Proportionality in international humanitarian law

van den Boogaard, J.C.

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This study examines the principle of proportionality as it applies in international humanitarian law (IHL). The study first examines international law to determine the category of legal norms in which the IHL principle of proportionality must be placed. Subsequently, the notion of proportionality is analysed in a number of branches of international law. The interrelationship of these notions is clarified in light of the theory concerning principles of international law. The study then turns to an in-depth analysis of the IHL proportionality rule and how this rule must be applied in practice and on different levels of decision-making.

The final conclusion of this study is that in IHL, proportionality is understood both as a general principle permeating the interpretation and application of all IHL rules, as well as an important rule of IHL. In its practical application, the IHL proportionality rule is an inherently imprecise and flexible yardstick that nonetheless helps in protecting the civilian population. This study suggests that the balance of the proportionality assessment should in close cases tilt more towards protecting the civilian population than the wording of the rule may suggest.

Jeroen C. van den Boogaard is assistant professor military law at the Netherlands Defence Academy and lecturer in international humanitarian law at the University of Amsterdam. Previous working experience includes: several positions as a military lawyer of the Royal Netherlands Army; head of the international humanitarian law department of the Netherlands Red Cross, and senior legal adviser at the Netherlands Ministry of Defence.
Proportionality in International Humanitarian Law

Principle, Rule and Practice

Jeroen van den Boogaard
Proportionality in International Humanitarian Law

*Principle, Rule and Practice*
Promotiecommissie:

Promotor: prof. dr. T.D. Gill Universiteit van Amsterdam

Overige leden: prof. mr. P.A. Nollkaemper Universiteit van Amsterdam
prof. dr. P.A.L. Ducheine Universiteit van Amsterdam
prof. mr. dr. H.G. van der Wilt Universiteit van Amsterdam
prof. dr. E. Lijnzaad Universiteit Maastricht
prof. dr. R. Geiss University of Glasgow

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Delft, July 2019
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Part I: Introduction

This Part I introduces the topic of this study, which is the principle of proportionality as it applies in international humanitarian law (IHL). Part I presents the main research questions of this study, its structure and methodology as well as a short introduction of the subject.
Chapter 1
Chapter 1: Introduction

1.1 Introducing the Study

In war, people die. But that does not mean that war is totally stripped of humanity. International humanitarian law (IHL) provides the legal framework for those who are fighting for one of the parties to an armed conflict, and for those affected by the effects of hostilities. IHL aims to regulate the way the war is fought and to protect those who are not taking part in the hostilities. IHL acknowledges that civilians and civilian objects may legitimately be affected by warfare. It is a myth that civilian casualties can be avoided in their entirety during contemporary armed conflicts, not necessarily because the law is violated, but because collateral damage is caused by other factors. Even though civilians and civilian objects may not be directly targeted, the IHL principle of proportionality allows civilian casualties and damage to civilian objects, under the restriction that these are not excessive to the military advantage anticipated. The IHL principle of proportionality is commonly understood to be codified in article 51 (5) (b) of Additional Protocol I (1977) to the Geneva Conventions:

“[Prohibited are attacks]... which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

The principle of proportionality is one of the principles of IHL. IHL, or ius in bello, is one of the branches of public international law. The principle of proportionality in the context of an armed conflict also exists in other branches of international law, such as international human rights law and the law on the use of force by States, or ius ad bellum, as it is more generally referred to. This study aims to provide more clarity on that principle in IHL and the balance it requires between anticipated military advantage and expected collateral damage.

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1 For example, unexpected collateral damage may be the result of imperfect intelligence, weapon system malfunction or damage caused by hostile forces. See Crowder, slide 19.
2 See for example Rogers 2004, p. 3, and the discussion below in Section 3.2.
3 Other names for this branch of law include the Law of Armed Conflict or the Law of War. For example, the United States of America prefer the term “Law of War, or Laws and Customs of War”, see Bellinger and Haynes, p. 443.
5 This study uses the term ‘international law’ as short for ‘public international law’, although the term international private law is technically also part of international law. International private law is not the object of this study.
1.2 International Humanitarian Law

IHL is a branch of international law that aims to mitigate the horrors of war by preserving some humanity during armed conflict. The provisions of IHL are applicable whenever there are military operations ongoing during which the armed violence that is used amounts to an armed conflict and in situations of occupation. The provisions of IHL bind the parties to the armed conflict and the members of their forces.

The objective of IHL is twofold. The first is to prevent suffering of those people who are not, or no longer, taking direct part in the hostilities as much as this is possible in times of war. Protected are inter alia captured, wounded, sick and even dead soldiers, medical personnel, vehicles and installations, and civilians and civilian objects. Secondly, IHL restricts the effect of means and methods of combat used by those who do participate in the armed conflict. Prohibited methods of combat include attacks against civilians and attacks that misuse the protection that has been awarded to others, such as misuse of the protected emblems of the Red Cross, Red Crescent or Red Crystal. Prohibited means of warfare include weapons that cause serious injury or unnecessary suffering, such as bullets that are designed to explode inside the human body, rendering the death of the victim inevitable.

A unique characteristic of IHL is that it is a preventive framework. Although States remain the main addressees of IHL, individuals are bound by it as well as representatives of those States. IHL has been drafted to influence behaviour on the battlefield, during the armed conflict, and not necessarily to make it possible to prosecute people for violations of IHL. In other words: the rules of IHL are drafted for soldiers, not lawyers. Of course, many lawyers were present during the negotiations of the main instruments of international law, but also military practitioners, with a view to keeping IHL workable for their military forces.

An important factor in IHL is that different legal regimes are applicable to different types of armed conflict. The classical interstate armed conflict, labelled an ‘international armed conflict’, is regulated through extensive rules of treaty law, including the Geneva Conventions of 1949 and the First Additional Protocol of 1977, as well as a number of other treaties pertaining mostly to weapons, but also treaties that provide protection for cultural property and the environment. The other category is that of a non-international armed conflict, which is regulated mainly by Common Article 3 of the Geneva Conventions. This article applies to armed conflicts within the territory of one State between the government armed forces and a dissident armed group, armed conflicts between such groups, and arguably a residual group of other types of armed conflicts. To a further restricted number

6 The Geneva Conventions of 12 August 1949: Geneva Convention (I) for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field (GCI); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GCII); Geneva Convention (III) relative to the Protection of Prisoners of War (GCIII); Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (GCIV).

7 The 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (hereinafter: Additional Protocol I or API).

8 See generally Bartels 2009a.
of types of non-international armed conflicts, the Second Additional Protocol applies in addition to Common Article 3. Of course, apart from the IHL treaties, customary IHL applies as well, and additionally, as is argued below, the principles of IHL.

Much has been written on the history of IHL. Depending on the background of the writer and purpose of the book, a description of the history of IHL may commence by referring to the Bible, the Koran, ancient Hindi texts or texts from other civilisations, including the Maori, the work of Hugo Grotius, the Lieber Code or a description of the Battle of Solferino in 1859. All these texts prove that the idea that warfare must not be unrestricted is universal, and has existed throughout history. Sadly, many atrocities have taken place in history violating these rules. However, at the same time, there have always been examples of commanders who attached value to a sense of humanity. The famous Sultan Saladin was a highly respected commander throughout the region because of his chivalrous behaviour towards his adversaries during and after combat.

The influence of Henri Dunant cannot be overlooked as an important factor in the development of IHL. Dunant published his account of the battle of Solferino in 1862, describing the suffering of thousands of soldiers during and after battle. His book ‘A memory of Solferino’ is a detailed description of courageous acts of war by mostly generals, dukes and princes. But Dunant also describes the suffering of those left hors de combat after the battle, with nobody there to care for them. And it is the suffering of these soldiers that motivates Dunant to propose in his book that there should be written rules to protect – in particular – sick and wounded soldiers. This proposal was successful in the sense that the first Geneva Convention was concluded in 1864, providing basic rules aiming to protect wounded and sick soldiers. The almost simultaneous founding of the International Committee of the Red Cross (ICRC), as it is called today, provided the basis for the leading role that this private organisation played, and still plays, in the development and implementation of IHL. The first Geneva Convention of 1864 has since regularly been updated, mostly after major armed

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10 See for example Deuteronomy, chapter 20: even though this chapter contains a provision stating that all male inhabitants of a conquered city may be killed, it also contains a provision stating that only trees that do not bear eatable fruit may be used to build fortification during a siege.
11 See for example Van Engeland, pp. 155-156.
12 Amerasinghe, pp. 264-267. See also Nirmal, pp. 25-38.
13 Judge Kenneth Keith presented the Maori ‘Solemn rules for governing the fighting’, during his lecture “Tutti Fratelli?” as delivered on 10 February 2009 in the lecture series of the Hague Initiative for Law and Armed Conflict (HILAC). The rules were used during the battle of Gate Pa, New Zealand, in April 1864.
14 See Grotius’ seminal work de jure ac bello pacis.
15 Instructions for the Government of Armies of the United States in the Field, promulgated as General Orders No. 100 by President Lincoln on 24 April 1863, but prepared by Francis Lieber (herein after: the Lieber code). See Schindler & Toman, p. 3.
conflicts. The result of the Geneva branch of IHL are the four Geneva Conventions of 1949 and its three Additional Protocols.

Many writers argue that this so-called Geneva law was in essence one of the two main lines of development of IHL, the other one being those rules that focus on the means and methods of warfare to be used during the conduct of hostilities. The first modern multilateral effort to regulate affairs during armed conflict was the Declaration of Paris of 1856. A more important founding document is the famous Lieber Code of 1863, which served as an early handbook on IHL for commanders during the American Civil War. The Lieber Code was the main inspiration for the Brussels Conference of 1874 and has been the basis for the other main line of development of IHL. This current is usually referred to as Hague law, because the founding treaty in which the main rules for the conduct of hostilities have been laid down, the Hague Regulations, was the result of the two Peace Conferences that took place in The Hague in 1899 and 1907. With regard to the use of certain means of warfare, treaties have been concluded on chemical, biological and conventional weapons. The conclusion of treaties prohibiting or restricting the use of a number of specific weapons have proved the direct impact that IHL continues to have on the battlefield.

Today, the distinction between Hague law and Geneva law is used mainly for historical and didactic reasons. For example, the First Additional Protocol to the Geneva Conventions contains both provisions on the protection of persons during armed conflict and on the conduct of hostilities. In other words, both Hague and Geneva law. The International Court of Justice notes in this regard that “these two branches of law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as IHL. The provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law.”

IHL has today become one of the best developed systems of law on the international plane, consisting of an impressive body of treaty law and a number of rules of customary IHL. Paradoxically, the humanitarian ideals behind the rules of IHL, clearly stemming from natural law sources, have succeeded in being codified in positive law. As Draper puts it: “It is
a strange reflection that the humanitarian movement of the mid-19th century appeared in the noon-tide of positivist theories of international law. When the claims of sovereignty of states were at their highest, when the last relics of moral restraint in the old theories of natural law and its corollary, the ‘just war’ idea, were receding, the full spate of the humanitarian ideal appeared.  

As far as customary IHL is concerned, there is still an ongoing debate on this subject, that has been sparked in particular by the ICRC Customary Law Study, the judgments of the Eritrea-Ethiopia Claims Tribunal, the ad-hoc tribunals for the former Yugoslavia and Rwanda, and the emerging jurisprudence of the International Criminal Court. These latter institutions are part of a major development in international relations that has resulted in the emergence of international criminal law (ICL). The developments in this field of law are remarkable since 1993. It provides procedural rules necessary for a part of the implementation of IHL: the criminal prosecution of individual violators of IHL outside national jurisdictions. Today, ICL judgements provide a valuable source for interpretation of IHL rules and concepts. The focus of this study is however IHL, more in particular the IHL principle of proportionality. As this principle is one of the commonly recognised principles of IHL, it is necessary to obtain some basic insight into the substantive content of the most commonly encountered principles of IHL. For that reason, the following Section provides a short explanation of the substantive content of the principles of IHL.

1.3 Principles of IHL

The principles of military necessity, humanity, distinction, proportionality, the prohibition to use means and methods of warfare that cause superfluous injury or unnecessary suffering and the principle of precautions are among those commonly mentioned as relevant principles of IHL, as is established below in Chapter 3. This section provides a short explanation of the substantive content of these principles in order to sketch a broader picture of the context in which the IHL proportionality principle is situated.

The principle of military necessity

In peacetime, it is prohibited to kill another person. Armed forces engaged in combat however, may kill their opponents for as long as it is necessary to win the fight and provided there is no other prohibition to attack the person or object. IHL recognises that it is necessary for armed forces to employ deadly force to overcome the enemy. For that purpose, it is permitted to use any legally permissible type of weapons and munitions as much as is military necessary to win the war. The origin of the notion of military necessity may be traced

24 Draper, p. 131.
back to the time of the Lieber Code of 1863.²⁵ An accepted definition is: “[m]ilitary necessity permits a state engaged in an armed conflict to use only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.”²⁶ This is the permissive part of the concept of military necessity. However, military necessity is also a restrictive norm, because it entails that whatever is military unnecessary, is prohibited.²⁷

The principle of humanity

Humanity guards human dignity in times of war. It safeguards a sense of humanity during the most inhumane acts human beings carry out: waging war. It aims to prevent total war and it gives hope for the future that after the armed conflict has ended, society will be able to function normally again. Therefore, the wounded and sick must be spared and cared for and it is inhumane to kill an adversary when he or she has already surrendered. For the same reason, those detained or taken as prisoners, must be treated humanely. It is clear that humanitarian considerations are the basis of a large part of the rules of IHL.²⁸ Humanity surfaces in specific rules applicable both to the individuals who are participating in warfare themselves, as well as with regard to persons who do not take part in the hostilities, but humanity is also relevant for the rules pertaining to means and methods of warfare. As Pictet notes: “Humanity is the sentiment or attitude of someone who shows himself to be human. With Littré’s dictionary, we would define humanity as being “a sentiment of active goodwill towards mankind”.”²⁹ An alternative definition is provided by Coupland, who proposes that “humanity arises from and signifies restraining the capacity for armed violence and limiting its effects on security and health. Humanity interpreted in these terms encompasses humanitarianism, morality, development, human rights and human security.”³⁰

²⁵ See paragraph 14 of the Lieber Code: "[m]ilitary necessity, as understood by modern civilized nations, consists in the necessity of these measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war", see also Downey, p. 252.
²⁷ M.N. Hayashi 2008, pp. 142-143, quoting in footnote 58 Gardam, Ticehurst, David and Bothe as proponents of the view that military necessity may be approached as a restraining factor, prohibiting any violence that is not military necessary. See also Geiss 2008, p. 566: “there is an obligation to choose the least intrusive among equally suitable means for achieving a legitimate aim [but] (...) the restrictive element inherent in the necessity requirement has fallen into near oblivion.”
²⁸ As confirmed, for example, by the ICJ in the South West Africa Cases, Second Phase, Judgment, (1966) ICJ Reports, 34, where it is noted that “humanitarian considerations may constitute the inspirational basis for rules of law”.
³⁰ Coupland, p. 988.
The principle of distinction

The notion of distinction is a central rule of the entire legal framework of IHL. As Dinstein puts it: “there are several cardinal principles lying at the root of the law of international armed conflict. Upon examination, none is more critical than the principle of distinction”. The main rule is contained in article 48 of Additional Protocol I, which provides that “Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly direct their operations only against military objectives.” The rule is also accepted as a rule of customary international law, even by States who are not parties to Additional Protocol I. The principle of distinction may be divided into three components: as an obligation to determine who may and who may not be attacked; as a ban on the use of indiscriminate weapons and, thirdly, as a prohibition on the indiscriminate use of otherwise discriminate means of warfare, resulting in indiscriminate attacks.

The principle prohibiting the use of means and methods of warfare that cause superfluous injury or unnecessary suffering

The principle of superfluous injury or unnecessary suffering is firmly established in IHL treaties and customary IHL. The principle embodied in the prohibition to cause superfluous injury or unnecessary suffering holds particularly that means and methods of warfare that cause superfluous injury or unnecessary suffering to combatants are prohibited. The principle is a balance between the effects of a means or method and its military utility. It is military necessary to employ means and methods that cause injury, or death to the opposing fighters. However, it is not humane to make them suffer unnecessarily. Also, as far as methods of warfare are concerned and the treatment of those that do not, or no longer participate in hostilities, the principle may be invoked to assure humane treatment, as is embodied in the expansive body of IHL rules concerning the treatment of these persons. Some attacks that are carried out with legitimate weapons may be carried out in a manner that is inconsistent with the prohibition to use methods of warfare that cause serious injury or unnecessary suffering.

33 The concept of superfluous injury and unnecessary suffering is captured much shorter in the French term ‘maux superflus’, but contrary to the concepts of for example ‘hors de combat’ and ‘levée en masse’, this French term has never made it to popular use by the English/speaking community. For a discussion on the proper translation of ‘maux superflus’, see Meyrowitz, pp. 104-105. See also Boutruche, p. 104-105. Rogers comments that the wording as incorporated in article 35 (2) of AP I is a general principle, bringing together the French and English texts of 1907. See Rogers 1998, p. 328.
34 Boutruche, p. 103-105.
An illustration of how the principle of superfluous injury and unnecessary suffering is put into practice is the use of incendiary weapons: “\textquote{[i]}nstinctively, man is afraid of fire. The injuries caused by incendiary weapons (burns and lesions due to the release of toxic gases) are particularly painful and, to be treated, they require greater hospital facilities than is the case for bullet or shrapnel wounds.”\textsuperscript{35} When considerations of humanity outweigh the military considerations with regard to a means of method of warfare, the principle of superfluous injury and unnecessary suffering provides the prohibition to use that means or method.\textsuperscript{36} To a certain extent, however, “\textquote{[t]}he superfluity of injury and the necessity of suffering can only be matters for subjective judgement”.\textsuperscript{37}

\textbf{The principle of precaution}

Armed conflict is a situation during which all parties to it take turns in launching attacks, conducting a defensive move, and executing a counter attack. Thus, parties to the conflict on the defending side have precautionary obligations as well. These latter type of obligations are codified in article 58 API, and may also be called ‘passive precautions’\textsuperscript{38}. Parties to an armed conflict must, to the maximum extent feasible, remove the civilian population, individual civilians and civilian objects under their control from military objectives and avoid locating military objectives within or near densely populated areas.\textsuperscript{39}

The rules with regard to precautions in attack are codified in article 57 API. The precautions in attack obligations may be generally divided into two parts: a general obligation to take ‘constant care’ to spare the civilian population in military operations during armed conflict and a list of specific obligations that operate to implement the general obligation during the specific situation of attacks. In addition, precautionary obligations can also be derived from other rules, such as the specific regulations that apply for attacking works and installations containing dangerous forces “if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.”\textsuperscript{40} Corn suggests that the obligations to take precautionary measures “should be understood to include a broad range of measures”\textsuperscript{41} that also includes measures such as training military lawyers in IHL and the targeting process.

\begin{itemize}
  \item \textsuperscript{35} Aubert, p. 489.
  \item \textsuperscript{36} Some commentators, such as Gardam, refer to the principle of serious injury and unnecessary suffering as the principle of proportionality. See Gardam 2004, p. 59. This view is dismissed by Meyrowitz, p. 109. See also Aubert, p. 478.
  \item \textsuperscript{37} Haines, p. 286.
  \item \textsuperscript{38} See Sassòli and Quintin, pp. 112-122, and Jensen, pp. 147-175.
  \item \textsuperscript{39} See Quéguiner 2006, p. 811-812 and Henckaerts & Doswald-Beck 2005a, Rule 22.
  \item \textsuperscript{40} See article 56 API and Henckaerts & Doswald-Beck 2005a, Rule 42.
  \item \textsuperscript{41} Corn 2014, p. 485.
\end{itemize}
Chapter 1: Introduction

The principle of proportionality, which is the main subject of this study, is closely connected to many of the other principles of IHL. A short introduction into its relevance and the purpose of this study is provided in the next section.

1.4 Proportionality in IHL

The text-book answer to the question of when an attack is conducted in accordance with the IHL principle of proportionality is: ‘it depends on the circumstances of each specific case’. This seems to be the inevitable outcome of a principle of IHL that is phrased as a comparison between the rather generic terms of ‘military advantage’ and ‘civilian casualties and damage’. This makes sense: every attack is different, and for each different military objective, or available type of weapon, the proportionality test will have a different outcome. But still, this text-book answer seems highly unsatisfactory. The goal of this study is therefore to get a more precise answer than that. This goal is important for a number of reasons.

Firstly, it is important for the conductors of an attack to receive more guidance on how to balance military advantage and collateral damage. Members of the armed forces of the parties to the conflict, often generally referred to as the military commanders, are the people that have been authorised by States to take the lives of the members of opposing forces. While they are conducting their operations, IHL applies to their actions. If they violate the provisions of IHL, they may face criminal prosecution. In fact, due to the developments in ICL in the past decades, the chances for this actually to occur have increased. Therefore, these fighters are entitled to receive clear guidance about what they can and what they cannot do during hostilities. They deserve this, given the fact that they are the ones putting their lives on the line in combat for the sake of the political goals of their leaders. In turn, States have a responsibility towards their military forces to provide clear guidance on how to conduct the military operations within the boundaries of IHL.

