDF (and broadly ISAF) troops by virtue of providing a military loss to insurgent forces.

The ISAF Concept of Operations document, created prior to the operation identifies that intelligence identified that one of the targets, Kalta, was “likely to command 15–20 ... fighters in his village”, also identifying that “Tirigan Village also operates a night guard force conducting armed roving patrols”.⁹⁸ On this basis, it can be seen that expected military objectives included insurgent forces and although not a primary objective for the mission, advantage would be gained by their “total or partial” capture or destruction.⁹⁹ Whilst this does not conclude that Afghan nationals engaged as a part of Operation Burnham were legitimate military targets, it does indicate that armed response was expected and, by dual virtue of defending the ground force and weakening the insurgent forces, a military advantage was anticipated.

An official NZDF account of events identifies that removal or destruction of insurgent weapons was also an objective.¹⁰⁰ As this report was written after the Operation, it is of diminished value for application of the test prior to the operation. However, the concept of operations contains reference to destruction of weapons – (although much information is redacted).¹⁰¹ In addition, the NZSAS troops included an Explosives Ordnance Disposal technician who conducted the destruction.¹⁰² Their inclusion in the mission indicates a prior intention to dispose of any weapons located. It is reasonable to interpret that removal and destruction of any insurgent weaponry was likely an objective prior to the operation, and indeed one that provided a secondary military advantage through the viewpoint of the reasonable military commander.

2. *Intangible military advantage*

The obligation for military advantage to be “direct and concrete” renders discussion of the intangible difficult.¹⁰³ Nonetheless, there remains direct advantages that are harder to quantify than that of a single objective. As discussed above, security of the attacking forces can be considered a

95 New Zealand Defence Force (NZDF) *Task Force 81 Command Brief* (6 May 2010) at 27, 29, from <www.operationburnham.inquiry.govt.nz>. See also ISAF, above n 94, at 6, 7: note: much is redacted, but contains explanations as to what has been redacted without specifics.

96 New Zealand Defence Force (NZDF) *Op Burnham public release GCSB email chain* (August 2010) from <www.operationburnham.inquiry.govt.nz>.

97 Additional Protocol I, above n 4, at 52(2).

98 NZDF, above n 96, at 6.

99 Beran, above n 33, at 5.

100 NZDF, above n 68 at 5.

101 ISAF, above n 94, at 15.

102 NZDF, above n 68 at 11.

103 Beran, above n 33, at 4.

military advantage, in this case the security of the ground troops present in the village.¹⁰⁴ Further, the operation originated due to concerns of growing insurgent forces attacking PRT's in the province. As a result, it can be interpreted that in doing so, the security of NZ and allied PRT's would be a direct and concrete, albeit intangible, anticipated advantage.

3. The counterinsurgency argument

As identified, where an operation has a counterinsurgency element such as the ISAF involvement in Afghanistan post late 2009, the traditional perspectives on priorities shift.¹⁰⁵ Counterinsurgency has a focus on the protection and trust of the local population.¹⁰⁶ This shifts impacts upon civilians to be considered in both columns of the proportionality equation, as ensuring civilian protection (and the ability to be trusted to continue to provide such protection) *is* therefore a part of the mandate.

It becomes a military advantage by remaining in line with the ISAF directive: "gaining and maintaining that support must be our overriding operational imperative".¹⁰⁷ When viewed through the lens of the reasonable military commander, protection of the civilians embroiled in the operation *must* be counted not only as a balancing factor but also as a part of the advantage anticipated prior to Operation Burnham.

4. Expected civilian impact

(a) Prior to the operation

Analysis will be applied concerning the decision to launch an operation, the means in which the operation was decided, the intelligence relied upon. This will focus on the NZDF HQ decisions from Kabul, as well as the CDF decision to authorise the mission. In this instance, applying the test will be done strictly – the "thick" end of the proportionality spectrum due to the fact this stage of an operation turns on the ascertainment of a "right" outcome against all other possible options.¹⁰⁸

The primary document to be relied upon in this instance is the ISAF Concept of Operations.¹⁰⁹ Produced prior to the operation as a part of the approval process, this document contains detailed information on the intelligence relied upon and actions taken to minimise risk to civilians and maximise likelihood of achieving the intended outcomes.

To begin, analysis of the reasoning behind electing for a night raid should be undertaken. Under the heading "justification for night raid" it is identified that a night raid would lessen risk to civilians as they will likely be indoors.¹¹⁰ Further, analysis shows that for these same reasons, an operation conducted at night lessens the risk of a "large scale insurgent response" which has the dual effect of increasing the chance of successful detention of the primary targets and minimising the risk to civilians by decreasing the chance of combat.¹¹¹

104 Bothe, above n 37.

105 Beran, above n 33, at 5.

106 Beran, above n 33, at 6.

107 Mchrystal (ISAF), above n 42.

108 Nolte, above n 62.

109 ISAF, above n 94.

110 ISAF, above n 94, at 2.

111 ISAF, above n 94.

Given the nature of the location – a mixed civilian and insurgent area, it is reasonable to conclude that in the eyes of the reasonable military commander this reasoning minimises the risk to civilians by reducing the overall risk of combat and by ensuring that they will likely be in their homes if any combat occurred.