Secondly, clear guidance for members of armed forces participating in armed conflicts is important for reasons of post-conflict reconciliation. The built-in reciprocity of the rules of IHL can prevent total escalation of hostilities. Observance of IHL on one side of the conflict can be very important for observance of the same rules on the opposing side. If the IHL proportionality rule is not clear, disproportionate attacks of one side of the conflict may be retaliated by disproportionate attacks of the adverse party. Total escalation of an armed conflict resulting in massive violations of IHL, is a key obstacle to reconciliation after the conflict. As noted by Pratzner:

“(…) perhaps most importantly, mitigating collateral damage provides for the possibility of a better peace. Warfare in the modern era demands this, perhaps more than conflicts in the past. (…) A vanquished opponent may fight for years and never give up the fight fully, as seen in Afghanistan and Iraq. The indiscriminate use of force does little to weaken this urge; instead,
it may even intensify it. Avoiding and mitigating collateral damage contributes to peace by protecting non-combatants, keeping infrastructure intact, and lessening the enemy’s desire to fight perpetual war.  

Thirdly, and perhaps most importantly: more clarity of the concept of proportionality in armed conflict will also provide better protection for those civilians and civilian objects that find themselves in the midst of the armed conflict. The obligation to apply a legal rule is at odds with a vague and subjective balance, restricted only by the discretion of military commanders. It is not an easy task for members of the armed forces to balance the concepts of military advantage and collateral damage. The two concepts are of a different nature and there is not always enough information available to assess the exact value of the two components of the IHL proportionality rule. The situation needs to be avoided that the principle of proportionality can be abused to justify the outcome of any attack. Because if that were the case, the protective character of the IHL proportionality rule may prove to be an illusion. As a result, the IHL proportionality rule would merely undermine the prohibition to directly attack civilians and civilian objects.

Thus, the main purpose of this study is to provide more clarity on the principle of proportionality that is applicable in armed conflict, both for the sake of the conductors of the attack and for the civilians that may be affected by it.

1.5 Structure and Methodology of the Study

The central research question of this study is: what is the normative legal content of the principle of proportionality in IHL? The approach to answering this question is based on a modern positivistic approach to international law. Therefore, for answering the central question and sub-questions arising from it, this study explores the sources of international law, citing and interpreting its rules. Furthermore, there is also a significant role for unwritten law, such as customary law, general principles and soft law instruments, although written rules are the starting point of the analysis. Where necessary for answering the research questions, this study uses illustrations based on military doctrine, such as targeting procedures, and descriptions of the moral underpinnings of the rules that are analysed, such as Just War theory.

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42 Pratzner, p. 92.
43 This study does not seek to address questions of legal philosophy. See for a general overview of seven different approaches to international law: Slaughter and Ratner, pp. 291-302: “Positivism summarizes a range of theories that focus upon describing the law as it is, backed up by effective sanctions, with reference to formal criteria, independently of moral or ethical considerations.”
The study starts in the domain of general public international law by exploring the rather general notion of principles of international law, which is also a source of international law. This is a study of the theory in relation to the applicable treaty law and its travaux préparatoires, judicial decisions of international courts and tribunals and the doctrine, or ‘the teachings of the most highly qualified publicists of the various nations’. But the study aims to end on a very practical level: the applicability and interpretation of the IHL principle of proportionality to individual members of an armed or military group who are taking part in actual hostilities. That means that the study aims at formulating practical recommendations on how the principle of proportionality in IHL must be interpreted and applied. This objective requires interpretation of the legal norms embodied in international law. Especially for the rules of IHL, this interpretation is informed by “the promotion of humanitarian principles, beyond the purely ‘written’ text.”

Part I

In order to get to the purpose of this study, and to find answers to the main research questions, Part I introduces the subject of the study in this Chapter 1 and provides insight into the subject, structure and methodology of the study. It therefore introduces IHL as a branch of international law in Section 1.2 and the main principles of IHL in Section 1.3. Section 1.4 then provides a short description of the reasons why clarity on the IHL proportionality principle is important.

Part II

IHL is a branch of international law. Because proportionality is generally referred to as a ‘principle’ of IHL, Part II provides an answer to the question of what the relevance and role is of principles as a source of international law (Chapter 2) and in relation to the character and application of the principles of IHL (Chapter 3). On the basis of the findings in these chapters, the applicability and three roles of principles of IHL – as a subsystem of international law – are identified. Part II thus aims to answer the question of what the relevance and role is of the principles of IHL.

44 Article 38 of the Statute if the International Court of Justice.
45 Article 31 of the Vienna Convention of the Law of Treaties: “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”
46 Lieblich 2014, p. 201.
The obvious starting point of the research in Part II is article 38 of the Statute of the International Court of Justice, because it enumerates the main sources of public international law, including the general principles of international law. The main purpose of this part is to establish how a principle of general international law finds its way to the battlefield, where it can be the decisive factor for a participant in an armed conflict to squeeze the trigger, or cancel the planned attack. Questions that are answered in Chapter 2 include: what are principles of international law? What is their normative value, in particular when compared to the other sources of international law? Do they have any normative character, or are they just the guidelines that only step into the light of legal relevance when they have been incorporated in a binding treaty rule, or have been established by a court of tribunal as a rule of customary international law? To find answers to these questions, general public international law is studied and discussed: the applicable treaty law; the case law of the International Court of Justice and other international courts as well as doctrine on this subject.

Having established the role and relevance of principles of international, the focus will shift in Chapter 3 to the relevance and meaning of the principles IHL. This is the first step into the field of IHL, which is the main focus of this study. A method to identify the principles of IHL is provided first, as well as a short introduction into the relevance and role of the principles of IHL. For this objective, the applicable treaty law in the field of IHL is studied, as well as customary international law, case law of the International Court of Justice and other international tribunals and the doctrine on the subject of principles of IHL. Through an assessment of the State practice and an analysis of jurisprudence of international courts and doctrine, the principles of IHL are identified. The focus then turns to the question of the applicability of these principles. For this purpose, an answer needs to be found to the question of whether these have any individual normative value, or only apply because they have been codified in the provisions of the treaties that apply in armed conflict. In other words: is there any normative value of the principles of IHL, next to existing treaty law and customary international law, and which roles do the principles of IHL play in the field of IHL? This includes an answer to the question of how a principle of IHL finds its way to the persons that need to apply the principle in practice, such as the planning cell of a military headquarters that is involved in a combat operation or an individual soldier.

**Part III**

The focus of Part III is on proportionality as a legal concept in connection to armed conflict. The central research questions of Part III include the question of what the origins and content of the principle, or legal notion of proportionality, are in different branches of international law. The objective of this is to use these different understandings of the principle of proportionality in order to improve the understanding of, and clarify the principle of proportionality in IHL.
Chapter 4 provides a description of the historical and normative origins of the notion of proportionality, as well as the content and use of proportionality in general international law. As a result, a number of different functions of the notion of proportionality are discerned. Furthermore, the notions of reasonability and equity are discussed in relation to proportionality.

Chapter 5 aims to provide an overview of the use of a proportionality test in the legal frameworks relating to the use of force, particularly those that apply during armed conflict. In order to find these, the study takes a modest sidestep outside legal analysis, because proportionality in armed conflict is closely connected to the moral notion of proportionality in Just War Theory. For that purpose, the writings of leading moral theorists are explored. Furthermore, the notions of proportionality as it applies during armed conflict in the *ius ad bellum* and international human rights law are analysed. In this phase, it is studied what proportionality means in these sets of rules applicable in armed conflict. The study of the notion of proportionality in other legal frameworks is mostly based on doctrine, but also includes an analysis of treaty law such as the Charter of the United Nations, jurisprudence of Human Rights bodies and case law of the International Court of Justice and the European Court of Human Rights.

The principle of proportionality as it applies in IHL is the main object of this study and it is first explored in Chapter 6. The principle of proportionality in IHL is codified as a rule in Additional Protocol I to the Geneva Conventions. The research will focus on the principle as it has been codified in Protocol I, but also subsequent treaty law such as the Rome Statute. Therefore, a closer look to the *travaux préparatoires* of these treaties is part of the analysis in Chapter 6. The principle of proportionality has been commented upon by many leading experts in IHL, and their writings will be an important source for the study. In addition, the principle of proportionality has been addressed in a number of cases of, for example, the International Court of Justice and the International Tribunal for the former Yugoslavia.

The questions that need an answer in this chapter include the following: what is the codification history of the IHL proportionality principle? Is the principle of proportionality *in belli* a part of customary international law? Is there a difference in the application of the principle in international armed conflict or in non-international armed conflict?

Subsequently, a number of other, related, standards of moderation contained in the rules of IHL are identified and discussed in Chapter 7. For that purpose, it is assessed whether the principle of proportionality only applies in IHL as a balance between collateral damage and military advantage, or whether it also exist as a legal obligation to use only 'proportionate' force between combatants. Furthermore, moderation standards in using blockades, security

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48 For example in the Nuclear Weapons Advisory Opinion.

49 For example in the Kupreskic case (ICTY, Prosecutor vs. Kupreskic, Case no. IT-95-16-T, Judgement, Trial Chamber, 14 January 2000).
measures during occupation, the destruction of enemy property and belligerent reprisals are discussed.

Chapter 8 deals with the interrelationship of the legal content of the principles of proportionality in the different fields of law applicable during armed conflict. In this chapter, it is analysed whether, and if so, how, the concepts of proportionality in the said bodies influence each other, interrelate or perhaps are totally distinct from each other. It aims, if possible, to come to a synthesis of the legal concept of proportionality during armed conflict. The purpose of this endeavour is to analyse in Chapter 9, which concludes Part III, whether proportionality functions as a general principle of international law in general, and separately, during armed conflict and within IHL. The conclusions reached in Part II concerning the normative value of principles of international law and IHL in particular inform this analysis in Chapter 9.

Part IV

Part IV of the study operationalises the IHL principle of proportionality by taking a closer look to the way the legal concept of proportionality in IHL, as it was identified in Parts II and III, is applied in practice, i.e. by those involved in combat on the battlefield.

In order to establish this, the operational and legal context of the IHL proportionality rule is analysed in Chapter 10. The operational context consists of the targeting processes that are used during different types of military operations. This is where the actual proportionality equation, balancing the military advantage and collateral damage, takes place. The legal context concerns the IHL rules with regard to indiscriminate attacks and precautions in attack, because the IHL proportionality rule is codified in that context.

The content of the IHL proportionality rule and the components of which it consists is analysed in Chapter 11. Issues that are addressed include an assessment of who is responsible for conducting the proportionality analysis, the temporal scope and an assessment of both the ‘civilian side’ and the ‘military advantage’ side of the proportionality equation.

Chapter 12 includes a number of examples of situations in which the principle of proportionality has been applied in practice. Describing these examples is complicated because most militaries are not prepared to openly display the way they conduct their proportionality equation. Nonetheless, some governments have conducted their own investigations and published reports of their military operations. Furthermore, the Prosecutors of the International Tribunal for the Former Yugoslavia and the International Criminal Court published reports of military operations they investigated. Also, international non-governmental organisations like Human Rights Watch and Amnesty International have
drafted reports on a number of recent armed conflicts. The analysis of the examples is intended to increase the understanding of the issue of how the IHL proportionality rule is put into practice in reality, on different levels of authority.

Chapters 13 and 14 subsequently analyse how the IHL proportionality rule must be applied and how the term ‘excessive’ must be understood. It is discussed whether the rule is either subjective or objective and how the rule must be interpreted in close cases. What does it mean to conclude that the civilian damage is ‘excessive’? And what is the significance in this respect of the notion of the reasonable military commander? Also, it is assessed whether (the interpretation of) the IHL proportionality rule must be changed or merely needs further clarification.

The general conclusions of this study are presented in Chapter 15. The chapter includes the answer to the main research question: how could more clarity be provided for the application of the principle of proportionality in IHL? The chapter also explains how the general principle of proportionality interacts with the IHL proportionality rule balancing collateral damage and military advantage of a planned attack. In the concluding chapter it is further concluded to what extent other manifestations of proportionality in other legal frameworks may be useful for this purpose and recommendations and guidance are proposed for those that need to apply the principle in practice.

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Proportionality in International Humanitarian Law
Part II: Principles

As proportionality is generally referred to as a ‘principle’ of IHL, Part II of this study aims to clarify what it means that proportionality is referenced to as a ‘principle’, more particularly a principle of law.\(^{51}\) Being part of international law, IHL is based on the same sources as international law.\(^{52}\) Principles are enumerated as one of these sources of international law, alongside treaty law and customary international law.\(^{53}\) Insight into the origins and legal status of principles as sources of international law is therefore relevant for determining the legal substance of principles of international law and the category of legal norms in which the IHL principle of proportionality must be placed. Before final conclusions may be drawn in this regard, it is also necessary to assess the notion of proportionality as it is found in international law. That is the subject of Part III of this study. This category is relevant for interpreting the principle of proportionality in IHL, which is the subject of Part IV.

This Part sets out in Chapter 2 with describing and analysing the term principles of international law. Chapter 3 builds on this description by analysing the particularities of principles of IHL.\(^{54}\)

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\(^{51}\) Law in general must be understood to consist of both national and international law. International law must be understood particularly as public international law.

\(^{52}\) Kleffner 2016, p.71. See for a discussion on whether the theory of sources of IHL is different from that of general public international law: Van Steenberghe, pp. 891-911 and Ratner, pp 912- 935.

\(^{53}\) Article 38(1)(c) of the Statute if the International Court of Justice: "The general principles of law recognised by civilised nations".

\(^{54}\) This part of the study has served as the basis of the book chapter ‘Fighting by the Principles: Principles as a Source of International Humanitarian Law’, see Van Den Boogaard 2013.
Chapter 2
Chapter 2: Principles as a Source of Public International Law

2.1 Introduction

The purpose of Chapter 2 is to establish an understanding of the term ‘principles of international law’. To that end, this chapter ventures to analyse the relevance and role of principles of international law. Section 2.2 analyses the term ‘principle of international law’ and describes how and in which context the term principle is used. In Section 2.3, it is assessed how principles of international law as a source of international law must be understood. Section 2.4 addresses the roles principles of international law play and their relation to treaty law and international customary law.

Writing about principles of law requires a preliminary remark about law itself. Legal theory advocates different understandings of law in general, and consequently, of international law. These different understandings impact on the roles ascribed to principles in international law. For example, a strict positivist like Kelsen would argue that the formation of law is contingent on the existence of a procedure that establishes a norm as law. As a result, international law is in Kelsen’s view limited to those norms that States have formed through their specific consent, and principles as underlying notions of law may be deemed irrelevant. Dworkin, on the other hand, sees law as a more dynamic system, as is explained below. This study is written from the latter perception of international law, but is not intended to provide an in-depth analysis of different legal theories and how these may impact the interpretation of principles of international law. Instead, this study takes the theory of Dworkin as its starting point and adopts as its frame of analysis the distinction between three types of different norms as introduced by Dworkin. This distinction is used in this chapter to refer to different types of legal norms and to explain how principles may be understood. This informs the interpretation of the IHL principle of proportionality in subsequent parts of this study.

1 See for an overview: Orford, The Oxford handbook of the theory of international law.
3 See Slaughter and Ratner: “Positivism summarizes a range of theories that focus upon describing the law as it is, backed up by effective sanctions, with reference to formal criteria, independently of moral or ethical considerations.” For an in-depth analysis of Kelsen’s position with regard to law and the theory of sources, particularly the general principles of international law, see Kammerhofer, pp.105-112.
4 See generally: Dworkin 1977.
5 See Lachenmann: para 26: “Dworkin not only denies that there can be any general theory of the existence and content of law but he also rejects the institutional focus of positivism. Rather than from legislation, Dworkin proceeds from adjudication. According to legal positivism, Dworkin claims, legal rights do not exist prior to legislation; thus, rights can be taken away by the legislator, leaving the individual exposed to legislative arbitrariness. Thus, in court the individual cannot invoke rights that are rooted in human dignity or equality. By concentrating on legal rules, Dworkin says, positivism fails to acknowledge the role of legal principles that come into play in those ‘hard cases’ that are not clear-cut and not to be solved by mere subsumption. Such principles (e.g. fairness) may guide the judge’s discretion. In Dworkin’s opinion, rules and principles together make up the legal system.”
According to Dworkin, a distinction must be made between three types of norms: policies, legal principles and legal rules. Policies can be characterized as norms aiming to certain objectives. As such, policies represent values which are not legally binding, but provide a normative quality in political and moral terms. With regard to the difference between legal principles and legal rules, Dworkin maintains that both sets of norms "point to particular decisions about legal obligation in particular circumstances, but they differ in the character they give. Rules are applicable in an all-or-nothing fashion." Thus, if the facts to which a rule relates occur, the rule must be applied. Principles seem to be in between policies and rules. They must be taken into account as a consideration inclining in one direction or another. Dworkin concludes that "principles have a dimension that rules do not – the dimension of weight and importance." The factor that sets principles apart from rules, is the qualitative aspect principles have. This means that it is the objective of principles to obtain a certain goal, which may, or may not, be reached to a certain extent. This requirement of degree is crucial to set principles apart from rules according to Alexy. Rules, on the other hand, are "norms that are always either fulfilled or not".

It is submitted that Dworkin’s distinction between policies, principles and rules is useful because it discerns extra-legal considerations (policies) from the law (rules and principles). A principle of law is thus a norm which is not itself a rule but underlies a rule, and explains or provides the rationale for the existence of the rule. Furthermore, principles may be understood as more important norms that rules.

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6 Dworkin, p. 22. The term 'policy' is also generally used to indicate actions by a State that are not necessarily motivated by legal concerns, but by, for example, political motives. Dworkin clearly understands the term 'policies' to refer to extra-legal considerations.

7 Dworkin, p. 24. See also Alexy, p.44 v., Petersen, p. 287-291.


9 Dworkin, p. 26. The distinction between rules and principles as drawn by Alexy is consistent with the distinction drawn by Dworkin, however, he assimilates policies with principles, stating that any norm "is either a rule or a principle." See Alexy, p. 44.

10 Alexy, p. 47-48

11 Alexy, p. 48. See also Gillich, p. 12: “rules and principles contain different levels of intensity in which a specific command is set out or in which a specific aim has to be fulfilled.”

12 Fitzmaurice, p. 7, see also Van Hoof, p. 148.

13 See also Van Hoof, p. 149: “have a wider scope of application and also more far-reaching consequences (...) Principles constitute a more important or fundamental standard than rules.”.
Chapter 2: Principles as a Source of Public International Law

2.2 Principles of International Law

Principles of law play an important role in any legal framework. However, the term ‘principle’ can have a variety of meanings, which poses additional challenges in analysing doctrine, conventional law and case law for principles of international law in general and for principles of IHL. Therefore, this section assesses how the term ‘principle’ is used within international law.

The term ‘principle of law’ is very loosely used in many different contexts, often without taking the distinctions to rules and policies as drawn by Dworkin into account. As a result, it is crucial to discern the exact type of norm States, courts or scholars are referring to when the term ‘principle’ is used. It may be deduced from the scholarly literature on the subject however that the term ‘principles’ is often used for very general norms. This is the first type of principles. The legal content of these principles is not as narrowly and precisely defined as that of rules. On the other hand, these principles are part of the law, and are not as broad as general political or moral concepts (in Dworkins typology: policies). A second type of principles consists of those norms that are deemed particularly important. As a result, the term ‘principle’ may thus signify not only general norms, but may also point to specific norms, or in other words: the most important rules of a certain legal framework. Thirdly, the term ‘principle’ is used to refer to underlying notions that have helped to shape other norms. These principles are thus formative norms that serve as a basis of rules. It is submitted that many writers use the term principle in this last context, but within the categories of norms as discerned by Dworkin, principles of this type would often constitute policies, because they consist of extra-legal considerations. It must be noted that norms that are referred to as ‘principles’ often have characteristics of more than one of these three different types: they may thus overlap and are not mutually exclusive. For example, the principle of distinction is referred to in the realm of IHL as a very important principle, but it is also the basis of specific rules of IHL. Furthermore, the principle of distinction provides a

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14 Concise Oxford English Dictionary, p. 1141: The Oxford Dictionary describes a “principle” as: “(1) a fundamental truth or proposition serving as the foundation for belief or action; or in other words: a rule or belief governing one’s personal behaviour; (2) a general scientific theorem or natural law; and (3) a fundamental source or basis of something.” See also Salmon, p. 876-883, identifying nine different categories of ‘principles’.

15 For example, the ICTY Trial Chamber states that “in the light of the way States and courts have implemented [the Martens clause], this clause clearly shows that principles of [IHL] may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent.” (emphasis added) It is unclear whether the Chamber is referring to principles as general rules of IHL, as opposed to more specific rules; as the more important rules of IHL, or as the primary source, or origin of rules of customary IHL. Prosecutor v Kupreskic et al. 14 January 2000, IT-95-16-T, Trial Chamber, Judgement, para 527.

16 See for example Alexy, p. 45.

17 Van Hoof, p. 149.

18 Nasser, p. 64.

19 See Concise Oxford English Dictionary, p. 1141: [principles are] a fundamental source or basis of something.” See also Salmon, p. 877: “Principe: Cause ou source première des règles”.

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Proportionality in International Humanitarian Law

general distinction between categories of persons and objects, which is further specified in numerous rules.20

2.3 Principles as a Source of International Law

Principles are referred to as one of the sources of international law.21 The sources of international law both serve as the place where international norms are found, as well as how these norms are created.22 There is a clear tendency to accept Article 38 of the Statute of the International Court of Justice as the starting point of the analysis,23 because it includes principles as one of the sources of public international law to be used by the International Court of Justice (ICJ).24 The text of the article places principles on an equal footing with treaties and customary law, as the primary sources of international law. The inclusion of principles of international law in Article 38 of the ICJ Statute is the result of the deliberations in the Committee of Jurists as appointed by the Council of the League of Nations in 1920 to prepare the Statute of the Permanent Court of International Justice (PCIJ).25 The category of general principles of law as codified in Article 38 (1) (c) of the ICJ Statute was at the time of drafting aimed at principles of domestic legal orders, that could be used in international law, after the “discussion moved from considering them in naturalistic overtones to thinking of them in a more positivistic manner as principles of national law, applicable by analogy in inter-State relations.”26

20 The ICJ referred to the importance of the principle of distinction by referring to it as ‘cardinal’, see Nuclear Weapons Advisory Opinion, para 78, p. 257. The principle is however also the origin of specific rules, such as article 44(3) API: “(...) combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself (...)”

21 Scholars writing on the subject of general principles as sources of international law often start by stating that there is controversy on the subject. See, for example, Van Hoof, p. 171, stating that “the general principles as a source of law are probably the most controversial one”, and Degan, p. 1, stating that “[n]o other source of law raises so many doctrinal controversies as the general principles of law “recognized by civilized nations” (...) Writers disagree on the substance and content of general principles of law, as well as their legal scope and relationship with the other main sources, namely treaties and customary law.”

22 Kolb 2006, p. 4.

23 See for example Kleffner 2016, p. 71. For a different view: Besson 2010, p.164, referring to article 38 of the ICJ Statute as “the now largely obsolete but still venerated triad of sources”.

24 Article 38 of the ICJ Statute reads: “(1) The Court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting States; (b) International custom, as evidence of a general practice accepted as law; (c) The general principles of law recognised by civilised nations; (d) Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. (2) This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.”

25 See for descriptions of this process: Degan, pp. 7-54, Van Hoof, pp. 136-139 and Lammers, pp. 59-60.

26 Koskenniemi, p. 402.
The PCIJ and the ICJ have not used the principles of international law extensively, but that does not mean that the principles of international law have played no role at all. The PCIJ applied principles in the Chorzow Factory Case and the Lotus Case. The ICJ applied principles in, for example, the Anglo-Norwegian Fisheries Case, stating that “it does not at all follow that in the absence of rules having the technically precise character alleged by the United Kingdom Government [concerning the course and length of straight base lines], the delimitation undertaken by the Norwegian Government in 1935 is not subject to certain principles which make it possible to judge as to its validity under international law.” In these cases, the principles concerned were principles taken from domestic jurisdictions, ‘elevated’ to international law and applied in specific cases. Courts can use comparative law techniques to identify and apply these principles.

In other cases, particularly the Corfu Channel Case, the Nicaragua Case and the Nuclear Weapons Advisory Opinion, it is not clear whether the ICJ applies principles originating from national law. In the Corfu Channel Case of 1949, the ICJ recognised the existence of “certain general and well-recognized principles, among which elementary considerations of humanity, even more exacting in peace than in war.” The ICJ based State responsibility for Albania on these principles, but did not explain the exact content and scope of these principles in this judgment. Nonetheless, these principles seem of a different character than those applied in the earlier cases at the PCIJ, because these ‘considerations of humanity’ seem to inspire rules of international law (in this case IHL) rather than qualify as firmly established rules of domestic law. The ICJ confirms this in the Nicaragua Case, noting that “principles of humanitarian law [are] underlying the specific provisions [of IHL]” Furthermore, in the Advisory Opinion concerning nuclear weapons, the ICJ notes that States that have not ratified the Geneva Conventions and its Protocols are nonetheless bound to “intransgressible principles of international humanitarian customary law.”

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27 Friedmann explains why the PCIJ and the ICJ have made very little practical use of general principles. Firstly, many cases before the courts dealt with solving disputes concerning diplomatic relations between States in which principles did not play a role. Secondly, international judicial institutions, such as the ICJ, depend for their jurisdiction, as well as for the acceptability of their decisions and opinions, upon the consent of States. The Courts therefore need to be extremely careful in applying principles of international law, in order to avoid being “accused of unauthorized exercise of international legislation.” See Friedmann, p. 280.

28 For a thorough survey of the practice of the PCIJ and the ICJ, see Degan, p. 41-53.

29 Factory at Chorzow, Merits, Judgement No. 13, PCIJ Series A, No. 17 (1928), pp. 47-49.

30 S.S. Lotus Case, PCIJ Series A, No. 9 (1927), p. 31.


32 Many commentators, for example Bin Cheng, hold the view that the principles as put down in Article 38 (1) (c) exclusively refer to principles originating from national law. See for an overview: Lammers, p. 57.

33 Bassiouini p.773. See also Lammers, p. 62 and Van Hoof, p. 32.

34 Corfu Channel Case, Judgment of April 9th, 1949, ICJ Reports 1949, p. 22 (hereinafter referred to as the "Corfu Channel case").

35 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment (hereinafter referred to as "the Nicaragua Case"), ICJ Reports 1986, para 215 on p. 112.

It may thus be suggested that the principles that are mentioned in Article 38 (1) (c) of the ICJ Statute also include principles of international law that do not originate from domestic, but instead from international law. The question then arises whether these principles, which apply in a particular branch of international law, may be understood as an independent source of that branch of law, or that the ICJ meant these principles to be included into the category of customary law. Some commentators as well as at least one State seem to accept principles as a separate source of law within a particular branch of international law. This however raises the issue of how principles as a source of international law relate to treaty law and international customary law and which role these principles play within a particular branch of international law.

2.4 Three Roles for Principles of International Law

The types of principle as identified in Section 2.2 already indicate the roles these principles may have. First, as a general norm, principles play the role of an interpretative tool. Courts may use the principles of international law to interpret existing rules of international law, be it customary or treaty rules, in accordance with the general rules for interpretation of international law. The principles may clarify obscure or uncertain elements in rules to determine the scope of rights and legal duties, for example through the principle of...
good faith or the principle of equitable application of the law.\(^{42}\) Principles can thus help interpreting terms "not susceptible to an ordinary or common meaning interpretation, or as a means for ascertaining the intent of the parties."\(^{43}\)

As a second role, principles may be used as a gap-filler when there is no rule of customary or treaty law available. This was the function the drafters of the PCIJ Statute had in mind when they inserted the principles of international law as one of the sources to be applied by the court.\(^ {44}\) The principles of international law reinforce weak points of the law in this role or bridge gaps in general international law and in between specific branches of international law.\(^ {45}\) This role of the principles of international law to fill gaps in the law is essential for international law to be applied as a coherent legal system. As an example, when a completely new type of weapon is developed, there are usually no specific rules of treaty law governing the use of that weapon. Nonetheless, the principles of IHL may be used to assess whether the use of such weapons would be in accordance with IHL.\(^ {46}\) In the gap-filling role, these principles may subsequently become the foundation of other rules, be it treaty rules or rules of customary international law.

It is evident that principles used to interpret the law and fill gaps, are those that are seen as the most important principles of international law. This brings us to a possible third role of principles of international law: a corrective role. According to some writers, the principles of international law can consist of such important norms, that they set aside and be a modifier of treaty rules and rules of customary international law.\(^ {47}\) In this role, principles would function as a primary source of international law, embodying an equal or even a higher order of norms than custom and treaty law. This corrective role is however difficult to square with the predominant consensual character of norms of international law as embodied in treaty law and customary law. Furthermore, this risks bringing subjective natural law concepts into the law, which could undermine the certainty of the law as expressed in treaty law and customary law.\(^ {48}\)

This brings us to the relation between principles of international law and the other main sources of international law: treaty law and custom. The majority view among commentators is that the principles of international law are a subsidiary source of international law, while treaty law and custom are the two primary sources, because these manifest the consent

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42 Lammers, p. 64-65.
43 Bassiouni, p. 800-801. See also Bin Cheng, p. 390, who notes that the principles of international law are 'guiding', and as such serve international judges to interpret and apply rules of international law.
44 Lammers, p. 64.
45 Kolb 2006, p. 31.
46 See also article 36 AP I for a confirmation of this in treaty law.
47 See for example Bassiouni, p. 776 and 801, Favre and Dahm, as quoted by Lammers, p. 65, and Kolb 2006, p. 32-33. Verdross claimed as early as 1935 that general principles could set aside treaty provisions or customary rules. Verdross, p. 204-205, see also Simma and Alston, p. 104-105. Lammers, however, denies the existence of a corrective function in which principles of international law would prevail over conflicting rules of conventional or customary international law and may modify these rules or even set them aside. At the same time, however, Lammers notes that this does not apply to rules of ius cogens.
48 See for example Koskenniemi, p.402, who looks at the 'elementary considerations of humanity' as introduced by the ICJ in the Cofru Channel Case in the context of customary international law.
of States to their rules in a more apparent manner. Some writers however regard the principles of international law as equivalent to treaties and customary law as far as their status of international law is concerned. This latter opinion corresponds to the text of article 38 of the ICJ Statute, but in practice, it is true that almost all rules of international law are contained in treaties and customary international law. However, it is submitted that through the roles set out above, as confirmed by the ICJ, the principles of international law have the potential to play an important supporting role.

If principles of international law are perceived as a separate source of international law, this does not mean that they operate independently from customary international law and treaty law. On the contrary, there is a very close relation between these three sources. Many treaty rules have become part of customary law, and the other way around. Thus it may be argued that some principles of international law have similarly been incorporated in treaties or are recognised as rules of customary law. Clear expressions of opinio juris regarding a certain norm without any supportive State practice may evidence an existing principle of international law. Indeed, it is submitted that principles of international law may have developed into rules of customary law because States have based their practice on pre-existing principles. This customary rule may subsequently have been codified in treaty law. The inclusion of such principles in treaty law may be understood as confirming the existence of the norm as a principle and, conversely, the principle as a legal norm. In practice, however, principles of this category are invoked and applied by reference to their codification as a treaty rule for reasons of clarity and certainty of the law. Thus, there is an intertwining relationship between principles, customary and treaty law where the one may be the evidence or the origin of the other. There may perhaps not be much residual value in establishing norms as principles of international law when these have also been codified in treaty law and are recognised as rules of customary international law. However, depending on the type of principle of international law, it is submitted that, for example in light of their gap-filling role, principles of international law may still be relevant in some situations. Also, if the principles are not accepted as an independent source of international law, the ICJ would at least on some occasions be faced with the problem of having to declare a non

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49 See for example Lammers, p. 66. For an overview of writers that concur with him, see note 72 on that same page. Degan confirms, after reviewing many cases of the International Court of Justice, the conclusion by Max Soerensen of 1946, that the general principles of law in relation to the two other main sources of law (treaties and custom) have a subsidiary character: “the present level of development of customary law and of conventional relations between States scarcely make necessary the application of these principles as a distinct source, that is to say in cases of genuine gaps (lacunae) in customary and conventional international law. In addition, the maxim lex specialis derogat legi generali, which is itself a general principle of law, prevents a more frequent use of these principles in judicial practice. On the other hand, the [ICJ] was sometimes eager to resort to general principles in order to confirm or verify its judicial considerations and motives within its large discretionary power.” See Degan, p. 53. For another discussion on this subject, see Bassiouni, p. 781-783.

50 Bassiouni, p. 784-785.

51 According to article 38 of the ICJ Statute, judicial decisions and the teachings of the most highly qualified publicists of the various nations, are subsidiary means for the determination of rules of law. They too influence the content of the rules in the other sources of international law.

52 Bassiouni, p. 768-769 and 800-801. See also Simma and Alston, pp. 202-203 and Petersen, p. 277.

53 See also Chapter 3.
As a result, it is submitted that in the absence of the principles of international law, the international legal order would also lose its coherence as a system of legal norms.

2.5 Conclusion

From the analysis in this chapter, it occurs that there are different types of principles of international law, playing different roles. Potentially, therefore, proportionality in IHL may be perceived as one or more of the following: first, as a principle applied in international law because it is elevated from domestic law. Alternatively, the principle of proportionality may be understood to constitute an independent source of law within a specific branch of international law, such as IHL. Furthermore, it may be that proportionality is referred to as a principle because it merely underlies a specific rule of IHL, and does not apply as a legally binding norm, but as a ‘policy’. Lastly, proportionality may be labelled as a principle because it is a particularly important norm within the branch of law in which it occurs, in this case IHL. In order to determine where in these categories the principle of proportionality fits in, it is necessary to analyse the substance of principles of IHL, their content and how they may be used. This is the subject of the next chapter.

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54 Degan, p. 54.
Chapter 3
Chapter 3: Characteristics of IHL Principles

“It is increasingly believed that the role of international law is to ensure a minimum of guarantees and of humanity for all, whether in time of peace or in time of war, whether the individual is in a state of conflict with a foreign race or with the community to which he belongs.”

3.1 Introduction

This chapter assesses the nature of the principles of IHL, including the principle of proportionality. In order to facilitate the identification of the category of legal norms in which the principles of IHL must be placed, Section 3.2 first discusses the Martens Clause, which plays a role in the assessment of the relevance of certain types of principles of IHL. Section 3.2 then discusses a method to determine principles of IHL, based upon an assessment of how the principles of IHL may be identified. The approach described in Section 3.2 is used to assess in Section 3.3 which principles of IHL are recognised. After this analysis, the focus turns to the applicability of principles of IHL in Section 3.4. This section assesses the situations in which there may be a role for principles of IHL. Section 3.5 then describes three roles principles of IHL play.

3.2 A Method to Determine Principles of IHL

It is examined in Chapter 2 which types of principles of international law exist, and which roles these principles may play. This chapter sets out to explore how different types of principles may be identified within the field of IHL. For the category of principles that is elevated from domestic law, the method used to identify them is straightforward. In order to see whether a principle may be applied in international law as it is applied in the domestic law context from which it originates, comparative law analysis can be used.

Nonetheless, some authors have expressed a view on this issue. One acceptable approach, it is submitted,
to prove the validity of a principle of international law within a branch of international law is to assess formless inter-State consent. This consent may prove the acceptance of a norm on the international legal level. This consent may be derived from a variety of judgements, authoritative statements, declarations of States, resolutions of international bodies and other sources. Relevant examples include references to resolutions or statements of the UN General Assembly or other international institutions that may represent significant portions of the international legal community.

The Martens Clause may be interpreted as outlining the sources from which IHL must be derived. Although there is no universal agreement on how the Martens Clause must be understood, it is submitted that the present significance of the Clause has become detached from its original function and underlines its importance for the application for some types of principles of IHL. The Martens Clause was initially incorporated into the preamble of the 1899 and 1907 Hague Conventions. As such, according to Kalshoven, it served initially as nothing more than an ‘exhortation’, because a preamble does not possess legally binding power by itself. But the Martens Clause has since been included in the main text of many IHL treaties. Therefore, the Martens Clause is now a legally binding rule, at least for the parties to these treaties. Furthermore, the Martens Clause itself is also regarded as a rule of customary international law. It is common to use the wording of the Martens Clause as it is formulated in article 1 (2) of Additional Protocol I:

“In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.”

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5 Van Hoof, p. 147.
6 Petersen, p. 308, see also Simma and Alston, p. 102.
7 Van den Boogaard 2013, pp. 18-20.
8 See for example Cassese 2000 and Giladi.
9 The Martens Clause first appeared in the preamble to the 1899 Hague Convention II. It was the result of the negotiations led by Friedrich Fromhold Martens, who was part of the Russian Delegation to the Peace Conference in The Hague. The objective of the preamble was to solve a dispute between some smaller States, in particular Belgium, and a number of larger States such as Prussia and Russia on the issue of the status of civilians who took up arms against occupying forces. The discussions in 1899, led by Martens, were the continuation of earlier discussions at the Conference of Brussels in 1874. To solve the deadlock, Martens accepted a Belgian proposal, which was subsequently included in the preamble of the Convention. See generally Kalshoven 1971, pp. 57-62, Kalshoven 2006, p. 48-52, Ticehurst, p. 125, Greig, p. 48-49, M.N. Hayashi 2008, p. 136, Meron 2000, p. 79-80, Meron 2006, p. 17-19, Cassese 2000, p. 187-216 and Salter, p. 405.
11 Miyazaki, p. 436.
12 Skordas, p. 325.
13 As Pustogarov notes on the adjusted language of the Martens Clause in AP I: “Reckoning up the comparison, one can assert that Protocol I changed the Martens clause only in one point: it omitted the notion of “civilized nations”. In other respects, it replaced outdated words with the language of contemporary legal parlance (“basic tenets” with “principles”, “belligerents” with “combatants”). The replacement of the term “population” by “civilians” did not change the content of the notion. But it has a definite meaning for humanitarian law, which attempts strictly to distinguish the civilian population and individual
The question is how the Martens Clause must be interpreted in light of the sources of international law. When the Martens Clause is understood in a narrow sense, all it means is that in addition to treaty law, customary international law is also a source of international law obligations. Indeed, noted experts in IHL, such as Dinstein, and Greenwood, adhere to this view and hold that the Martens Clause is exclusively referring to customary international law. The ICRC Commentary to Additional Protocol I provides a wider interpretation, holding that the Martens Clause means that “something which is not explicitly prohibited by a treaty is not ipso facto permitted.” The broadest interpretation is that according to the Martens Clause, in addition to treaty law and customary international law, conduct in armed conflicts is also subject to the principles of IHL. It is submitted that this interpretation is most in accordance with the findings above in Chapter 2 that there are types of principles of international law which may play a role to fill gaps in a specific branch of international law. This last approach also points to the possibility to interpret the Martens Clause as a reference to the sources of IHL. As such, it is submitted, the Martens Clause is another way to phrase what Article 38 (1) (c) also provides: if there is no other law available, i.e. a rule of treaty or customary international law, the principles of international law must be applied. Fortunately, there are today many more rules codified in the IHL treaties than at the time the Martens Clause was drafted. The Martens Clause nonetheless still indicates that the principles of IHL may have a residual role as a source of legal obligation for parties to armed conflicts, in cases where conventional and customary law fail to provide guidance. The question is then how these principles may be identified.

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15 O’Connell 2013, p. 34, who holds that the suggestion that the Martens Clause goes further than customary international law “is impracticable since the ‘public conscience’ is too vague a concept to be used as the basis for a separate rule of law and has attracted little support”.
16 Sandoz et al., p. 39.
17 Ticehurst, p. 125.
18 Based on the reference to the Martens Clause by the International Court of Justice in both the Nicaragua Case and the Nuclear Weapons Advisory Opinion, Hayashi points to the possible conclusion that the ICJ was referring to the general principles of international law and not customary international law: "because of the way and the location in which the Martens Clause is referred to in these cases, the Martens Clause looks like as if it is the direct source of the identified rules. If so, the identified rules are norms that are not based on custom. (...) Customary international law as a source of obligations is dislocated by the Martens Clause, and possibly by the elementary considerations of humanity, and its place is filled by general principles they themselves embody." See M.N. Hayashi 2008, p. 149. Thus, the Martens Clause may be interpreted as a procedural rule, pointing to the third source of international obligations, additional to conventional and customary international law.
19 In a case before the United States Military Tribunals at Nuremberg, Krupp and others, the Tribunal stated: “The Preamble is much more than a pious declaration. It is a general clause, making the usages established among civilized nations, the laws of humanity and the dictates of public conscience into the legal yardstick to be applied if and when the specific provisions of the Convention and the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare.” Krupp and others, 15 Ann. Dig. 620, 622 (U.S. Mil. Trib. 1948), see also Meron 2006, p. 19, and Miyazaki, who considers the general principles of law to be one of the sources of international law, and “the principles of the law of nations as mentioned in the Martens Clause to be precisely a part of such general principles of international law and a source of the law of armed conflicts.” See Miyazaki, p. 437.
It is suggested that principles of international law “must pass through a process of objectification, either as precedents in judicial practice or through codification, before the principles have become positive rules of at least some legal branches.” This seems an acceptable approach, because only in situations where norms have successfully passed through such a process, these principles of international law become part and parcel of positive law. Norms can thus only attain the standing of a principle of international law if they have been called upon by the parties to an international legal procedure, or are codified in a treaty. Thus, conversely, if a norm has not, it could never be recognised as being part of the law even when it would be applied in practice. This statement would ignore customary law and principles as part of international law. It is self-evident that law in general is not only applicable in a courtroom. States involved in disputes, which are to be solved on the basis of international law, may also settle their differences outside the courtroom of the ICJ or another tribunal, through the application of customary rules or principles of international law. International law is - as is law in general - particularly designed to regulate affairs in actual and factual situations. Some authors maintain that for the drafters of the ICJ Statute, the decisive point was that principles were not to be derived from mere speculation: objectification of the norm by States or international judges should take place before a norm could be accepted as a principle of international law. Principles of international law may thus also be derived from a more implicit consensus of States and international institutions. This implicit consensus could be derived from international case law, resolutions of the General Assembly, and other types of soft-law, such as preambles of multilateral treaties. The principles that are derived in this manner are distinct from customary law in the sense that these principles do not necessarily require the proof of both State practice and opinio juris. The existence of clear opinio juris alone may in some views be sufficient to establish this type of principles of international law. It must be noted that a universally agreed and clear methodology to identify a principle of international law, is lacking. It also seems, however, that this is not necessarily problematic. It is submitted that there are different ways acceptable to establish that sufficient formless inter-State consent exists to bring a principle into existence which is legally binding within a branch of international law. But caution is necessary: it must be prevented that the existence of a certain principle of international law is identified too easily. That situation would seem fertile ground for misuse of this category of legal norms, pretending to turn rules de lege ferenda into lex lata. For principles which bind States, they must consist of legal norms, not of mere underlying considerations.
Frits Kalshoven proposed a method to identify principles of IHL. This method relates to principles in the sense of article in article 38 (1) (c) of the ICJ Statute, as principles of international law that apply as substantive legal norms within one specific branch of international law, in this case IHL. The test Kalshoven proposes has three components to determine whether a norm could be accepted as a principle of IHL. In his view, a norm may amount to an accepted principle of IHL when it reflects “some sort of communis opinio” on the basis of three criteria: (1) there is a certain degree of support from States, as evidenced for example in their military manuals; (2) the norm reflects a “widely recognised core value of humanity” and (3) the norm “enjoys broad support in informed international discourse.”