This was further mitigated by the use of interpreters and callouts in order to ensure civilian safety – despite the fact that this would provide prior warning to the targets and reduce the ability to complete the objective.¹¹² This is a clear instance where reduction of civilian loss was put ahead of anticipated military advantage.

There is a slight increase in risk at night generated by the fact civilian houses are more likely to be occupied and therefore air support weaponry hitting such a building would have a more devastating effect. The test is to be applied prior to the operation so the *actual* fact that this consequence arose is not relevant – but the possibility that it could occur was at all times present.

(b) Air Support

At any given point, the decision to involve air support increases the risk of civilian impact. Due to the fact that weapon platforms are further away from their targets, and that their weapons have a larger impact zone than small arms fire. The directive issued by General McChrystal further imposed a requirement that operations “scrutinize and limit the use of force like close air support”.¹¹³

But as discussed previously, proportionality does not impute a total requirement that own-side forces be put completely at risk.¹¹⁴ Official Information Act (OIA) Requests from April 2018 state that air support was provided in order to ensure that the ground team would be better positioned to complete the primary objective – the capture of the two insurgent leaders.¹¹⁵ This is especially pertinent when consideration is given to prior intelligence of roaming patrols and armed insurgents. Small, special operations teams covered by CAS was standard procedure for operations of this type at the time.¹¹⁶ Given the terrain and difficulty to get to the location of the Operation, smaller ground forces covered by CAS to allow ground forces protection to obtain the military advantage was reasonable at the planning stage. The technology available to those aircraft allow their inclusion at night to not drastically increase risk to civilians.

(c) During the operation

There were several individual engagements authorised by the GFC and the JTAC.¹¹⁷ These can be assessed individually by nature of the chain of command inherent in each engagement, approval from ground command was required in each instance. The approval decision can be considered by virtue of the requirement for proportionality to be assessed prior to actual engagements.¹¹⁸

112 New Zealand Defence Force (NZDF) *Summary of Incident* (22 August 2010) from <www.operationburnham.inquiry.govt.nz>.

113 Mchrystal (ISAF), above n 42.

114 Barber, above n 8 at 482.

115 New Zealand Defence Force (NZDF) *April 2018 Responses* (19 April 2019) at 3 (Obtained under Official Information Act 1982 Request to Headquarters New Zealand Defence Force, Ministry of Defence) from <www.nzdf.mil.nz>.

116 Lara M Dadkhah “Close Air Support and Civilian Casualties in Afghanistan” (2008) *Small Wars Journal* from <<https://smallwarsjournal.com/index.php/>>.

117 NZDF, above n 112.

118 Additional Protocol I, above n 4, at 51(5)(b).

At this stage, the principle is applied in a “thin” manner, reflective of the rapidly developing nature of the theatre of war. This adjustment of the application is reflective of the requirement for the test to be applied “in the shoes of the actual decision maker”. The determinative requirement becomes determination that “a particular outcome is the best possible” in the context of the “possibility to verify certain facts”.¹¹⁹

(d) Individual engagements

We can turn now to discussion of individual engagements as a part of the Operation. This is not outside the scope of the test as a “bullet-by-bullet” analysis, nor does it shift to an ex-post facto analysis, but rather analysis of the decision to engage prior to the engagement itself.¹²⁰

As discussed, military advantage is taken as a fixed component – so application will not be made as to the military advantage and civilian impact of each engagement, but rather the *increase* to civilian danger that each engagement provided. This can be taken cumulatively and added to the countervailing factors against proportionality.

Shortly after the arrival of the first Chinook, insurgents were seen retrieving weapons, including rocket propelled grenades (RPG’s) from a previously unknown cache house.¹²¹ Accordingly the second Chinook was advised to refrain from landing. The GFC, still in transit at this time, advised (through the JTAC) that the Apache’s had clearance to engage *provided they had explicit visual confirmation that there was not likely to be damage to civilian persons or objects*, and that the terms of the rules of engagement remained operable.¹²² This two-stage requirement remained in effect for the entirety of the operation.¹²³ CAS did not engage immediately due to the proximity of friendly ground troops.