Kalshoven derives these components of the formless consent of States and other actors of international law from the three sources listed cumulatively in the Martens Clause (established custom; the principles of humanity and the dictates of public conscience).

“A certain degree of support from States”

It may be noted that the Kalshoven-test attributes major importance to the behaviour of States, albeit that it does not require the fairly high threshold of State practice which is necessary to establish the existence of a rule of customary international law. The ‘usages established among civilised nations’ that the Martens Clause refers to should be understood in a more limited way. This first requirement should therefore take away possible critique States may have that the formation of international law is taken totally out of their hands by admitting that principles of international law form a third source of international law, separate from treaty law and custom. This requirement, it is submitted, is a clear signal that all behaviour a States put on display, including policy statements, military manuals, memoranda of understanding or other soft-law sources, may be taken into account when the existence of a principle of international law is determined. This also includes the voting behaviour of States in international forums, most notably the General Assembly of the United Nations, but also the International Conference of the Red Cross and Red Crescent.

“Widely recognised core value of humanity”

The second requirement Kalshoven mentions refers to the moral source of a norm. This is a clear expression of natural law influence on the formation of principles of international law. The aim of the norm should be the protection of the well-being of humans. In terms of IHL, this may be understood as a requirement that the norm should mitigate human suffering during armed conflict or, in the words of the Martens Clause, be in accordance with ‘the laws of humanity’. This is a clear reference to the ICJ Corfu Channel Case. The ‘recognition’ of the
‘core value’ of principles of IHL may thus also be found in judgements of international courts. Regrettably, this second requirement fails to reiterate that IHL norms must also include the other side of the coin: considerations of military necessity. Nonetheless, the assertion by Kalshoven is correct in the sense that the moral source of some norms of IHL is indeed only found in considerations of humanity. When this second requirement is compared to the typology of principles discerned in Chapter 2, it seems that for IHL, it means that the formative principles (or ‘policies’ according to Dworkin) must be the basis of a principle of IHL.

“Broad support in informed international discourse”

The third component of the Kalshoven-test for principles of IHL refers to what the Martens Clause calls ‘the dictates of the public conscience’. It is clear that this may consist of many different components. Here, the consent of States for the formation of rules of international law is totally absent, and the major role that non-state actors can play in the formation of international law is revealed.\(^\text{26}\) However, the influence of other factors of importance on the international plane may prove to be important, but not sufficient to independently create an obligation under international law. For IHL, obviously, the International Movement of the Red Cross and Red Crescent will be important. Statements of the International Committee of the Red Cross may also play a major role. Additionally, for example, resolutions or statements of the International Conferences of the Red Cross and Red Crescent, in which the ICRC, national societies, their international federation and also States participate, can be a clear sign of a developing or existing principle of IHL. But also other non-governmental organisations may play a role, such as Amnesty International and Human Rights Watch, or a coalition of a large number of organisations.\(^\text{27}\) Finally, Kalshoven suggests that also the academic world, as academic authors may be presumed to be ‘informed’, may contribute to identifying this broad support.\(^\text{28}\)

The Kalshoven-test to determine principles of IHL reflects some similarities to the sources of international law enumerated in the ICJ Statute. The first component requires consent of States similar to that which is the basis of treaty law. As Kalshoven notes, this consent may become exposed by assessing military manuals of States in which they address principles of IHL. Secondly, the widely recognised values that must underpin a principle seem to point at the underlying motivations for legal norms, similar to Dworkin’s category of policies. These may be found by looking at judgements of international courts. Thirdly, the component of ‘broad support in informed international discourse’ seems to point to a

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\(^\text{26}\) Skordas maintains that the ICTY has acknowledged this in the Kupreskic Case and is also supported by the dissenting opinion of Judge Shahabuddeen. See Skordas, p. 321.

\(^\text{27}\) It may be argued that the International Campaign to Ban Landmines constituted proof for the existence of broad support in informed international discourse for the banning of anti-personnel landmines.

\(^\text{28}\) Kalshoven 2006, p. 59.
basis of agreement between an informed audience, as some sense of agreement of opinion which is not restricted to those of States, in other words some sort of 'opinio juris-light'. This component seems to reflect the increasing role of international actors other than States in a globalising world, including noted experts who have written treatises on IHL. It is submitted that this Kalshoven-test provides a workable method to assess inter-State consent and identify principles of IHL. Section 3.3 applies this test for the purpose of this study in order to determine whether the principle of proportionality in IHL is among the principles that may qualify as a principle of IHL.

3.3 The Principles of IHL

States, international courts and notable writers identify different norms as ‘principles of IHL’. In addition, the number of principles identified differs to a large extent. There is no “official list of core principles” of IHL. Nonetheless, as a guideline for behaviour in armed conflict, ‘principles’ were recognised more than 150 years ago. For example, the 1863 Lieber Code notes that during an occupation, the “principles of justice, honor and humanity must be applied”. The Martens Clause as noted above, refers to ‘principles of humanity’ in its modern codification. The Geneva Conventions note in the articles about dissemination, that the ‘principles’ of the Geneva Conventions must be instructed to the members of the military as well as to the civilian population. Consequently, as a minimum, it seems that States have a duty to identify which IHL principles must be included in their IHL dissemination programs. Indeed, Corn rightly points out that although the principles are the foundation of the universally accepted and codified IHL rules, it is “impossible to transform every soldier into a LOAC expert. Instead, compliance is built upon a foundation of core principles.” As will be shown below, many States have identified a set of principles of IHL in their military manuals. Furthermore, the Statute of the International Criminal Court (ICC) explicitly refers to principles as part of the applicable law that the ICC shall apply.

A preliminary issue is the number of IHL principles that exist. There is no universal agreement on this issue: for example, the International Court of Justice mentions in the

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29 See Corn et al., p. 112, proposing a similar methodology to identify principles of IHL.
30 Solis, pp. 268-269 and 306.
31 Lieber Code, article 4.
32 Article 4(2) API.
33 Article 47 GCII, article 48 GCIII, article 127 GCIV. Interestingly, the dissemination article in API (article 87 API) and APIII (article 7 APIII) refer to secure knowledge of the “instruments” rather than ‘principles’. Article 19 APIII simply states that “[t]his Protocol shall be disseminated as widely as possible.”
34 Corn et al., p. 110.
35 Article 21 (Applicable law) of the ICC Statute reads:
1. The Court shall apply:
   (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
   (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
Nuclear Weapons Advisory Opinion that there are only two ‘cardinal’ principles of IHL: distinction and the prohibition to cause unnecessary suffering to combatants.\textsuperscript{36} McDougal and Feliciano stated in 1961 that it “is commonly stated in the learned literature that three basic principles underlie the more detailed prescriptions of combatant law: the principle of military necessity, the principle of humanity and the principle of chivalry.”\textsuperscript{37} Pictet\textsuperscript{38} and Chetail,\textsuperscript{39} on the other hand, identified a rather high number of principles of IHL. One writer even notes that since the Geneva Conventions have been universally ratified, the question may be raised whether all their articles constitute principles of IHL.\textsuperscript{40} This disagreement on the number of principles of IHL serves as a caution that any attempt to identify those norms that qualify as principles of IHL, including their substantive content, is contingent on the definition of an IHL ‘principle’ by the respective State, court or commentator. However, as this section demonstrates, there is agreement on the classification of a number of norms as principles of IHL. This section takes stock of these principles of IHL, on the basis of a review of military manuals of a number of States, a number of judicial opinions of international courts, a review of doctrine and other sources of State practice.

3.3.1 IHL Principles Identified by States

States may express the principles of IHL they recognize in their military manuals.\textsuperscript{41} Since not all States have published military IHL manuals and those that are available are furthermore not all translated into a language understandable to the author, the review in this study is restricted to a review of the military manuals of the following seven States: Canada,\textsuperscript{42}
Germany, 43 Israel, 44 the Netherlands, 45 Norway, 46 the United Kingdom, 47 and the United States. 48 It follows from this review that States view the principles mostly reflective of the source of the rules of IHL to which they are bound. For all seven States, this applies in

43 Neither the 1992, nor the 2013 version of the German Military Manual explicitly identify principles of IHL as such. However, following Section III on the ‘Legal Basis’ of IHL, the Manual of 2013 notes in Section IV on ‘Military Necessity and Humanity’ that “[a]ccording to the principle of military necessity, all military measures are permissible in armed conflict which are required for the successful execution of military operations in order to engage an enemy, provided that these measures are not forbidden by LOAC. (…) LOAC is a compromise between military and humanitarian requirements. Its rules take account of both military necessity and the dictates of humanity. Considerations of military necessity can therefore not justify a departure from the rules of humanitarian law; to seek a military advantage using forbidden means is not permissible.” See: Law of Armed Conflict – Manual, p. 25.

44 According to the Israel Defense Forces, “Underpinning the Laws of Armed Conflict are four basic principles that must be implemented in each context: military necessity, distinction, proportionality and humanity.” See the 2006 Israel Military manual: “Rules of Warfare on the Battlefield, Military Advocate-General’s Corps Command, IDF School of Military Law, Second Edition, 2006” Elsewhere, the four principles are further specified: “[t]he IDF closely adheres to the four fundamental principles of the laws of armed conflict: military necessity – permitting the use of force as long as it is in order to achieve a military objective; distinction – requiring the distinction between combatants and military targets, which may be attacked, versus civilians and civilian objects, which may not be intentionally attacked, and to the extent possible, should not be harmed during the hostilities; proportionality – which acknowledges the possibilities that civilians and civilian objects may be harmed (as collateral damage), as long as the expected collateral damage is not excessive in relation to the concrete and direct military advantage anticipated from the attack; and humanity – which provides the obligation to avoid actions that are liable to cause superfluous injury or unnecessary suffering. The effects of the hostilities on the civilian population should be minimized as much as possible.” See Efroni, p. 82.

45 The Handbook on international humanitarian law, VS 27-412/1, published in 2005 by the Royal Netherlands Army identifies five principles of IHL. These five are the principles of military necessity, humanity, distinction, proportionality and the principle of chivalry and good faith. See: VS 27-412/1, pp 30-36. This author was secretary and member of the committee of military lawyers responsible for drafting this military manual from 2000-2003. The Manual is currently under review. The manual explains that the principles are of utmost importance to a full understanding of the rules of IHL, as well as the basis for IHL rules. For that purpose, the principles are formulated “generally abstract.” See VS 27-412/1, p. 36.

46 The draft-Military Manual of Norway notes in the chapter on ‘basic’ principles, that IHL “is based on four principles: distinction, military necessity, humanity and proportionality.” It also notes that the principles constitute customary law, and, referring to the Martens Clause, play an important role when IHL rules lack clarity or in case States is not bound by a treaty rule. Furthermore, the manual notes that the specific IHL rules are “different expressions of the principles” and although there is a certain overlap between the principles, they “together constitute the heart” of IHL for all types of armed conflicts. See: Draft-English translation of the Norwegian military manual, p. 19-20.

47 The UK Manual of the Law of Armed Conflict was published in 2004 and identifies four “fundamental principles [that] still underlie the law of armed conflict.” These are the principles military necessity, humanity, distinction and proportionality. The UK Manual identifies only treaty law and international customary law as sources of IHL. See: UK Manual, p. 21. Also, note 1 on page 21 of the Manual states that the right of the parties to the conflict to choose methods or means of warfare is not unlimited is a “general principle firmly rooted in the law of armed conflict”

48 Chapter II of the revised Department of Defense Law of War Manual contains a description of five principles: military necessity, humanity, proportionality, distinction and honor. The reference to principles in the Law of War Manual is not a novelty in the practice in the United States. In fact, the Lieber Code already contained references to principles. Furthermore, the 1956 US Army Field Manual also notes that IHL “places limits on the exercise of a belligerent’s power in the interests mentioned in paragraph 2 and requires that belligerents refrain from employing any kind or degree of violence which is not actually necessary for military purposes and that they conduct hostilities with regard for the principles of humanity and chivalry.” Department of the Army Field Manual, The Law of Land Warfare, (FM 27-10), July 1956. In the current version of the DOD Manual, it is noted that military necessity, humanity and honor “provide the foundation for other law of war principles, such as proportionality and distinction, and most of the treaty and customary rules of the law of war.” The Manual notes furthermore, referring to Article 38 (1) (c) of the ICJ Statute (in note 2) and the Martens Clause (in note 3) that these principles must be understood as “[g]eneral principles of law common to the major legal systems of the world [and that these principles] are a recognised part of international law” With regard to the use of the principles, the Manual notes that the principles are the basis of the specific rules of IHL, and because of their more general formulation, may lead to varying interpretations in specific circumstances. They thus “(1) help practitioners interpret and apply specific treaty or customary rules; (2) provide a general guide for conduct during war when no specific rule applies; and (3) work as interdependent and reinforcing parts of a coherent system.” See: DOD Law of War Manual, (3rd revised version, December 2016), pp. 50-69, available online on https://www.hsdl.org/?view&did=797480.
particular to the principles of humanity and military necessity, and in some States also to the principle of honor and good faith, which is sometimes also referred to as chivalry. Six out of the seven military manuals recognise distinction and proportionality as principles. In addition, the North Atlantic Treaty Organisation (NATO), as a coalition of 28 States, discerned four principles in its Allied Joint Doctrine for Joint Targeting: military necessity, humanity, distinction and proportionality.

3.3.2 IHL Principles Identified by International Courts

The most prominent international court that has dealt with principles of IHL is the International Court of Justice (ICJ). The ICJ mentions the principles of IHL in the Corfu Channel Case, the Nicaragua Case and the Nuclear Weapons Advisory Opinion. In the Corfu Channel Case, the ICJ refers particularly to the principle of humanity. In the Nicaragua Case, the ICJ repeats this and refers to precautionary obligations that follow from it.

The ICJ expanded on this in the Nuclear Weapons Advisory Opinion in 1996, clarifying that even those States that have not ratified the Geneva Conventions and its Protocols are nonetheless bound to fundamental rules of IHL because they constitute “intransgressible principles of international humanitarian customary law.”

The ICJ had the task in the 1996 Nuclear Weapons Advisory Opinion, to “identify the existing principles and rules, interpret them and apply them to the threat or use of nuclear weapons.” As a result, at least a number of principles of IHL were identified by the ICJ, but arguably not all of them. The ICJ clearly looked at the principles of IHL as part of customary law, and stated that:

“The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian
objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering.

In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use. In addition, the ICJ referred in its Nuclear Weapons Advisory Opinion to three other principles. First, referring to its ruling in the Corfu Channel Case, the ICJ seems to refer to the principle of humanity, noting that the high rate of ratifications of the Geneva Conventions is due to the fact that "a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity'". The principles of military necessity and proportionality are furthermore referred to in the discussion dealing with the rules concerning the protection of the environment during armed conflict in the pursuit of legitimate military objectives. The ICJ also refers to the application of the principle of proportionality for the specific issue of determining the legality of belligerent reprisals.

**International Criminal Courts and Tribunals**

Furthermore, the International Criminal Tribunal for the Former-Yugoslavia (ICTY), the Special Court for Sierra Leone (SCSL) and the International Criminal Court (ICC) have addressed the principles of IHL in order to inform their respective criminal prosecutions of violations of IHL. The ICTY Appeals Chamber notes in the Tadic Jurisdiction Decision that “customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.”

In the Kupreskic Case, the Trial Chamber uses the term ‘principle’ in the context of IHL many times, to express the foundational character of certain norms. For example, the Trial Chamber notes that “it is now a universally recognised principle, recently restated by the International Court of Justice, that deliberate attacks on civilians or civilian objects

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57 Nuclear Weapons Advisory Opinion, para 78, p. 257.
58 Corfu Channel Case, p. 22: "certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war".
61 Nuclear Weapons Advisory Opinion, para 46, p. 246.
62 Tadic Appeals Chamber, Judgement, para 134 (emphasis added).
are absolutely prohibited by international humanitarian law" and "[i]n the case of attacks on military objectives causing damage to civilians, international law contains a general principle prescribing that reasonable care must be taken in attacking military objectives so that civilians are not needlessly injured through carelessness. This principle, already referred to by the United Kingdom in 1938 with regard to the Spanish Civil War, has always been applied in conjunction with the principle of proportionality (...). It thus seems that the Trial Chamber describes distinction, precautionary measures and proportionality as principles of IHL. However, in later cases, the ICTY translates the precautionary measures principle into a more general ‘principle of protection’. In the Galic case, the Appeals Chamber held that “[t]he principles underlying the prohibition of attacks on civilians, namely the principles of distinction and protection, have a long-standing history in international humanitarian law. These principles incontrovertibly form the basic foundation of international humanitarian law and constitute “intransgressible principles of international customary law.” Furthermore, the Chamber stated that “[o]ne of the fundamental principles of [IHL] is that civilians and civilian objects shall be spared as much as possible from the effects of hostilities. This principle stems from the principles of distinction and the principle of protection of the civilian population.”

In subsequent judgements, different chambers of the ICTY have referred to three ‘fundamental’ principles of IHL: the principles of distinction, precaution, and protection, lastly in the Karadzic Trial Chamber Judgment of 24 March 2016. This latter principle is described “as referred to in Article 51(i) of Additional Protocol I and Article 13(i) of Additional Protocol II, [and] ensures that the civilian population and individual civilians enjoy general protections against dangers arising from military operations.”

The Special Court for Sierra Leone (SCSL) includes as the sources of law on which basis it prosecutes “(ii) where appropriate, other applicable treaties and the principles and rules of international customary law [and] (iii) general principles of law derived from national laws or legal systems of the world, including, as appropriate, the national laws of the Republic of Sierra Leone, provided that those principles are not inconsistent with the Statute, the Agreement, and with international customary law and internationally recognised norms and standards.”

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63 Kupreskic Trial Chamber, Judgement, para 521. (emphasis added).
64 Kupreskic Trial Chamber, Judgement, para 524. (footnotes omitted, emphasis added).
65 Galic Appeals Chamber, Judgement, para 87, on p. 40 (footnotes omitted).
66 Galic Appeals Chamber, Judgement, para 190, on p. 83 (footnotes omitted).
67 Galić Trial Judgement, para. 56; Dragomir Milošević Trial Judgement, paras. 942, 951. See also Kordić and Čerkez Trial Judgement, para. 328; Kordić and Čerkez Appeal Judgement, paras. 47–68.
68 Karadzic, Trial Chamber, Judgement, footnote 1484, para 450, p. 174.
69 Karadzic, Trial Chamber, Judgement, footnote 1484, para 450, p. 174. See also Dragomir Milošević Trial Judgement, Case No. IT-98-29/1-T, 12 December 2007, para. 941, p. 308: “The principle of protection ensures that the civilian population and individual civilians enjoy general protection against dangers arising from military.”
In the Taylor Case, the Appeals Chamber of the SCSL acknowledges the principle of distinction, referring to both the ICJ as the ICTY, affirming that “[t]he prohibition and criminalisation of attacks against civilians is one of the essential principles of international humanitarian law.” As a criminal court, it is unsurprising that the SCSL expands the principle of distinction to the criminalisation of its violation, however this is a factor that is usually treated separately in the context of the enforcement of IHL.

In the case concerning the Armed Forces Revolutionary Council (AFRC), the SCSL Trial Chamber refers to ‘principles of IHL’, when it discusses the distinction between civilians and a person hors de combat. Furthermore, the SCSL Trial Chamber refers to the “the principles of humane treatment.” This is a clear reference to the principle of humanity as embodied in common Article 3 of the Geneva Convention, that contains the minimum protection of persons during non-international conflicts.

In the Katanga Verdict, Trial Chamber II of the ICC notes the IHL principles of distinction, proportionality and arguably precaution. The Trial Chamber mentions with regard to the interpretation of the crime of directly attacking civilians, that it “considers that the inclusion of the third element of the crime, which specifies that “[t]he perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack”, does not constitute a particular intent requirement but is justified in particular by the presence of the word “intentionally” in the text of the article (…) and by the need to make a clear distinction between this crime, which proscribes violations of the principle of distinction, and acts violating the principles of proportionality and/or precaution.” It thus follows from the reference to ‘and/or’ that the ICC Trial Chamber did not rule on the question whether the obligation under IHL to take precautionary measures constitutes a separate principle of IHL, or that it must be interpreted as part of the principle of proportionality.

Furthermore, Trial Chamber VI of the ICC notes in the Ntaganda Case that the ‘scope of the protection’ against rape or sexual slavery is not only limited to persons in the power of a party to the conflict, but also to other individuals, on the basis of the Martens Clause, because the IHL protective scope also includes “the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.” Also, the ICC refers to the principle
of proportionality, explaining it as an example of a justification for “the death of persons that may not be legitimately targeted.”

Summary

In sum, it seems from its jurisprudence that the ICJ identifies the following five principles of IHL: distinction, the prohibition to cause unnecessary suffering to combatants, humanity, military necessity and proportionality. The ICTY refers to the principles of distinction, precaution, and protection. The principle of proportionality is sometimes included within those three principles and sometimes noted as a separate principle. The SCSL identifies the principles of distinction and that of humane treatment. The ICC mentions the principle of humanity when it discusses the Martens Clause, as well as the principles of distinction, proportionality and precaution. It may be argued that these courts have never intended to provide a definite and exhaustive list of the principles of IHL because in the individual cases only the law relevant for the case at hand would be addressed. Nonetheless, the jurisprudence adds to the formation of consent for those norms which were mentioned as principles of IHL by the courts.

3.3.3 IHL Principles Identified by Doctrine

A general reference to the principles of IHL is found in most treatises of IHL. This Section assesses which principles of IHL have been identified by a number of notable writers.

In doctrine, different authors have demonstrated a different understanding of the norms they claim to qualify as a principle of IHL. Many authors use the phrase ‘principles of IHL’ or ‘fundamental principles’ to indicate rules of IHL they deem most important for the entire field of IHL. Many writers simply note that there are a number of principles of IHL, although it differs which these are. For example, Rogers and Blank and Noone, limit the principles to four: humanity, military necessity, distinction and proportionality. Some authors, such

77  Rogers, for instance, talks about “the great principles of customary law”. See Rogers 2004, p. 3.
78  Rogers’ Law on the battlefield identifies in Chapter 1 a number of “great principles of customary law, from which all else stems”: military necessity and humanity and the ‘rules’ of distinction and proportionality. See Rogers 2004, p. 3-23.
79  Blank and Noone discern in their coursebook International Law and Armed Conflict four ‘basic’ or ‘fundamental’ principles: humanity, military necessity, distinction and proportionality. They note that “[t]ogether, the four principles create a framework that can guide examination of the obligations and actions of parties to conflicts and the rights and privileges of individuals in the conflict zone.” See Blank and Noone, p. 35-36.
as Dinstein, Solis and Crawford and Perth add the principle that prohibits the use of means and methods of warfare of a nature to cause superfluous injury or unnecessary suffering to the opponent to this list.

An often recurring theme is to understand principles as occurring on different ‘levels’, as for example understood by Kolb and Hyde, Gill, Pictet, Corn and Chetail. This seems to indicate that on a first level, the authors use the term ‘principles’ as the basis of other norms. On this level, the principles of IHL are used in combination with the word ‘basic’ or ‘foundational’, referring to the moral principles from which the legal rules in the Geneva Conventions originate. The principles that are identified in doctrine to play this role are

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80 See Dinstein 2004, p. 16 and p. 255; Dinstein recognises as ‘basic’ principles of IHL: “[t]he principle of distinction (between combatants and civilians), the principle of causing no unnecessary suffering to combatants, the principle of proportionality in attack etc.” Although the list he provides is apparently non-exhaustive (given the use of “etc.”), Dinstein notes that these principles “are elevated to the pinnacle of the law regulating the conduct of hostilities in international armed conflict”, but he provides no further elaboration on the use, legal characteristics or functions of these principles. ‘Considerations’ of humanity and military necessity are in his view the ‘two diametrically opposed impulses’ that forge “a subtle equilibrium” for IHL in international armed conflicts. In the 3rd edition of his handbook of 2016, Dinstein calls these two factors the ‘driving forces’ of IHL. See Dinstein 2016, pp. 8-9.

81 Solis The Law of Armed Conflict – international humanitarian law in war (second edition) contains a chapter that discusses IHL’s ‘core’ principles. The chapter notes that there are four principles that are closely intertwined: distinction, military necessity, unnecessary suffering and proportionality. See Solis, p. 269. Interestingly, only Solis is of the opinion that the principle of humanity is of a moral character rather than a legally binding concept, and excludes it from his list of ‘core’ principles for that reason. See Solis, p. 305-309.

82 As “fundamental principles ... from which all the substantive rules of IHL are derived”, the authors identify the principle of distinction, of which the principle of discrimination (prohibition on indiscriminate attack) is a part; the principle of military necessity; the principle of proportionality; the prohibition on causing unnecessary suffering and superfluous injury; ... and the principle of humanity. See Crawford and Pert, pp. 41-48. The authors also mention ‘the principle of neutrality in their list.

83 Kolb and Hyde’s An Introduction to the International Law of Armed Conflicts provides the reader with a chapter devoted to the ‘basic’ principles of IHL, in order to “understand the basic principles upon which the detailed rules of [IHL] rest and from which they can be deduced.” The principles of humanity and military necessity are recognised as the ‘fundamental’ principles on the “most general level”. Somewhat more specific, they mention “[a]nother pair of fundamental principles that govern [IHL] are those that dominate Hague Law and Geneva Law respectively. The detailed rules of [IHL] may be shown to be elaborations of these two general principles, which exist at the apex of the system of [IHL]. These two foundational principles may also form a basis upon which gaps of the law may be filled and particular rules of [IHL] can be interpreted, especially in cases of doubt.” These principles are the principle of limitation and the principle of humanity. After these two principles on an “intermediate level” level, Kolb and Hyde identify three principles on a more “concrete” level: those of distinction, necessity and proportionality. See Kolb & Hyde, p. 43-50.

84 Gill notes that “[t]he fundamental principles of military necessity and humanity are the two keystone principles which lie at the heart of the balance between military requirements and the need to prevent suffering and devastation caused by war and to protect individuals, such as the wounded and captured, and to the civilian population. These two main principles are complemented by several other fundamental principles which are drawn from the two main ones and which complement them in forming the overall system. These include the principle of distinction, which has the function of demarcating who and what is, and is not, subject to attack; the principle of proportionality (in bello) which sets out a balance between the expected military advantage and probable incidental injury and damage to civilians and civilian objects in conducting attacks upon military targets; the principle of prohibition of unnecessary suffering and superfluous injury in the use of certain types of weapons and means of combat as a sub-principle of humanity; and the principle of equal application, which establishes an equality between opposing forces and participants in the application of the law of war, irrespective of considerations of the legality of resorting to force between States or the motivations of the opposing parties.” See Gill 2013, pp. 40-41.

85 Pictet 1985, pp. 59-60.
86 Corn et al., p. 110 and 112.
87 Chetail, p. 252-267.
those of humanity and military necessity. Some also include the principle of chivalry, which is sometimes referred to under different names, such as the principle prohibiting perfidy; honour or good faith. Also, it is argued by one author that a 'principle of ambituity' exists which is the foundational principle of IHL rules concerning the protection of civilians.

On a more practical level, the majority opinion seems to be that the principles of distinction, proportionality and the principle of unnecessary suffering must be applied. Others, however, add an implementing principle of humane treatment, clearly derived from that of humanity. For example, the San Remo Manual on non-international armed conflicts, which was drafted by a number of recognised experts in IHL, mentions three 'general' principles of IHL: the principles of distinction, prohibition of unnecessary suffering, and humane treatment. In addition, Corn argues that also the obligation to take precautionary measures qualifies as an additional 'substantive' principle of IHL, because:

"[p]recautionary measures, including the targeting process itself, play a vital role in mitigating the risk to civilians and civilian property during armed conflict. As such, the obligation to implement such measures should be considered equally fundamental as that related to substantive principles such as distinction and proportionality. Treating precautions as a fundamental LOAC principle will increase the likelihood that precautions will be more broadly conceived at every step of the training, planning, and mission execution process, and will not be viewed as a last-minute afterthought once a course of action involving lethal targeting has been largely approved for execution. Furthermore, an expanded conception of precautions – a conception that ranges from training, through the process for LOAC implementation, to the substantive warning and less harmful alternative consideration – will contribute to the improvement of targeting practices among all armed forces, and in turn to a more credible balance between the necessities of armed conflict and the humanitarian interests of risk mitigation."

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89 See for example Dinstein 2004, p. 16 and Corn et al., p. 112. Dinstein notes that IHL is "in its entirety ... predicated on a subtle equilibrium between two diametrically opposed impulses: military necessity and humanitarian considerations." Corn et al. note in their IHL textbook *The Law of Armed Conflict: an operational approach* that the principles of military necessity and humanity "lie at the core of all battlefield regulation."

90 Gill pleads for the acceptance of the principle of chivalry and honor as a principle of IHL, on the basis of the fact that (1) this has historically always been part of the 'code of the warrior'; (2) as the foundation of specific rules of IHL, and (3) "that as a fundamental principle of the law of war, they perform another of the functions of a general principle of law, namely as a means to assist in the interpretation of the law and as a guiding principle in both a legal and in a wider sense of incorporating extra legal considerations of ethics and military tradition into the practice of warfare" See Gill 2013, p. 49. However, with regard to the principle of chivalry, Rogers notes that although it has played an important role in shaping the rules of IHL as they stand today, chivalry may "be classified as an element of the principle of humanity". See Rogers 2004, p. 3.

91 Koppe 2013, p. 53: Koppe argues that in addition to the principles mentioned by most other authors (the principles of military necessity, distinction, proportionality and humanity), there is an additional principle of IHL that is the basis for a number of rules of IHL, because their origin can only be explained on the basis of this underlying principle. Koppe proposes this 'principle of ambituity' because it is the "legal basis of the protection of the environment during armed conflict in general, and of the prohibition against excessive collateral damage to the environment in particular".


93 See paragraph 1.21 of the San Remo Manual for Non-International Armed Conflicts, p. 8.

94 Corn 2014, p. 466.
3.3.4 Other Practice

Multilateral statements by States are also relevant to identify principles of IHL. An example is Resolution 2444 of the United Nations General Assembly, adopted unanimously in 1968. It identifies four “principles for observance by all governmental and other authorities responsible for action in armed conflicts.” The wording of the resolution seems to suggest that these principles were to be applicable in both international and internal armed conflicts. These principles were derived from the XXVIII Resolution adopted at the XXth Conference of the Red Cross, which “declares that all Governments and other authorities responsible for action in armed conflicts should conform at least to the following principles:

1. that the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;
2. that it is prohibited to launch attacks against the civilian populations as such;
3. that distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible;
4. that the general principles of the Law of War apply to nuclear and similar weapons.\(^{96}\)

3.3.5 Sub-Conclusion

In applying the Kalshoven-test, the overview of military manuals, judgements of international courts, doctrine and other practice in this section has made it clear that the term ‘principles of IHL’ is often used to indicate that a particular norm is seen as the basis of rules of IHL. This applies particularly to military necessity, humanity and, to a lesser extent, to chivalry or good faith. These notions lack normative force but are usually described as the underpinnings of the rules of treaty and customary IHL. These norms may be labelled as formative principles, and in the categorisation of Dworkin as ‘policies’ instead of principles. Therefore, it is submitted that military necessity, humanity and chivalry must be excluded

\(^{95}\) Kalshoven 2006, p. 53.


\(^{97}\) See for example Gill 2013, p. 34, referring to the ‘principle’ of chivalry, which “which has been, and still is, identified in some military manuals as one of the fundamental principles of [IHL] and elements of it have obtained the status of binding rules of law of a conventional and/or customary nature”. See also Koppe 2013, introducing the IHL “fundamental principle” of ambiguity to “explain the emergence” of the IHL rules on the protection of the environment. See Koppe 2013, p. 60.

\(^{98}\) Kalshoven and Zegveld use the word ‘limits’ instead of policies, describing a similar category of norms. They state that: “the ‘limits’ of the law of war may be distinguished into principles and rules. Overriding principles are military necessity and humanity. The first principle tells us that for an act of war to be at all justifiable requires that it is militarily necessary: a practical consideration; and the other, that the act cannot be justified if it goes beyond what can be tolerated from a humanitarian point of view: a moral component. Obviously these are extremely broad principles: over time, they have been elaborated into ever more detailed principles and rules”. Kalshoven and Zegveld 2011, p. 2. Ronen describes necessity and humanity as “standards, not practicable rules” See Ronen, p. 496.
from the category of legally binding principles of IHL, in the sense that these policies are incapable of conveying rights and obligations to States and individuals. The function of this type of principles is rather to form the extra-legal, underlying basis of the substantive rules and principles. They may be used to interpret rules and principles IHL, but cannot fill gaps in the law themselves.

Furthermore, a second category of IHL principles that may be discerned is that of very important rules of IHL. The principle of distinction is the most prominent of this type, but the principle of proportionality is also among the principles that is recognised in this category by States, courts and doctrine. Arguably, according to the categories of norms as discerned by Dworkin, the principles of this category (distinction and proportionality), would be rules rather than principles, because they do not necessarily contain an objective, but the characteristic that military operations are either distinguishing between military objectives and civilians or civilian objects or not (distinction) and the collateral damage expected from a planned attack is either excessive or not (proportionality). The function of these rules is not to serve as an interpretative tool or to fill gaps in the law, because they apply in clearly delineated circumstances, such as when planning and conducting attacks. These norms are thus always either fulfilled or they are not. Different States, courts and authors also mention other rules they deem to be particularly important, but these are not shared among these categories of actors. It seems that State practice as well as the opinions of the majority of courts and authors point in the direction to refer to the rules of distinction and proportionality as principles nonetheless.

A third category may be referred to as ‘general’ principles, the principles of IHL ‘in a strict sense’, or ‘substantive’ principles. In the field of IHL, it is submitted, this category includes the prohibition to cause superfluous injury or unnecessary suffering and the precautionary principle, but also, again, the principles of distinction and proportionality. These have been mentioned by a considerate number of States, writers and courts as principles of IHL. These later two IHL principles are of a more general nature than the specific rules of distinction and proportionality (that are based on these principles), because these principles also have the role to serve as a foundation for other, more specific rules. These principles do contain a certain objective, but are more specific than the foundational principles (humanity and military necessity): to minimise the impact of military operations on civilians (precautions, proportionality and distinction) and on the opposing forces (proportionality and the prohibition to cause superfluous injury or unnecessary suffering). These objectives are mostly specified in more detailed rules. The rules based on the prohibition to cause superfluous injury or unnecessary suffering are most notably those on the use of means and methods of warfare, but could arguably also include the rules pertaining to the humane treatment of those do not, or no longer participate in hostilities. The rules based on the precautions principle include those in articles 57 and 58 of API, and the corresponding customary rules.

99 Alexy, p. 48. See Chapter 2 above.
Chapter 3: Characteristics of IHL Principles

The principles of distinction and proportionality are the basis of a number of specific rules, but may, as follows from the practice of particularly States, also apply more broadly. It is submitted that these are principles of IHL in a strict sense, meaning that they may potentially serve as a gap-filler, and in that capacity these principles are capable of creating legal rights or obligations, and as such, they are part of the law, not of an extra-legal character.

Furthermore, the different categories of principles function on different levels, corresponding to the roles they play. The above may thus be summarised as follows:

<table>
<thead>
<tr>
<th>Formative principles</th>
<th>Principal principles</th>
<th>General principles</th>
</tr>
</thead>
<tbody>
<tr>
<td>military necessity, humanity and chivalry</td>
<td>The rules of distinction and proportionality</td>
<td>prohibition to cause superfluous injury or unnecessary suffering, the precautionary principle, distinction and proportionality</td>
</tr>
</tbody>
</table>

3.4 The Applicability of the Principles of IHL

It follows from the above, that principles of IHL may potentially be applied as an independent source of legal obligations during armed conflict in some situations. That these principles of IHL are legally binding has been argued by a number of courts and authors. There are however notable authors who deny such a prominent role for the principles of IHL, as well as the use of the Martens Clause to come to that conclusion. In nearly all situations, there is a

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101 For example, Kalshoven cites the 1995 Tadic Jurisdiction Decision of the ICTY Appeals Chamber as well as the 2006 Galic Judgement, claiming that the Tribunal in fact has not applied customary international law, but principles of IHL. He states that “these principles are not customary but moral in nature. They stem, in other words, from the mind rather than from actual battlefield practice. Reflection of a principle in texts such as treaties or military manuals helps to give the principle body and, so to speak, anchor it in somewhat more solid ground. The crucial point is however that for its existence as a principle of law, it does not depend on a showing that in the conduct of war, a certain mode of acting, apart from being accepted as law, is demonstrably customary. And the point may be emphasised again that “principles of law recognised by civilised nations” (as they are styled in the Statute of the International Court of Justice) or the “principles of the law of nations” (as they are listed in the Martens clause) are “law”; they must be respected and should be enforced as much as other sources of law.” See Kalshoven 2006, p. 67. See also Miyazaki p. 439: “the principles of the law of nations, as they result from the laws of humanity, which were mentioned expressly in the Martens Clause as incorporated in Additional Protocol I are lex lata binding on the Parties.” Rosemary Abi-Saab may also be deemed to support this, because of her statement that “the fundamental general principles of humanitarian law belong to the body of general international law, in other words, they apply in all circumstances, for the better protection of the victims.” See Abi-Saab, p. 375. Chetail argues in the same direction. He concludes, from the jurisprudence of the International Court of Justice in the field of IHL, that the fundamental rules of IHL that are contained in multilateral conventions “go beyond the domain of purely conventional law” and amount to obligations of general international law with their own separate and independent existence. He holds that the Geneva Conventions have merely given specific expression to the general principles of IHL: “the fundamental principles of humanitarian law identified by the International Court of Justice provide a condensed synthesis of the law of armed conflicts and constitute the normative quintessence of this traditional branch of international law. They give expression to what the Court has called “elementary considerations of humanity”. As general principles of international law, they thus provide a minimum standard of humane conduct in the particular context of armed conflict.” See Chetail, p. 268. See also Strebel, p. 327.

102 For example, Kleffner notes that “the principles of humanity and dictates of public conscience mentioned in the Martens Clause” cannot provide a basis for restraints to the parties to an armed conflict “as long as [they] have not found their expression in a treaty provision, a rule of customary international law, or other source of positive international law (...)”
more precise rule of treaty law or customary law available. Nonetheless, it is submitted that
the principles of IHL may play a role to fill gaps in IHL. This section examines the situations
in which there may be a role for the substantive principles of IHL. This section first examines
the potential for the applicability ratione materiae of the principles of IHL, followed by a short
description of their applicability ratione personae.

In practice, it seems that there have indeed been instances where the principles of IHL
were referred to as the main source of law for a given case. One early example of how a
principle of IHL fills the gap that customary and conventional IHL have left is that of the
enforced use of Russian prisoners of war on German military installations during the World
War II.\footnote{For a description of the case at hand, see Greig, p. 50 and accompanying notes.} This was a clear violation of the 1929 Geneva Convention relative to the Treatment
of Prisoners of War.\footnote{Article 31 (1) of this convention: “Work done by prisoners of war shall have no direct connection with the operations of the
war. In particular, it is forbidden to employ prisoners in the manufacture or transport of arms or munition of any kind, or
on the transport of material destined for combatant units.”} Even though Germany was not restrained by this treaty rule because
Russia was not a party to the treaty, a judge referred to a memorandum of the German
Admiral Canaris, which noted that “therefore only the principles of general international
law on the treatment of prisoners of war apply. Since the 18th century these have gradually
been established along the lines that war captivity is neither revenge nor punishment, but
solely protective custody, the only purpose of which is to prevent the prisoners of war from
further participation in the war.”\footnote{Greig, p. 50.} The judge found the position of the Admiral to be correct
and in accordance with accepted international law, although he did not clarify whether these
‘principles’ were understood as customary law or as principles in the sense of article 38 of the
ICJ Statute.

After the Second World War, the Nuremberg Tribunal also referred in connection with IHL
to the possibility of applying the principles of international law as one of the three sources
of international law. It held that “the law of war is to be found not only in treaties, but in the

\footnotesize{Principles of humanity and dictates of public conscience may be driving forces for the development of the law, but they
do not constitute the law.” See Kleffner 2012, p. 40. See also Wilmshurst, p. 412-413: She warns that “while State forces
and armed opposition groups should be encouraged to act in a humanitarian way and, indeed follow the Martens Clause, the
exigencies of conflict and the powerful interests of belligerents will frequently be such that only firmly established
rules of law will be sufficient to constrain battlefield conduct in a direction contrary to military desirability. In such
circumstances, those claiming the existence of legal rules, whether treaty or custom, must be able to substantiate them
as such. Unsupported rhetoric about the existence of legal norms may cause the law to fall into disrepute with the result
that there will be failure to observe such rules as there are. In other words, clarity about the existence of rules of law can
assist in securing compliance.” Furthermore, Crawford and Pert note that treaty rules and rules of customary IHL are the
main sources of IHL. Principles of international law are mentioned in passing as a separate source of international law,
but they are dismissed as a source of IHL because “in practice, only treaties and custom are considered to be binding
sources of international law”. See Crawford & Pert, footnote 61 on p. 40. However, soft law instruments may “provide
useful instructions and guidance for States and non-State actors, and often reiterate or elucidate existing international
law norms.” See Crawford & Pert, p. 37. The authors cite as examples of these soft law instruments, that are not legally
binding: UN resolution or declarations, codes of conduct issued by international organisations, and other instruments
such as manuals or interpretative guidance documents. See also p. 40 for examples of these documents. See also Van
Steenbergh 2017, p. 895: “All those specific approaches, which derive the existence of unwritten IHL and ICL sources
from considerations of natural law or objective justice, are highly debatable. Given the very subjective nature of these
considerations and the absence of any further elaboration or guidelines on the specific way in which those sources may
emerge, the latter are likely to be arbitrarily claimed and applied.”}
customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do not more than express and define for more accurate reference the principles of law already existing.\footnote{IMT, vol. I, pp. 220-221, as quoted also by Greig, p. 49 (emphasis added).}

These two historic examples show the potential for principles to fill gaps that the IHL treaty rules and customary IHL rules have been unable to fill. However, it is submitted that this role is still relevant in contemporary armed conflicts.