At approximately 0054, upon positive identification that targets were direct participants, air support engaged, killing a number of insurgents.¹²⁴ One insurgent had broken away from this group. It was when the Apache fired at this individual that rounds have been determined to have fallen short and hit the building causing civilian casualties.¹²⁵

As the test for proportionality deems that actual results are not relevant, this does not weigh against the outcome unless the risk to civilians was too great immediately prior to engagement. Based on the outcome of the previous and later engagements, it can be said that had the weapon not been misaligned, the risk to civilians would have been within the acceptable range for legal engagement.

However, because the test for proportionality requires adjustment in the light of available information, had the GFC, JTAC or Apache Crews become aware of this misalignment after this engagement they would have been aware of the increase in expected civilian impact.

119 Nolte, above n 62.

120 Fenrick, above n 58, at 499; and ICTY, above n 1 at 50.

121 NZDF, above n 68, at 7, 8.

122 NZDF, above n 68, at 8.

123 Keating (NZDF), above n 67, at 4, per Leon Fox.

124 NZDF, above n 68, at 9. See also: Nicky Hager “Operation Burnham FIOA Documents” from <www.nickyhager.info/foia/>. These videos were seen by the Inquiry, but not published, stating it would not be inappropriate for Hager to publish. Review positively identifies the group carrying weapons.

125 NZDF, above n 70, at 18.

NZDF and ISAF documents indicate that this information did not come to light until after the operation.¹²⁶ If, for example, the CAS crews had attempted to contact the JTAC with this information and failed, it could then be said that this would be information should have been known, becoming relevant in analysis of proportionality. This was not the case, and the error only became brought to light during the subsequent ISAF investigation.¹²⁷

Subsequent engagements were made by CAS, once again only authorised where clear visual identification indicated direct participation in hostilities, and that there was no risk to civilians.¹²⁸ One engagement took place at 0123. Subsequently another group of insurgents was identified, but as both requirements to engage were not met, they remained merely observed.

A final aerial engagement took place at 0238.¹²⁹ Analysis of video footage indicates direct involvement by all targets by virtue of visible weaponry and tactical movement, although it is difficult to consider wider civilian impact due to the limited scope of footage compared to the location as a whole.¹³⁰

It is worth noting at this point that several other engagements were requested, but not approved due to risk to civilians.¹³¹ An indication of serious consideration of the principle of distinction.

Regarding the shots fired by the NZSAS sniper, narratives differ. The NZDF position is that the individual killed in this engagement was an armed insurgent, making his way along the ridgeline toward the position of the command team.¹³² The *Hit & Run* position, however, is that the individual killed was an unarmed schoolteacher named Islamuddin.¹³³

Two points must be raised. The first, the location of where the deceased was shot was on a ridgeline to the west of the village, a location which would be considerably difficult to get to.¹³⁴ In addition the footage from the PSR vehicle recording the operation would be able to confirm the presence of a weapon – although that footage is not available for the purposes of *this* research, it has been made available to the inquiry and therefore is an easily verifiable fact.

But, for these purposes, the question arises – does the status of this individual matter when the test must be applied in advance? It can only matter where we are using the facts to verify information that the sniper (and the GFC who authorised the engagement) reasonably should have known.

If the individual was not armed or verifiable as a direct participant in the hostilities, there would be a direct breach of the rules of engagement. Evidence exists as to the high level of training NZDF troops were given by Legal Officers on this topic.¹³⁵

Engagement of a single individual can only be said to hold potential civilian loss of one person. That is not to say that the killing of a single civilian outside of the rules of engagement is *justified*

126 NZDF, above n 68, at 8.

127 NZDF, above n 68, at 8.

128 NZDF, above n 68, at 8.

129 NZDF, above n 68, at 10.

130 Hager, above n 124.

131 NZDF, above n 71.

132 NZDF, above n 68, at 9; and Keating (NZDF), above n 67, at 4, per Leon Fox.

133 Hager and Stephenson, above n 2, at 56.

134 NZDF, above n 70, at 8.

135 NZDF, above n 39 at 27, 29. See also NZDF, above n 68, at 2.

under proportionality, but rather that this should be treated as a separate issue. It cannot alone be found to shift the balance of the operation, as a whole, to being indiscriminate and excessive.

There is not sufficient information available to make a definitive conclusion on this matter, nor does that influence the outcome of this research, being application of the proportionality principle.

On the facts available, the NZDF position (and the verifiability via the PSR) it seems reasonable that the target was verified as a direct participant – however as no biometric data was able to be taken from the deceased there is no way to confirm the identity.¹³⁶ Furthermore, it should be considered that the individual alleged to have been killed by *Hit & Run* may have been the actual individual killed, being a schoolteacher may not necessarily preclude insurgent activity. However, this runs in to the realm of speculation and cannot be verified. Ultimately, this is something that the inquiry will be better placed to speak to.

(e) Weapon malfunction

Fenrick posits that where civilian casualties arise where “weapons hit the wrong object because of weapon malfunction” regard must be given to more than what happens during one attack.¹³⁷ This is directly applicable to the Apache’s misaligned gunsights.