A first situation that may be imagined for a role of the principles of IHL is that of non-international armed conflicts. IHL applicable in an international armed conflict is well-codified in treaty law. A much higher number of IHL treaty rules is applicable to international armed conflicts than to non-international armed conflicts, although the operational realities for the parties to the conflict is in many situations very similar. Common Article 3 of the Geneva Conventions and, if applicable, the provisions of Additional Protocol II are the only treaty rules available, together with a number of specific treaties, such as the CCW. There is thus an absence of specific provisions applicable to non-international armed conflicts. Many of the gaps left by treaty law have been filled by customary law, as evidenced by the ICRC Customary Law Study, containing a large number of rules that are claimed to apply both in international armed conflicts as in non-international armed conflicts. However, because the existence of rules of customary IHL is sometimes hard to prove, and controversies exist with regard to the methodology to identify customary rules, gaps remain.\footnote{See Van Den Boogaard 2013, p. 13-16 for a more elaborate analysis of this issue.} These gaps may be filled by applying principles of IHL.\footnote{Kalshoven asserts that the criminal tribunals for Rwanda and the former Yugoslavia have handled many cases in which the facts indicated that there was a non-international armed conflict. In these decisions, Kalshoven observes critically, “the Tribunals should not have based their decisions on asserted yet non-existent custom, but on principle, a source of law as effective and, indeed, convincing as custom in the promotion and enforcement of the law of armed conflict.” See Kalshoven 2006, p. 68. His critique is thus directed both to the methodology the Tribunals used to establish customary international law, and to the refusal of the courts to acknowledge that what they are actually applying are principles of international law, which he calls “a source of the present-day law of armed conflict”. See also Kalshoven 2006, p. 59.}

A second situation in which principles of IHL may provide guidance is the situation where the applicability of the rules of IHL is unclear, because there is uncertainty whether the applicability clauses of IHL\footnote{Common article 2 and 3 of the Geneva Conventions and the respective Articles 1 of Additional Protocol I and Additional Protocol II.} have been fulfilled. This may include situations in which it is unclear whether an non-international armed conflict has started, for example because the level of organisation of one of the parties to the conflict is not clearly established yet, although the intensity of the violence has risen to a level which would normally be designated as one of hostilities.\footnote{See generally, also for some other situations: Van Den Boogaard 2013 p. 10-13. See also Corn et al. 2012, p. 113.} A third situation where a gap may exist, is the situation in which one State is a party to a treaty containing rules of IHL, while its opponent or ally is not. This situation corresponds to the example above regarding the treatment of the Russian prisoners of war during World War II. Fourthly, problems may
Proportionality in International Humanitarian Law

arise if third armed actors, like multinational troops or peace forces are present in a certain conflict zone without actually being a party to that conflict.\textsuperscript{111}

One method States use to fill these gaps in cases where the applicability of IHL has not been evident, is to apply the principles of IHL as a matter of policy. Examples of this are their application during peacekeeping and other military operations and the application in armed conflicts where it has not been evident whether the rather limited number of legal rules of non-international armed conflict, i.e. common article 3 of the Geneva Conventions and in some cases Additional Protocol II to the Geneva Conventions, are applicable or the rules applicable in an international armed conflict. In other types of operations, such as peace support operations or stability operations, there is very limited treaty or customary law. The principles of IHL are usually made applicable through policy. However, given the character of the principles of IHL as set out above, they could be considered to apply \textit{de jure}, as principles of international law, applicable not only to States, but also to individual participants to armed violence and armed groups, thus to private military companies, peacekeepers and other organised non-state actors.\textsuperscript{112} This legal character of the principles may be confirmed by the Martens Clause, understood as another way to phrase what article 38 (1) (c) of the ICJ Statute also provides: if there is no other law available, i.e. a rule of conventional or customary international law, the principles of international law must be applied. This counters the threat that States may attempt to deny the applicability of legal rights and obligations by declaring that they follow the principles of IHL out of policy considerations. After all, when States consider that a policy is no longer necessary, they may conclude that there is no legal framework applicable. However, the invocation of the principles of IHL should only be allowed if its applicability would enhance the protective character of the relevant rule. Thus, the use of the principles may only be done in accordance with the purpose of IHL, which is to protect those not participating in the hostilities and restrict its means and methods. They cannot be used to override more stringent rules, such as the rules that apply to the use of lethal force in law enforcement situations.\textsuperscript{113}

With regard to the applicability \textit{ratione personae} of the principles of IHL, there is no reason to diverge from the basic premise that States are the main subjects of international law. However, as Lauterpacht stated: “in relation to both rights and duties, the individual is the final subject of all law.”\textsuperscript{114} States have certainly lost their monopoly as actors in international law.\textsuperscript{115} That there are also other actors follows from a number of developments, including the emergence of international organisations as producers of international norms and, secondly, from the fact that increasingly also individuals have become the direct addressees of rules.

\begin{footnotes}
\item[111] This issue is explored into more depth in Van den Boogaard 2013, pp. 10-16.
\item[112] See generally also Corn 2006.
\item[113] Kleffner 2013, pp 74-75.
\item[114] Lauterpacht 1950, p. 69.
\item[115] Cassese 2005, p. 144.
\end{footnotes}
of international law.\textsuperscript{116} If it is true that the system of international law is still an imperfect legal framework with regard to States, this is even more the case for the applicability of international law to individuals, which has only recently become more sophisticated.\textsuperscript{117} Presently, it may be said that individuals are participating in the international legal system, but not to the same extent as States.\textsuperscript{118}

According to traditional international law, individuals did not enjoy the status of subjects of international law, but they remained under the exclusive control of States.\textsuperscript{119} There were only very few exceptions.\textsuperscript{120} As the PCIJ put it in 1928: “according to a well-established principle of international law, [a treaty] cannot, as such, create direct rights and obligations for private individuals.”\textsuperscript{121} However it was deemed possible that States in concluding international agreements were able to confer rights and obligations on individuals that could be called upon by individuals in proceedings in national courts.\textsuperscript{122} It has since then increasingly been maintained that also individuals may invoke and are bound by international law.\textsuperscript{123} The first significant exception was the setting up of the International Labour Organisation in 1919, although this concerned a group of persons.\textsuperscript{124} The fact that after 1945, at the Nuremberg Trials, individuals have been prosecuted for war crimes on the basis of their individual criminal responsibility during the Second World War is also a clear indication in this direction.\textsuperscript{125} However, more recent developments have made it possible to implement and maintain the obligations of IHL by creating its own framework for prosecuting war crimes internationally, through the framework of international criminal law. As Judge Harhoff put it:

“whatever the case may be after the Nuremberg Trials, the fact remains that, by creating the two Criminal Tribunals for the Former Yugoslavia and Rwanda, The Security Council took a great leap forward and established beyond any doubt that individuals may now, in respect of IHL, appear as subjects bound by certain legal obligations directly under international law, and that they can be individually responsible before an international forum for their violations

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\textsuperscript{116} Cassese 2005, p. 143. For an overview of the doctrine on the subject of the position of the individual in international law in traditional international law up to 1962, see Norgaard, p. 34-78.
\textsuperscript{117} Franck 2008a, pp. 2-3.
\textsuperscript{118} McCordquodale, pp. 328-329.
\textsuperscript{119} Cassese 2005, p. 142.
\textsuperscript{120} Cassese argues that in fact already at the end of the 19th century, international law pertaining to piracy imposed direct obligations on individuals. See Cassese 2005, p. 144, quoting Kelsen, p. 203-205 and Westlake (1894).
\textsuperscript{121} The Danzig Railway Officials Advisory Opinion, 3 March 1928, PCIJ Series B nr. 15, pp 17.
\textsuperscript{122} The Danzig Railway Officials Advisory Opinion, 3 March 1928, PCIJ Series B nr. 15, pp 18.
\textsuperscript{123} See for example Shaw 2014, p. 188-189, Brownlie 2008, p. 65 and Cassese 2005, p. 142-150.
\textsuperscript{124} Franck 1999, p. 64.
\textsuperscript{125} But see Zoller, writing in 1990, on page 99-100, arguing that individuals are not subjects of international law, because the two prerequisites have not been met: (1) rights and obligations should be established directly by international law and (2) direct enforcement of these rights and obligations should be in place.
\end{flushleft}
of these obligations. This is a remarkable development in international law with far-reaching implications for, *inter alia* the concept of state sovereignty.\textsuperscript{126}

Treaty law has accorded rights and obligations to individuals in a variety of situations, such as the Rome Statute of the International Criminal Court.\textsuperscript{127} Treaties may thus afford provisions obliging States to implement such enforcement mechanisms. The dominant view for customary law has always been that an individual has no individual rights in this respect under customary international law and is dependent on the political discretion of the home State, for example as to whether or not to present a claim for the individual.\textsuperscript{128} Still, although it is certainly much more difficult to prove these rights to exist, in the field of IHL, the ICRC stated in its 2005 Customary IHL Study that the argument can be made that individuals are afforded rights and obligations under customary international law.\textsuperscript{129} Similarly, general principles as a basis of individuals' responsibility in international law were invoked by the Supreme Court of Israel in the Eichmann Case and by the French *Cour de Cassation* in the Klaus Barbie case and described in the Nuremberg principles as being consistent with the general principles of law recognised by the community of nations.\textsuperscript{130} The acceptance of such a statement remains of course dependent on the understanding one has of the legal status of principles of international law and the type of principle at hand.\textsuperscript{131}

When international law is viewed as a coherent system in which principles of international law may be binding on States, it seems illogical to deny that these principles may in some situations bestow legal obligations on individuals directly. Although the identification of a norm originating from principles of international law is arguably more difficult, it seems unnecessary to require that rights and obligations rules originate only from the two dominant sources of treaty and customary international law. Particularly in the field of IHL, rules must ultimately be applied by the military - even individual soldiers - during their participation in armed hostilities or while conducting other military operations.\textsuperscript{132} The rules in which the

\begin{footnotes}
\textsuperscript{126} Harhoff, p. 665.
\textsuperscript{127} For example, article 75 of the ICC Statute affords individuals the right to bring international claims to seek reparation.
\textsuperscript{128} Malanczuk, p. 2 and Bantekas, p. 122
\textsuperscript{129} Henckaerts and Doswald Beck, pp. 551-558. Rule 151 states that "Individuals are criminally responsible for war crimes they commit" and Rule 152 states that "Commanders and other superiors are criminally responsible for war crimes committed pursuant to their orders."
\textsuperscript{130} Socha, p. 74.
\textsuperscript{131} For a contrary view: Zoller states that "finding grounds for the norm of responsibility in the general principles of law may be justified. But this implicitly relies on the assumption that general principles of law are autonomous rules of international law, different from international custom, which is rather doubtful." See Zoller, p. 105-106. See also Van Steenberghe 2017, p. 896: calling this approach "so isolated that it does not seem relevant to consider whether they imply the existence of specific secondary norms regulating the formation of some unwritten IHL (…) sources".
\textsuperscript{132} See for example the 1992 Military manual of Germany, rule 133 and 134 concerning the "Binding Effect of International Law for the Soldier": The obligations of the Federal Republic of Germany under international humanitarian law are binding not only upon its government and its supreme military command but also upon every individual. And "According to Article 25 of the Basic Law of the Federal Republic of Germany, the general rules of international law form part of the federal law. They take precedence over the law and entail rights and duties for all inhabitants of the Federal territory. These general rules include those provisions of international humanitarian law demanding a behaviour as it results from the principles of humanity and from the dictates of public conscience (Art. 1 para 2 AP I; Preamble para 4 AP II)." See Humanitarian Law in
IHL proportionality principle is codified refer expressly to “those who plan or decide upon attack”, which must be understood to mean a person rather than an abstract entity such as a State. As such, it seems that international law could bind the individual soldier as an agent of a party to the conflict and it is not required that the norm is first confirmed in a specific treaty rule or as a rule of customary international law. The question of whether an individual soldier is bound directly by a principle of international law, in particular a principle of IHL, may thus in some cases be answered in the affirmative, although this is dependent on the type of principle that needs to be applied.

3.5 Three Roles for the Principles of IHL

Although it may be unclear to which principles of IHL States mean to refer to when they declare that they will apply the principles of IHL, this will probably include both the rules of distinction and proportionality, as well as the four principles of IHL in a strict sense. The different character of the principles of IHL that have been identified above needs to be taken into account. Substantively, military necessity and humanity give some general guidance in a certain direction, whereas the rules on distinction and proportionality provide more specific legal obligations. Nonetheless, this author concurs with Pictet that the principles of IHL are “of capital importance” because they “motivate the whole, enable the respective value of the facts to be appreciated and also offer solutions for unexpected cases. They contribute towards filling gaps in the law and help in their future development by indicating the path to be followed.”

As a result, there are three roles that the principles of IHL play: the coherency role, the educating role and the foundational role.

The coherency role

The principles of IHL are thus a source of the legal obligations for States, armed groups and the individual arms bearers whenever armed violence is employed in the course of military operations that exceed law enforcement and are qualified as hostilities. These norms complement the norms these actors have already agreed to in treaties or – through their practice and opinio juris – customary international law. There are also other notions that are very important for IHL, but nonetheless fail the criteria to be labelled as principles of IHL. Examples of these notions are chivalry, reciprocity, the principle of equal application and neutrality. These notions are part of the framework of IHL and together, IHL forms a
coherent legal framework that regulates behaviour of the parties to an armed conflict. The role of the principles of IHL as a supplier of coherency in IHL as a whole is crucial. The different types of principles of IHL together safeguard that IHL is a consistent legal framework that provides guidance for any specific situation during armed conflict. Thus, for this role, the understanding of principles of IHL is broader than the IHL principles in a strict sense.

The educating role

Principles of IHL, understood in a broad sense, are indispensable in educating members of the parties to the conflict. Soldiers, as the main users of the rules of IHL, are not lawyers. Complete knowledge of every single rule of IHL by soldiers is both unattainable and undesirable. The Geneva Conventions note in the articles about dissemination, that the 'principles' of the Geneva Conventions must be instructed to the members of the military as well as to the civilian population. It is submitted that the use of the term 'principles' for the purpose of education members of the military and the civilian population as a whole is not confined to the principles of IHL in a strict sense that were identified above. It includes the most important rules (particularly the IHL rules of proportionality and distinction) and also the policies, even though these are not legally binding notions. In deciding upon different courses of action, the members of military forces must be trained to apply both humanity and military necessity, because these notions guide the members of armed forces in taking decisions on the battlefield. The principles of IHL then “serve in a sense as the bone structure in a living body, providing guidelines in unforeseen cases and constituting a complete summary of the whole, easy to understand and indispensable for the purposes for dissemination.”

The foundational role

Furthermore, the principles of IHL form the origin of the specific rules of IHL, and they are applicable to all parties to an armed conflict. The addressee of the norm in general international law may thus be individual soldiers on the battlefield, because ultimately, it is their behaviour, and targeting decisions, that dictate whether the State is acting in conformity with international law, or not. The principles of IHL, particularly the policies of humanity and military necessity are the basis of the principles and rules of IHL. According to Draper: “At least since the time of Grotius the law of war has rested on an uneasy balance between military needs, flowing from the nature of the activity to be subjected to law, and...”

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those of humanity.” These foundations are important to interpret the rules of IHL, however the extent to which IHL itself allows these two policies to play a role in the interpretation of its rules differs. The notion of military necessity is restricted to those situations in which the rule itself expressly allows for invocation of reasons of military necessity. Invoking considerations of humanity as an interpretative tool for the rules of IHL is not expressly regulated, but must nonetheless remain in sync with the considerations of military necessity.

An example of how the principles may operate could be the absence of combatant status in the conventional and perhaps also customary IHL applicable during a non-international armed conflict. It may be true that, for understandable reasons, States have not been willing to award the de facto fighter in non-international law the protection of prisoners of war, which comes with ample provisions on its treatment. However, that does not mean that those individuals cannot be targeted for such time as they are taking a direct part in hostilities, as they belong to the armed forces of one of the parties to the conflict. The basic protection of Common Article 3 to the Geneva Conventions is complemented by the principles of IHL, whether on the basis of a rule of customary law, or in absence of such a rule, on the basis of the principles themselves. This includes the rule of distinction, which provides that the armed members of the parties to the conflict should distinguish themselves from civilians in the conduct of their operations, and that they may be targeted, but other civilians may not. Also, the principles dictate that that upon arrest, these persons should be awarded the protection that results from the principle of humanity. Precautionary measures need to be taken to safeguard the well-being of this person. Distinction provides that he may no longer be attacked. In short: where conventional and customary IHL provide no clear guidance, the principles of IHL step in to fill the gap.

3.6 Conclusion

The conclusion of Part II of this study is that the IHL principle of proportionality is firstly a rule of international law. This means that it is referred to as a principle because it is deemed to be a particularly important rule of IHL. However, proportionality may potentially also play the role of a broader, substantive principle of IHL: as a principle of IHL in a strict sense. What that means in practice is further analysed below. First, the notion of proportionality itself requires deeper analysis, because proportionality as a legal notion manifests itself also in other branches of international law. Part III of this study therefore analyses proportionality as a legal notion in international law, including IHL.

136 Draper, p. 141.
137 Dinstein 2016, p. 10.
138 See also Van Den Boogaard 2018a, pp. 205-206.
Part III: Proportionality

“proportionality remains quite a mysterious concept”

The conclusion of Part II is that the IHL principle of proportionality is first and foremost a rule of international law. This means that it is primarily referred to as a ‘principle’ because it is deemed to be a particularly important rule of IHL. Nonetheless, a broader principle of proportionality is also evident in IHL. Furthermore, proportionality as a legal notion manifests itself also in other branches of international law. Part III of this study analyses proportionality as a legal notion in international law, primarily in connection with armed conflict. This part describes how proportionality has developed from a general concept used in law into specific rules of a variety of branches of international law, including the rules applicable in armed conflict. The central research question of Part III is the question of what the content of the principle, or legal notion, of proportionality is in international law and in its different branches. The question then arises whether these different manifestations of the principle of proportionality, applied to a specific context, interrelate, or retain their individual substance. The question is thus not only the applicability of one or more norms of proportionality, but what the result is of their simultaneous application. The objective of this is to assess whether these different understandings of the principle of proportionality may be useful to clarifying the IHL proportionality rule.

For this purpose, this Part III starts out with a description of the historical and normative origins of the legal notion of proportionality and the role it plays in general public international law (Chapter 4). Chapter 5 provides an overview of the content of the notion of proportionality in those branches of international law that are most relevant in armed conflict. The principle of proportionality and similar standards of moderation that apply in IHL are explored in Chapters 6 and 7 and are revisited and further analysed in Part IV. Chapter 8 contains an analysis of the relationship between the different manifestations of proportionality found in the legal frameworks applicable during armed conflict. Chapter 9 concludes Part III with an appraisal of the way the different manifestations of the proportionality principle may lead to the conclusion that proportionality applies as a general principle of international law and how such a principle, if it exists, influences other manifestations of proportionality. In this chapter, it is analysed whether the understanding of proportionality in different fields of international law is useful, as an inspiration or otherwise, to increase the understanding of the IHL rule of proportionality.

139 Cannizzaro 2000, p 455.
Chapter 4
Chapter 4: Proportionality in International Law

“In plain English proportionality means that ‘you must not use a steam hammer to crack a nut, if a nutcracker would do’.”

4.1 Introduction

The question could be asked whether the widely recognised process of the fragmentation of international law has led to the result that there could be no general principle of proportionality applicable throughout the entire field of international law, including all its sub-branches. In this study, it is established that the rather general notion of proportionality is indeed multi-faceted and may have a very distinct meaning in different contexts. Nonetheless, proportionality has a general core that applies in law in general, including in international law and in its sub-branches. In the context of armed conflict, it may even be the case that to a certain situation in which military (counter-) measures amount to an armed conflict, different fields of international law simultaneously apply a different standard of proportionality.

This chapter deals with the origins and earliest manifestations of the notion of proportionality in general international law. To this end, historic origins of the notion of proportionality are traced in Section 4.2, and two types of manifestations of proportionality are identified and discussed. The subject of the subsequent Section 4.3 is an examination of the notions of ‘equity’ and ‘reasonableness’ in international law and how these relate to proportionality. Section 4.4 discusses proportionality in international law in relation to the law on countermeasures, in order to be able to compare the notion of proportionality in international law in peacetime with the notion in times of armed conflict. The manifestations of the proportionality principle in legal frameworks that apply during armed conflict are the subject of the next chapter.

4.2 Origins and Functions of Proportionality in International Law

The roots of the notion of proportionality are deep and have been traced to ancient Greek, Rome, Egypt and Babylonia. There is however no gradual development visible in the legal history of the principle, nor had the principle an equivalent meaning in the different contexts.

1 Lord Diplock in R v Goldstein (1983) 1 WLR 151 at 155, as quoted in Arancibia, p. 297.
2 For a short and concise discussion of the notion of the fragmentation of international law, see for example Shaw 2014, pp. 46-47.
3 See for example Delbrück, p. 1140, Christoffersen 2009, p. 33-34.
where it appeared. The literal translation of proportionality, the Latin *proportio*, is ‘an equal part’ and thus implies a comparison between the shares, or interests, of different actors. The principle has as its main objective to find a fair balance. When law is understood as a system to organise society, the notion of proportionality serves to distribute the shares or interests of individuals in an equal manner. The principle of proportionality is thus inherent to any legal system in an organised society, be it today or in the past, because it is a fundamental concept of justice.4

The notion of proportionality was an important basic ethical principle in both ancient Greek and Roman philosophy. It was used to determine the relation between two goods, prescribed the avoidance of radical behaviour and that moderation was needed whenever different interests were to be balanced.5 Proportionality is a tool to make a comparison between two entities or interests, because “[n]othing is proportional to itself.”6 Aristotle wrote about what he called ‘distributive justice’, which means that the benefits that accrue from a common asset must be distributed to individuals in proportion to their merit, because it is required by justice.7 Thus, for example with regard to a common property, there must be a proportionate balance between the merit and context of a claim on that property. Moderation and reasonableness of behaviour towards other actors is a logical and normal feature of any type of legal system and may be found in national legal systems around the world.8 Proportionality may even be labelled as a “fundamental concept of justice as old as organised society”.9

Cicero regarded proportionality as a means to determine whether a State could resort to war after exploring all peaceful alternatives. This theory was later developed for the purpose of the waging of a Just War by legal philosophers like Augustine, Aquinas and Grotius.10 As Aquinas wrote: “whenever a thing is for an end, its form must be determined proportionally to that end; as the form of a saw is such as to be suitable for cutting ... everything that is ruled and measured must have a form proportionate to its rule and measure.”11 Grotius later argued, based on his view on Natural Law,12 that for a war to be started justly, the use of

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5 Delbrück, p. 1140.
6 Fotion, p. 91.
7 Crawford, MPEPIL, paragraph 3.
8 The rule of proportionality is well-established in national law, in particular in the administrative law of many States. See for example Krüger-Sprengel, p. 183: “La règle de proportionnalité est aussi largement consacrée par le droit interne (...), lant l’administration publique dans son action à l’égard des citoyens.” For example, in Dutch administrative law, proportionality is codified in the Algemene Wet Bestuursrecht, article 3:4: “(1) The public organ must weigh all interests directly involved in the decision, in so far as a statutory provision or the nature of the power exercised does not contain a limitation. (2) the harmful consequences which the decision would have for one or more interested parties may not be disproportionate to the aims pursued by the decision.”
9 Christofferson 2010, p. 33.
10 Fotion, p. 92.
11 Aquinas, Summa Theologica, as quoted in Crawford, MPEPIL, paragraph 4.
12 For a brief explanation of Grotius’ view on Natural Law, see Scobbie 2018, pp. 58-60.
armed force should be a proportionate measure, and in addition, the conduct of the warring State during the war must also be proportionate in relation to its aim.\textsuperscript{13}

Proportionality is also found as a restraining principle of punishment. This is already embodied in the \textit{lex talionis} of the biblical Old Testament, that has always operated “to restrain wanton or excessive retaliation and cannot be understood to have authorized cruelty as an acceptable form of punishment.”\textsuperscript{14} It has also been included in national criminal codes, where it plays a restraining role, and may be regarded as a fundamental principle.\textsuperscript{15}

Keeping in mind the distinction between legal principles and rules that was introduced in Part II, the connection between proportionality and the existence of competing principles, as basis for rules, is “as close as it could possibly be.”\textsuperscript{16} This is the logical result of the need to establishing a balance between competing interests, embodied in legal principles. Proportionality thus follows from the nature of principles. Likewise, international law has its own concept of proportionality. But there is not just one concept of proportionality in international law: the idea is present in many aspects of international law and also in different sub-branches of international law. The subjects of international law, including States, international organisations and individuals, interrelate in many ways, with sometimes very divergent interests. The nature of these diverging interests is different in the respective branches of international law, thus the applicable proportionality equations are accordingly dissimilar. All these manifestations must however be deemed to be grounded in the common root of balancing relevant interests.

The protection of human beings and the enhancement of their well-being, which may in short be called ‘human dignity’, is a factor that is important in many relations between the subjects of international law.\textsuperscript{17} But there are also other factors that usually are balanced against human dignity, such as the sovereignty of States or other collective interests such as security concerns or free trade. The balance of interests in the light of human dignity is even more important in times of armed conflict, because the preservation of human dignity is in that situation more in danger than in times of peace. Given the fact that other considerations are balanced against human dignity, it is clear that human dignity as such is not “an absolute principle.”\textsuperscript{18}

The notion of proportionality is often linked to the notions of necessity, suitability and choice of the appropriate measure.\textsuperscript{19} The latter notion dictates whether a certain measure is not only necessary to achieve its objective, but also whether there is another act possible with less harmful effects instead of the measure under scrutiny. Sometimes the terms

\begin{itemize}
  \item \textsuperscript{13} Fotion, p. 92 and Crawford, MPEPIL, paragraph 5.
  \item \textsuperscript{14} For a description of the \textit{lex talionis} (“an eye for an eye”, etc.) and the principle of proportionality in punishment, see Fish.
  \item \textsuperscript{15} Section 718.1 of the Canadian Criminal Code: “A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.” See Fish, p. 7.
  \item \textsuperscript{16} Alexy, p. 66.
  \item \textsuperscript{17} See also Alexy, p. 64.
  \item \textsuperscript{18} Alexy, p. 64.
  \item \textsuperscript{19} The term used for the ‘choice of the appropriate measure’ in Dutch is ‘subsidiariteit’.
\end{itemize}
proportionality and necessity are even used interchangeably: when a certain act is not necessary, it is sometimes said that it is therefore disproportionate.\(^{20}\) It must however be kept in mind that the notions of necessity and proportionality are closely related, yet they have a distinct function. The sequence is that first, it must be determined whether a certain measure is necessary, because if it is not, it is usually already prohibited on that ground. Necessity implies that it is unavoidable to address a situation and that there are no feasible alternatives than to take action. But if a certain measure is necessary, it may nonetheless be illegal if it is subsequently found to be disproportionate on qualitative or quantitative grounds. Both grounds are equally important to balance the aim and the effects of the measure. The qualitative and quantitative elements represent different sides of the same coin and must be seen together and in relation to the factual circumstances. Suitability requires a measure to be appropriate for the achievement of its objective. In other words, the measure and its objective must have a certain causal relationship.

Instead of ‘linking’ proportionality to necessity and suitability, some authors divide the notion of proportionality into three sub-elements: suitability, necessity and proportionality \textit{stricto sensu}.\(^{21}\) Proportionality \textit{stricto sensu} must then be understood as the more quantitative comparison of the effects of the measure and its purpose. Proportionality \textit{stricto sensu} serves to ensure that the former is not disproportionate or excessive compared to the latter. As was mentioned above, a fourth sub-element could be added to this when proportionality is understood as a general notion in law, i.e. the choice of the appropriate measure.

Often, a proportionality requirement is implied in law, and not expressly spelled out in the relevant rule of customary or conventional international law. However, in general terms, it seems that there are two main functions that the proportionality principle performs: (1) as a limit on the functional powers of an entity, and (2) as a means to resolve conflicts between competing interests.\(^{22}\) These two main functions are discussed in the following Sections.

\subsection*{4.2.1 Proportionality as a Limit on the Functional Powers of an Entity}

Proportionality may operate to restrict interference of the larger entity to the interests or rights of its constituents. This type of proportionality is a well-established legal notion in a number of national jurisdictions, in particular in Europe\(^{23}\) and it was subsequently also transplanted into European law.\(^{24}\) In domestic public law, proportionality delineates the

\begin{itemize}
\item \(^{20}\) See for example Franck 2008b, p. 8, and Gardam 2004.
\item \(^{21}\) Alexy, p. 66, Cottier et.al., p. 629, Krommendijk and Morijn, p. 438, see also Emiliou, p. 24-37 and p. 268.
\item \(^{22}\) Cannizzaro 2000, p. 464.
\item \(^{23}\) See Ellis for an overview.
\item \(^{24}\) Arai-Takahashi 2002, p. 190.
\end{itemize}
extent to which the State and its organs may interfere with the rights of its citizens.\textsuperscript{25} The principle of proportionality thus:

“constitutes a legal and judicial standard to assess the reach and effect of measures taken by States or individuals. In particular, it facilitates the solution of conflicts or tensions between different rights and obligations by providing a tool to evaluate justifications for interferences with other rights and obligations. The principle is used to determine whether a measure has gone too far, in law or in fact. It helps to construe the border between legitimate governmental regulation and excessive interference with rights and obligations.”\textsuperscript{26}

The proportionality principle in international human rights law may serve to balance the importance of the protection of the fundamental rights of individuals against the interference by authorities.\textsuperscript{27} An example is the Olsson judgement, in which the European Court of Human Rights holds that “the notion of necessity implies that the interference [with a right protected by the European Charter of Human Rights] corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued.”\textsuperscript{28}

A similar function is found in European Law, where proportionality governs the extent to which the European Union (EU) is allowed to interfere with the legal systems of the EU member States and also for the protection of fundamental freedoms within the context of European Law. This concerns the question of whether a subject must be handled on the European level or on the level of its member States. The European Court has consistently applied proportionality as “one of the general principles of Community law.”\textsuperscript{29} Proportionality as a principle of European law originates from a legal notion found in the legal systems of various European States. The two major influences in this respect were German and French law, which have served as the source for some of the most important principles used by the European Court of Justice.\textsuperscript{30}

Furthermore, there is a strong resemblance with the way courts in the United States of America apply the “doctrine of the ‘less restrictive alternative’ (…) to assess the compatibility of state legislation with the United States Constitution: the question there too is whether the [S]tate interest, however legitimate, could be achieved in a matter less damaging to free trade than the one actually adopted.”\textsuperscript{31} Thus particularly in the context of review mechanisms,
proportionality is used to assess the suitability and necessity of measures, and to consider how (dis)proportionate the adverse effects of the measure are on affected individuals.\footnote{Arancibia, p. 297, discussing the impact in the British Courts.}

It may be concluded at this point that proportionality plays a role in international law as a "key tool of modern administrative law to ensure the purposive rationality of public action."\footnote{Franck 2008b, p. 31, quoting R. Thomas, Legitimate Expectations and Proportionality in Europe, 2000, p. 77.}

\subsection*{4.2.2 Proportionality as a Means to Resolve Conflicts between Competing Interests}

Where the proportionality principle is used as a technique to evaluate the interests of equal actors, the principle of proportionality serves to decide where the balance is between two competing, but not necessarily equal interests. Cannizzaro denies any normative content to the principle of proportionality when it fulfils this function in international law. Rather, he regards the principle of proportionality as a 'technique' or a "flexible tool for the analysis of conflicts between competing legal situations and interests."\footnote{Cannizzaro 2000, p. 456 and p. 481.}

For example, the concept of proportionality is used in the resolution of disputes in the field of international trade. The World Trade Organisation has its own system for the settlement of disputes, requiring countermeasures in this context to be "equivalent to the nullification of impairment."\footnote{Franck 2008b, p. 9.} Because the arbitration panels have frequently dealt with the issue of proportionality, the notion of proportionality in this context has been defined to a rather large extent. In a case between Canada and Brazil, which is quoted by Franck, the arbitration panel said that "a countermeasure is appropriate \textit{inter alia} if it effectively induces compliance."\footnote{Decision by the Arbitrators, Brazil--Export Financing Programme for Aircraft, Recourse to Arbitration by Brazil Under Article 4.11 of the SCM Agreement, WT/DS46/ARB (adopted Aug. 28, 2000)} In the case of a subsidy, in this case for the sale of Brazilian airplanes, a counter measure is proportionate and appropriate if it is used to "inducing the withdrawal of the prohibited subsidy."\footnote{Franck 2008b, p. 10.} Arbitrators use the principle of proportionality in disputes under International Investment Law to "balance human rights protection imperatives against investors’ interests in the light of the different international obligations underlying the dispute."\footnote{Kromendijk and Morijn, p. 423.} Also in the Law of the Sea, proportionality is used to achieve a fair balance between the competing interests of neighbouring States, as the International Court of Justice decided in the Continental Shelf Cases.\footnote{See North Sea Continental Shelf Cases (ICJ Reports 1969, p. 48) and Tunisia-Libya Continental Shelf Case (ICJ Reports (1982) p. 60. See also Cannizzaro 2000, p. 460-462.}
In the law of countermeasures outside of armed conflict, proportionality is used for the appraisal whether a certain countermeasure is proportionate in relation to a prior wrongful act. This type of proportionality analysis is slightly different in nature, because it concerns the use of proportionality as a limit for enforcement measures which makes it adjacent to the proportionality standard in the *ius ad bellum*. An example of such an unlawful act with regard to another State is a breach of a treaty obligation. The aim of the countermeasure should serve “neither as punishment for past, nor as means to deter future, wrongs.” The authority to use a countermeasure is always “hedged by the principle of proportionality.” The arbitration tribunal in the *Nautilus* case held that the countermeasures were to have the equivalent effect of the initial wrongful act. Nowadays, article 60 of the Vienna Convention on the Law of Treaties may serve as an example of how proportionality manifests itself in this context. In this provision, proportionality plays a role, without being explicitly mentioned, in the determination of which type of countermeasure a State may take in case a party to a treaty has breached an obligation that arises from that treaty. In addition, the ICJ decided that the ILC draft rules on countermeasures should be used to determine the legality of a countermeasure. Article 51 of the draft-articles now echoes the decision of the ICJ in the *Gabcikovo-Nagymaros* case, codifying the proportionality principle for this branch of international law. It states that “countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.” The proportionality principle in the law of international countermeasures is a means to resolve conflicts between competing interests as well as a general interpretative tool to reach an equitable result and aims to prevent countermeasures from “spiralling out of control.” Not only should the proportionally equation in countermeasures consist of a quantitative component (how much damage has been caused?), there is also a qualitative factor (how important was the interest that was violated?). In more simple terms, this

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40 According to the Arbitral Tribunal in the Air Services Agreement, “[i]f a situation arises which, in one State’s view, results in the violation of an international obligation by another State, the first State is entitled, within the limits set by general rules of international law (...) to affirm its rights through countermeasures.” Air Services Agreement of 27 March 1946 between the United States of America and France, 9 December 2978, 18 Reports of International Arbitral Awards (1978), pp. 417-493, at p. 443.

41 Franck 2008b, p. 17. But see Cannizzaro, who finds the idea of a unitary function for countermeasures unpersuasive and identifies four types of countermeasures: normative, retributive, coercive and executive countermeasures. See Cannizzaro 2001, p. 475.

42 Franck 2008b, p. 17. There are also other conditions that may preclude the wrongfulness of unlawful acts. For example, when compensation is offered, or arbitration is ongoing, this also precludes a State to take unilateral action. And again, when it comes to paying compensation for injuries suffered, the demanded compensation “should be proportionate to the actual injury caused.” See Franck 2008b, p. 17.


45 See Wall Advisory Opinion and also article 22 of the ILC Draft articles on Responsibility of States for internationally wrongful acts (2001).

46 Crawford 2011, paragraph 12.

47 Franck 2008b, p. 34.

48 O’Keefe, p. 1161.
Proportionality in International Humanitarian Law

means that “the harm which results from the response to a wrong [must] not outweigh the harms occasioned by the wrong in the first place.”

It must be noted that proportionality is not the only notion in international law that is used to resolve conflicts between competing interests. Therefore, the next section addresses notions in international law that are akin to the use of proportionality in international law: equity and reasonableness.

4.3 Proportionality, Equity and Reasonableness

Proportionality is not the only notion in international law that aims to reach acceptable outcomes. Similar notions include equity and reasonableness. In some cases these principles are used hand in hand, for example by the ICJ, which stated that “what is reasonable and equitable in any case must depend on its particular circumstances” and with regard to the delimitation of the continental shelf that there must be “a reasonable degree of proportionality.” Similarly, the European Court of Human Rights stated with regard to restrictions upon the exercise of rights which are necessary in democratic society, that these must be “reasonably proportionate to the legitimate aim pursued.”

Equity is a concept that originated from the Roman Law notion of *aequitas*. Equity is an integral part of contemporary public international law and refers to “what is fair and reasonable in the administration of justice.” Equity is also mentioned in the ICJ Charter as a method to resolve legal disputes *ex aequo et bono*, but equity is also expressly incorporated in treaty rules “in order to achieve an equitable solution”. Equity is used in international law to reconcile competing interests of international actors, primarily States, and also “different ethical and cultural views of the peoples in the world.” As such, it performs its role as part of the system of international law and it has particular significance as an “element in the progressive development of international law (...) [because] it may infuse basic considerations of fairness and justice into the fabric of the law.”

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49 O’Keefe, p. 1160.
50 Corten 2006, paragraph 2.
52 North Sea Continental Shelf, ICJ Reports 1969, paragraph 98, p. 52.
53 Chorherr v Austria, ECHR Series A No 266-B paragraph 33.
54 Francioni 2013, paragraph 1. According to Blum, it was Judge Hudson who introduced the term in dispute settlement in international law, in his opinion submitted during the Diversion of Water from the Meuse Case (see OCIJ Serie A/B, No 70, 1937, PP. 4-89, at 76.). See also Blum, pp. 395-396.
55 See article 38 (2) of the ICJ Statute which provides “the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.” See also Jennings, p. 30.
56 See articles 83(1) and 74(1) UNCLOS.
57 Francioni 2013, paragraph 3. See also Gourgourinis, p. 340.
58 Francioni 2013, paragraph 26.
that the legal concept of equity is held to be “a general principle directly applicable as law [and the Court] is bound to apply equitable principles as part of international law, and to balance up the various considerations which it regards as relevant in order to produce an equitable result.”\textsuperscript{59} Equity can thus be understood also as a general principle of international law that must be observed when international law is applied.\textsuperscript{60} It is result-oriented, because the result must be in accordance with a certain notion of justice.

Reasonableness has been used in many instances in international law to reach a desired outcome and in addition it has found its way into a number of positive legal rules of international law. For example, in IHRL, the concept is used to determine whether a State has concluded a criminal or administrative procedure within a ‘reasonable’ timeframe.\textsuperscript{61} In the Barcelona Traction Case, the ICJ stated that “in the field of diplomatic protection as in all other fields of international law, it is necessary that the law be applied reasonably.”\textsuperscript{62} The objective of a reasonable application of international law is that it would provide legitimacy to the framework of international law in general and helps to view international law as a coherent legal framework.\textsuperscript{63} This has both a formal and a material component. The formal component may be understood as the question whether there is a procedure in place that provides the relevant stakeholders with a realistic opportunity to plead their side of the case. But apart from this formal component, reasonableness may also be understood in the material sense and as such dictate whether in specific circumstances the outcome of a certain legal question is reasonable. The delimitation of the continental shelf is an example of a matter where the ‘reasonable degree of proportionality’ could provide the legal standard to solve a situation where the application of the rules to the situation at hand leads to unreasonable results. In that case, “the notion of reasonableness demonstrates the contradiction between on the one hand, the static, and in theory closed, nature of a legal system, and, on the other, the need to integrate facts, and sometimes values, within that system.”\textsuperscript{64} In fact, the link between reasonableness and proportionality is so close, that according to Corten, proportionality is one of the three criteria that need to be satisfied to assess the reasonableness of a measure under international law.\textsuperscript{65}

When proportionality is understood as a legal notion that dictates that a State’s “acts must be a rational and reasonable exercise of means towards achieving a permissible goal, without unduly encroaching on protected rights of either the individual or another State”\textsuperscript{66},

\begin{enumerate}
\item \textsuperscript{59} Tunisia-Libya Continental Shelf (Judgment), ICJ Reports 1982, p. 60.
\item \textsuperscript{60} Gourgourinis, p. 344.
\item \textsuperscript{61} See article 6 (1) ECHR: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” (emphasis added)
\item \textsuperscript{62} Barcelona Traction Case, ICJ Reports 1970, paragraph 93.
\item \textsuperscript{63} Corten 2006, paragraph 9.
\item \textsuperscript{64} Corten 2006, paragraph 8.
\item \textsuperscript{65} Corten 2006, paragraph 20.
\item \textsuperscript{66} Crawford, 2011, paragraph 1.
\end{enumerate}
it would be similar to claiming that the State must act reasonably and the result of its actions must be equitable.\footnote{Cottier et al. 2018, p. 671: “Given the role of proportionality as a legal principle in different legal orders, it clearly amounts to a legal principle recognized in international law under Article 38 of the Statute of the ICJ, essentially derived from the tradition of equity”} Although the more positivist oriented international lawyer will regard these notions as opening the door to ethical or moral considerations, rather than legal ones,\footnote{Corten 2006, paragraph 1.} these notions play an undeniable role in the system of public international law and its sub-branches. They are used as tools of interpretation of positive rules of international law and as gap-fillers.\footnote{Francioni 2013, paragraph 5-5. Corten 2006, para 7-8.} Equity is a “normative flexifier mitigating the rigidity of application of positive international law”\footnote{Gourgourinis, p. 327.} and reasonableness must be granted a similar function. These notions may also be understood as principles of international law, as a separate source of material international law.\footnote{Francioni refers to what he calls the ‘high water mark’ of the concept of equity, which was construed by the ICJ as a “self-standing source of legal principles” in the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, ICJ Reports 1982, p. 18, para 70 on p. 59: “the term ‘equitable principles’ cannot be interpreted in the abstract; it refers back to the principles and rules which may be appropriate in order to achieve an equitable result.”.}

According to Nasser, “the imprecision of some norms and the ambiguity found in the language of international law are considered manifestations of the soft law phenomenon.”\footnote{Nasser, p. 117.} The notions of equity, reasonableness and also proportionality may be labelled as such vague and imprecise norms. The problem of these types of norms is “one of substance rather than form: there is no doubt about their legal character, since they are part of legal binding treaties, but there is a degree of indeterminacy over the specific obligations and rights of States.”\footnote{Nasser , p. 117 , quoting Elias and Lim in note 26. Nasser states that “:the content may vary, according to the material context in which the expression is inserted, because of doubts concerning the characteristics of the expression, or because of the temporal factor. The examples are numerous and they include due diligence, reasonable, equitable, equivalence, proportionality etc.”} Proportionality is a concept that is related to equity and reasonableness, however the notions retain a separate significance and role in international law. For example, it seems that equity is mostly used to provide a solution when two similar interests must be balanced, in a more quantitative sense, whereas reasonableness is used for a clash between unequal interests, which requires a more qualitative assessment. Proportionality assessments may take into account both qualitative and quantitative factors.

\section*{4.4 Conclusion}

In order to qualify as a general principle of international law, it needs assessing whether proportionality performs some or all of the roles of principles of international law as identified in Chapter 2 of this study. It was established in Part II that the term ‘principle’
could mean something different in varying legal frameworks and contexts. A preliminary conclusion is that the principle of proportionality in international law is multi-faceted and may have a very distinct significance in different contexts. But as became clear in this chapter, proportionality is a concept that is inherent in any legal framework, and thus plays a role in any branch of international law.\textsuperscript{74} It allows for flexibility in the application of the rules or underlying legal principles and is also crucial in reaching a fair balance between competing interests. This confirms that the principle of proportionality “constitutes a general principle of international law”.\textsuperscript{75}

In this chapter, three basic functions of proportionality in international law are identified:
1. The function to restrict interference of the larger entity to the interests or rights of its constituents in international law (see Section 4.2.1 above), such as in IHRL;
2. The function to balance competing, and not necessarily equal interests between equal actors (see Section 4.2.2 above), such as in international law in relation to countermeasures.
3. The function of proportionality as a general interpretative tool for unclear or imprecise legal rules, similar to the role equity and reasonableness play in international law (see Section 4.3 above).