He suggests that the standard measurement should be analysis of that particular weapon (or weapons platform) over an extended period of time – perhaps a portion of the campaign itself.¹³⁸ It can then be seen where a particular weapon has a higher than expected chance at misfiring (and therefore a higher risk of civilian impact) that the proportionality principle has potentially been breached.

This has a logical basis in the case-by-case approach, as well as a practical basis. To impart a requirement for those making decisions to factor the statistical probability of a weapon malfunction across all weapons used in a particular operation would be too onerous an obligation and fundamentally undermine the ability of the test to protect proactively.

The consideration of the Apache weapon platform in Afghanistan is not within the scope of this research. There could, however, be a basis for future analysis of the proportionality principle in this scope.

C. Limitations to this Study

This study does not seek to emulate the Inquiry, however in applying the law to Operation Burnham, a natural parallel can be seen. This study conducted entirely “on the papers” requiring some assumptions to be made.

A large amount of the information relied upon, authored by the NZDF or by the Inquiry, has redacted sections. In fact, there will be other documents and information that remain entirely classified and unavailable for review. There is, therefore, a requirement for veracity to be assumed in many cases. This was achieved in two ways; the first being that the documents published by the Inquiry are likely to reflect the information under review in totality, as well as by cross referencing certain information against other documents from other sources – the more consistent an indicated fact was, the greater the ability to rely upon it.

136 NZDF, above n 68, at 12.

137 Fenrick, above n 58, at 499, 500.

138 Fenrick, above n 58, at 500.

There too, must be an assumption that the NZDF has cooperated fully in preparing and producing these documents. The fact that documents “went missing” and only surfaced later in the process indicates that this may not have been the case.¹³⁹ Once again this required cross referencing of fact. More weight was placed on documents produced *prior* to the operation – especially given the relevant time for conducting the test.

Not only was the Inquiry provided with greater, and less redacted information, so too did they have the opportunity to question, cross examine, and evaluate the weight of evidence based on traditional features of testimony. This was not an option in conducting this research. It must be noted that while care was taken to cross reference all facts relied upon, there was no way to emulate these conditions.

As a result, whilst thorough, this analysis may only be taken as an application as to the information *as publicly available* at the time of conducting this study. Serious concerns do not exist that the information relied upon is entirely false or unreliable, but the caveat must be acknowledged.

III. CONCLUDING REMARKS

Discussing proportionality is difficult for two reasons. The first, that the equation asks for the balancing of two inherently difficult to define concepts. Military advantage is an abstract concept influenced by context. Differing military doctrines will consider advantages in different lights.¹⁴⁰ Reconciling these differences when considering the appropriateness of military action becomes a difficult necessity.

Civilian impact carries the same issues, what value does one place on a human life? The law does not ask for a certain ratio or number of expected casualties – nor should it. The case-by-case approach is the appropriate metric for such a balancing act, but this too brings difficulties.¹⁴¹ Each time an application of this test is made, different and fact specific considerations must be accounted for.

This highlights the broader nature of international law when compared to domestic legislation. The very nature of the proportionality rule arises from a single sentence, it is not a step by step black letter approach that one must take, but rather an informed and academic understanding of both the broader concept and the specific scenario.

It is undeniable that Protocol I allows for *some* civilian casualties.¹⁴² But even at the very origin of the discussion, the NATO Report identifies that:¹⁴³

... it is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values.

In the hypothetical, the principle can be clearly seen to be met or breached– it would be an almost unanimous understanding that a high value target would not be prohibited from attack just “merely

139 Thomas Manch “Crucial evidence suddenly upsets Burhnam inquiry” (19 September 2019) Stuff <www.stuff.co.nz>.

140 ICTY, above n 1, at 50.

141 ICTY, above n 1, at 50.

142 Barber, above n 8, at 499.

143 ICTY, above n 1, at 48.

because a farmer is plowing a field in the area”.¹⁴⁴ When it comes to actual application of the principle however, the questions to be asked and indeed their answers, exist in a grey area where proportionality (or lack thereof) is not immediately obvious.

It is this abstract application that this report finds itself regarding Operation Burnham. The realities of warfare are such that these questions do not find themselves easily answered. Consideration must be given to the intricacies of actual and anticipated military advantage, to the effects of the decision to involve air support, to conduct the operation at night, and a thousand other factors that shift the balance for and against a finding of proportionality.

Yet the conclusion of this research in consideration of the factors envisaged by those who planned or decided upon the operation, as well as those who executed it, identifies the following:

In the eyes of the reasonable military commander, the anticipated military advantage of Operation Burnham was greater than expected civilian impact to a sufficient degree for a finding of proportionality under the laws of armed conflict.

144 ICTY, above n 1, at 48.