There are thus manifestations of proportionality as an interpretative tool in all legal systems, including a diverging range of branches of international law. This however does not mean that proportionality is used in a similar way in dissimilar legal frameworks. It matters to a great extent whether the proportionality principle operates to interpret a rule that regulates the relation between equal entities, such as States, or as a regulatory mechanism between unequal entities, such as a State and its citizens or an international organisation and its constituents. The different functions the notion of proportionality performs, at least in the legal frameworks that apply in peacetime, are very different and are dependent on the particular character of the different branches of international law and the types of relations they regulate. Proportionality as a principle elevated from national law is clearly discernible, for example in IHRL, applying as a mitigating factor on States’ interference with their constituents. But that role is very different from the proportionality principle as it functions to secure a reasonable balance between the interests of two States, as in international law concerning countermeasures. So although proportionality is often used as an interpretative tool to solve conflicts of interests, it clearly seems to be more than that. Proportionality retains a separate significance and role in different branches of international law. This would argue against the existence of an unitary content, at least for the two first functions.\textsuperscript{76}

\textsuperscript{74} Delbrück, p. 1143.
\textsuperscript{75} Cannizzaro 2000, p. 481.
\textsuperscript{76} See also Pertile, p. 679-680.
There is nonetheless support from a number of authors who argue that an overarching, or ‘general principle of proportionality’ indeed exists in international law. This would for example be a logical position for proponents of global constitutionalism. Krüger-Sprengel summarises the function of such a principle of proportionality as a general principle that must be taken into account when interpreting important rules of international law. Franck notes that the role of proportionality in international law is ‘central’: “[t]his centrality results both from proportionality’s impressive historical and cultural pedigree and from the underdeveloped state of a global legal system still quite reliant on mutuality of obligation, reciprocity, and self-enforcement.” Crawford describes how proportionality becomes ‘self-perpetuating’, because it is employed by all players in the international law field and to be a successful international lawyer, “means learning to reason and deploy the language of [proportionality analysis].” Cannizzaro concludes in his 2001 study on proportionality that “proportionality represents a structural principle of international law, a principle which may be deduced from the observation of the formal structure of the legal situations to which it applies.” Cannizzaro furthermore states that “[w]ith respect to each of the various fields of application, proportionality maintains a common evaluative structure and unitary content.” It is suggested that these different authors refer to the principle of proportionality as a general interpretative tool for unclear or imprecise legal rules, similar to the role equity and reasonableness play in international law. Also, the Supreme Court of Israel recognised proportionality as a general principle of international law in the Beit Sourik case of 2004.

The ICJ has stated with regard to the notion of equity that it is a “general principle directly applicable as law [and the Court] is bound to apply equitable principles as part of international law and to balance up the various considerations which it regards as relevant in order to produce an equitable result.” Equity can thus be understood also as a general principle of international law that must be observed when international law is applied. It is result-oriented, because the result must be in accordance with a certain notion of justice. It may be argued that a general proportionality principle performs a similar function. The proportionality principle is used in many legal systems as a tool to interpret vague legal rules, to balance competing interests in order to provide reasonable and equitable outcomes and to protect the rights of smaller entities from excessive interference from the larger entity.

78 Krüger-Sprengel, p. 194-195: “un principe general don’t il faut tenir compte dans l’interprétation des règles pertinentes du droit international.” (translation by the author).
79 Franck 2008b, p. 34.
81 Crawford 2011, paragraph 26, quoting Sweet and Matthews at p. 161.
82 Cannizzaro 2000, p. 483.
83 Cannizzaro 2001, p. 481.
84 But see Dinstein 2013, p. 74, who states that this “is a completely untenable proposition. Indeed, proportionality is not even a general principle of IHL: it is patently excluded insofar as combat operations are concerned.”
85 Tunisia-Libya Continental Shelf (Judgment), ICJ Reports 1982, p. 60.
86 Tunisia-Libya Continental Shelf (Judgment), ICJ Reports 1982, p. 60.
These different manifestations of proportionality are based on a general proportionality principle, which plays a similar role as equity and reasonableness do across the palette of general international law and its branches. The understanding of the notable writers mentioned above seems to imply that proportionality applies on the level of principles, not rules, and it is often used to provide an equitable outcome for dynamic situations in which a rule that provides a fixed outcome is unsuitable.  This does not lead to the conclusion that proportionality has a unitary substantive meaning enabling it to set aside specific legal rules. There does not seem to exist unanimity among legal doctrine and courts in the international sphere that a general principle of proportionality with this function exists in general international law, although it may exist in some national law systems. If such ‘correcting’ function of proportionality would be accepted to apply in all branches of international law, this would seriously impair the certainty that specific legal rules are intended to provide to the subject regulated by that rule. Nonetheless, lawyers, States or courts themselves may use proportionality on occasion to produce a desired outcome, where that would be beneficial for their case.

When compared to the roles principles of international law perform, it may be concluded that the general principle of proportionality in international law serves to fill gaps and to interpret other rules of international law. Proportionality also operates as the basis for specific proportionality rules in different branches of international law applicable in peacetime, used to balance diverging interests, without superseding these rules. The conclusion is thus that a general proportionality principle in general international law is applicable in peacetime. A follow-up question is then whether the existence of a general principle of proportionality in the general framework of international law has consequences for the way in which proportionality manifests itself in IHL. The following chapters deal with the manifestations of the notion of proportionality in international law, including those relating to the use of force and those applicable in times of armed conflict.

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87 As Cannizzaro concludes, see Cannizzaro 2000, p. 481. Cannizzaro concludes that proportionality is not a rule, but a general principle of international law, more as a “technique for the legal order” to evaluate the exercise of powers by a State.
Chapter 5
Chapter 5. Proportionality and the Use of Force

5.1 Introduction

As is explained in the previous chapter, the notion of proportionality is often used as a concept that strikes a balance between competing interests, such as the protection of the human dignity of one or more individuals and another consideration. Of course, respect for human dignity is especially under pressure when armed force is used and in situations of armed conflict. Proportionality developed to prevent the practice of self-help by States from escalation into an uncontrollable spiral of full-scale war. Therefore, it can be no surprise that the legal frameworks that deal with the use of force, including those which apply during armed conflict, contain manifestations of proportionality.

This and the following chapters analyse the principle of proportionality as it occurs in the legal frameworks that apply during armed conflict, in particular the *ius ad bellum* and the *ius in bello* (international humanitarian law, IHL). Additionally, the framework of IHRL deals with the use of force and remains applicable in times of war as well. First, however, it is relevant to assess the origins of proportionality in Just War theory, which stems from moral philosophy, because “the ‘moral’ roots of the proportionality principle [in armed conflict] provide valuable insight into the scope and limits of the legal test.”

1 Franck discusses “proportionality in military matters” and distinguishes between the *ius ad bellum*, *ius in bello* and the role of proportionality in determining individual criminal responsibility. In the discussion below, the principle of proportionality in human rights law will be discussed additionally, where it is applied as a restraining factor to the use of force. Although the circumstances in which this will occur does not necessarily imply that a state of conflict exists, the part in which it is discussed is nevertheless called “proportionality in armed conflict” because particularly in that context, the relation between proportionality in the *ius in bello* and human rights law surfaces. Technically, the heading used by Franck of “proportionality in military matters” may be deemed to be more precise. International criminal law will receive less attention, except for the fact that some judgements that arise from it will be used to explain or explore concepts from, in particular, *ius in bello*. See Franck 2008b, pp. 4-17.


3 ICJ: Nuclear Weapons Advisory Opinion, p. 226; para 25, p. 240; the Wall Advisory Opinion, para. 106, p. 178: “the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.”

5.2 Just War Theory

5.2.1 Introduction

The historical and normative predecessor for the concept of proportionality in international law during armed conflict is the Just War theory, as developed in moral philosophy. Just War theory has deep historical roots and is based on the writings of philosophers from a wide variety of cultural backgrounds. The concept of proportionality as it appears in modern Just War theory is the result of the way philosophic schools have thought about war for centuries.

5.2.2 From Morality to International Law

War was the subject of philosophical debates in many ancient civilizations. The origins of Just War theory may be deemed to start at the Stoic writings of Aristotle (364-322 BC) and his followers in ancient Greece. The Stoic ideas were later developed by Roman writers like Cicero (106-43 BC).

During the middle ages, Augustine (354-430) argued that, subject to a number of conditions, it could be morally justified to wage war. These conditions included a declaration of war by the competent authorities and that the war was fought for the right reasons, such as reinstating the peace or punishing wrongdoers. Francisco de Vitoria (1485-1546) writes that even if the war is undertaken for a just cause, there are limits to the way the war is fought. He holds that the innocent must be spared if that is possible, although the ‘guilty’ may be killed, even after the actual battle is over and the adversary is no longer a threat.

During the classical period, (1600-1815), the ius gentium (or the Law of Nations) and natural law were understood to co-exist and as such both regulated international relations. Suárez (1612) played an instrumental role in the distinction between the natural law and the ius gentium. The former was understood to be eternal, universal, and though it was based on the ancient Stoic and Roman traditions, it developed to a large extent during the medieval Catholic Church, for example through the writings of Thomas Aquinas. The ius gentium, on the other hand, was a strictly human affair, to be applied between States and developed under the influence of civilizations that had organised themselves as separate States that shared a common culture. The ultimate goal of both natural law and ius gentium was to create

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6 It is important to note that the moral discourse was phrased in terms that are understood in this study as legal terms: the ius in bello and the ius ad bellum.
7 Neff 2005, p. 49.
8 Kinsella and Carr 2007b, p. 55.
9 Francisco de Vitoria, pp. 70-79.
10 Neff 2014, p. 5-6.
a framework based on justice. In war, the goal to achieve justice was framed in terms of a war being waged for the right reason (the *ius ad bellum*) and with the right methods (the *ius in bello*).

In Hugo Grotius’ *De jure belli ac pacis* of 1625, the theological arguments on war, based on the work of Augustine and his predecessors, were transformed into normative claims. In Hugo Grotius’ *De jure belli ac pacis* of 1625, the theological arguments on war, based on the work of Augustine and his predecessors, were transformed into normative claims. Nonetheless, some philosophers, among who was Thomas Hobbes, maintained that the *ius gentium* had no binding character and referred to natural law instead. De Vattel subsequently framed both types of philosophical notions in a more systemic, and thus more legal fashion in his “The Law of Nations” of 1758. Ultimately, in the 19th century, through the period during which positivism dominated international law, the two drifted apart even more, resulting in both branches of modern international law (IHL and *ius ad bellum*) as in a branch of ethics (Just War theory).

Modern Just War theory may be characterised as the middle ground between two other influential philosophical schools: realism and pacifism. Realists argue that that there is no morality in warfare: why a war is started does not depend on the question whether it would be morally just, and nor are there any moral constraints on the way the war is fought. Rather, as Morgenthau argues, “international politics, like all politics, is a struggle for power.” Therefore, war may be used by States to increase their power in order to survive and prosper. Rules for conduct in war may still be agreed upon by the parties, but only because this limits their own losses. Pacifists such as Erasmus (1466-1536), on the other hand, argue that war is wrong because it is immoral and that it should therefore be abolished altogether.

As a result of the gradual developments of international law and ethics, the *ius ad bellum* and *ius in bello* concepts of proportionality in Just War theory and in international law have common roots, but today all these four concepts have their own distinct meaning.
5.2.3. Proportionality in Just War Theory

Just War doctrine acknowledges that, under certain restrictions, there may be a just cause to go to war, but the war fighting is subject to restraints.\(^{19}\) Just War theory contains both a \textit{ius ad bellum} and a \textit{ius in bello} component and both components contain a proportionality test.\(^{20}\)

5.2.3.1 The \textit{ius ad Bellum} Proportionality in Just War Theory

Hugo Grotius lists a number of conditions for a war to be just, including “a just cause, the necessity of waging war to attain the just cause, a determination of the probability of success, the right intention by the defender, a public declaration of war by the proper authority, and a proportional response to aggression.”\(^{21}\) Other commentators add the condition that waging the war must be the last resort for a State.\(^{22}\)

The proportionality condition of the \textit{ius ad bellum} part of Just War theory says that “even if a war does achieve relevant benefits, it is wrong if the destruction it causes is excessive, or out of proportion, to those benefits.”\(^{23}\) The \textit{ad bellum} proportionality principle in Just War theory may therefore be described as a proportionality ‘of ends’. This criterion asks the question “whether the overall harm likely to be caused by the war is less than that caused by the wrong that is being righted.”\(^{24}\) This implies that not all wrongs are sufficiently wrong to justify armed force, because inevitably, the war would also result in evil. This must be understood as a calculation of all the wrongs that result from the war, not only the evil that is expected to fall upon the party that is contemplating to use armed force, and compared to all the good that is likely to result from the war. The criterion of last resort is related to this calculation, because it “demands that actors carefully evaluate all the different strategies that might bring about the desired ends, selecting force if it appears to be the only feasible strategy for securing those ends.”\(^{25}\)

Fotion notes that the principle suffers a major deficit, because it is only possible to apply the principle in the easy cases. In the hard cases, even if it would be accepted that

\(^{19}\) Coppetiers and Fotion, p. 11-15, see also Kinsella and Carr, p. 55.
\(^{20}\) According to Grotius, proportionality was not only of critical importance in decisions regarding \textit{ius ad bellum}, but also in the conduct of the war itself. See Crawford 2011, paragraph 5: Grotius in \textit{De Jure Belli ac Pacis}: ‘no war should be undertaken, but where the hopes of advantage could be shewn to overbalance the apprehensions of ruin’. See also Sullivan, p. 1. Sullivan states that proportionality must be seen as the overarching principle behind the Just War doctrine, because “this doctrine observes that (1) any sovereign undertaking a war should measure its response in proportion to the claimed wrong, and (2) the means used to carry out that war should be proportionate to its desired goal.” Note that there is a difference between the use of certain terms by international lawyers and philosophers. The philosophical meaning is “closely related but still distinct to the one which derives from the use of a legal discourse.” See Van Damme, p. 126.
\(^{21}\) Crawford 2011, paragraph 5 and Sullivan, p. 1.
\(^{22}\) Fotion, Coppetiers and Apressyan, p. 12-14.
\(^{23}\) Hurka 2008, pp. 127-128.
\(^{24}\) Bellamy, p. 123.
\(^{25}\) Bellamy, p. 123.
it is sufficient if the overall harm likely to be caused by the war is less than 50 percent, it is simply impossible to quantify the percentage in any credible way.\textsuperscript{26} This leads Fotion to conclude that the \textit{ius ad bellum} proportionality principle in Just War theory “will tend to be permissive”.\textsuperscript{27}

\subsection*{5.2.3.2 The \textit{Ius in Bello} Proportionality in Just War Theory}

The proportionality condition of the \textit{ius in bello} says that “an act in war is wrong if the harm it causes, especially to civilians, is out of proportion to its military benefits.”\textsuperscript{28} The term proportionality thus refers to “the total calculus of the balance of goods and evils associated with a particular operation or action in the course of a war.”\textsuperscript{29}

The \textit{ius in bello} component of Just War theory may be explained through the (philosophical) doctrine of double effect. The theory of double effect was first formulated by Thomas Aquinas. It may be summarised as the idea that any act that is done may have both an intended consequence, and an unintended consequence. Even if the objective of an act is good, the action might still result in unintended negative consequences. The doctrine of double-effect states that the unintended negative consequences are excusable if four conditions are satisfied. First, the desired end must be good in itself. Second, only the good effect must be the intention of the act. Thirdly, the good effect must not be produced by means of the evil effect, and finally, the good of the good effect must outweigh the evil of the evil effect (proportionality).\textsuperscript{30}

In military terms, “[d]ouble effect is a way of reconciling the absolute prohibition against attacking non-combatants with the legitimate conduct of military activity.”\textsuperscript{31} For the purpose of collateral damage during armed conflict, the theory of double effect says that it matters whether damage to civilian objects or loss of civilian lives result from a deliberate attack on these persons or objects, or whether these were the result of an attack on another, legitimate military objective (consisting of either persons or objects), as a foreseeable, but still not desired side effect.\textsuperscript{32} Some philosophers criticize the doctrine of double effect. For example, McKeogh argues that “for an attack on a military objective to be just, there must be not only an intention but also a likelihood of no civilian deaths occurring as a result (...) For a military act to be just, it must be reasonably probable that no civilian will be killed.”\textsuperscript{33}

\begin{itemize}
\item \textsuperscript{26} Fotion, p. 93.
\item \textsuperscript{27} Fotion, p. 93.
\item \textsuperscript{28} Hurka 2008, pp. 127-128. See also Bellamy, p. 124.
\item \textsuperscript{29} Van Damme and Fotion, p. 129.
\item \textsuperscript{31} Walzer 1977, p. 194.
\item \textsuperscript{32} There is no unanimity among philosophers about the justification the double effect doctrine provides for collateral damage. See for example Lefkowitz, p. 159.
\item \textsuperscript{33} McKeogh 2002, p. 170, and accompanying footnotes.
\end{itemize}
Waltzer notes that even though it is important that the intention is that civilians are spared, the theory of double effect fails to acknowledge that in some instances the death of civilians may be nonetheless foreseen. He concludes that the danger is, that an attack may be morally just on the basis of the doctrine of double effect, but still is likely to cause a large number of foreseeable civilian casualties. He believes that the principle of proportionality that is also included in the theory of double effect, is “a weak constraint” and therefore, there is a danger that the theory of double effect provides a “blanket justification” for civilian damage. Waltzer therefore argues that not only must the intention of the attacker be good, he must also “aim narrowly at the acceptable effect; the evil is not one of his ends, and, aware of the evil involved, he seeks to minimize it, accepting costs to himself.” An interesting preliminary test that may be relevant here, derived from the doctrine of double effect, is the answer to the test question provided by Bennet: “if you had believed that there would be no civilian deaths, would you have been less likely to go through with the raid?” This filters out any attack that has the objective to kill civilians, in particular to lower the morale of the civilian population to sustain or support the fighting. The principle of proportionality in Just War theory entails that if damage to civilians is foreseeable, it must also be minimised. This may sometimes lead to a moral obligation on the soldier of the attacking party that they risk their own lives to a certain extent. Therefore, a soldier acts morally just if he displays a “positive commitment to save civilian lives” because civilians are entitled to more protection than soldiers. Walzer provides two relevant examples. The first concerns the way French pilots engaged factories in occupied France during World War II. Because they were so keen to hit as few French civilians as possible, they flew at low altitude, bombing as precisely as they possibly could. This posed more risk to themselves, but they decided to go ahead with that method anyway. The second example, also from World War II, is the way the Allied troops attacked the plant for heavy water located in Vemork, Norway. In 1943, the plant was attacked for the first time. The military advantage that was sought was the delay of the development of nuclear weapons by German scientists. This was obviously a very important objective, thus the military necessity of this attack may be deemed to be high. Nonetheless, the British and Norwegian planners did not decide to attack the plant through a devastating airstrike. The first attempt by commandoes was a failure however, killing 34 men. A second attempt, by a smaller squad, succeeded without any casualties. When later in the war, the production of heavy water at the plant had resumed, and the security of the facility had been ameliorated, the plant was bombed by planes, killing 22 Norwegian civilians.

37 Bennet, p. 189.
38 Walzer 1977, p. 156.
39 Walzer 1977, p. 156.
In short: the doctrine of double effect justifies killing civilians when attacking military targets. The constraint on these unintended, yet foreseen, civilian casualties is the proportionality principle. This principle prevents that the mere intention to hit a military objective is sufficient to justify any number of civilian casualties, and destruction of civilian property. There needs to be a fair balance.

5.2.4 Sub-Conclusion

As mentioned above, the proportionality requirement is found in both the *ius ad bellum* and the *ius in bello* components of Just War theory, but the meaning of the notion of proportionality is different in the two components. According to a commonly accepted understanding of Just War theory, the *ius ad bellum* and the *ius in bello* must be judged separately. Yet, there is a connection between the *ius ad bellum* and the *ius in bello* with regard to proportionality, because the use of armed force “is not justified where the necessary means to be employed to achieve the object would be inherently excessive or indiscriminate.” Whether a similar connection is present in international law is explored below in Chapter 8.

As is demonstrated in Chapter 6 and in Part IV of this study, the interpretation of the IHL proportionality rule, is very different than this understanding of the theory of double effect. The prohibition to launch a disproportionate attack that applies to the armed members of a party to an armed conflict is not necessarily based on moral considerations, but on a legally binding rule. Therefore, the following sections will deal with law rather than moral considerations. First, in the next section, the *ius ad bellum* proportionality principle is discussed.

5.3 The Concept of Proportionality in the *Ius ad Bellum*

5.3.1 Introduction

In international law, the *ius ad bellum* regulates the recourse to the use of armed force by States. States, courts and authors agree that proportionality is one of the regulatory conditions that applies to the use of armed force by States under the *ius ad bellum*. This section presents some of the debate regarding the interpretation of these conditions.

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41 Bellamy, p. 128.
42 Shearer, p. 1. See also Bellamy, p. 128-130
43 Although this branch of international law is normally referred to as the law regulating the use of armed force by States, this study refers to this field as the *ius ad bellum* for reasons of clarity, because the use of armed force by States is also regulated by IHL and IHRL.
Traditionally, the *ius ad bellum* concerns primarily inter-State armed force, but the principles of the *ius ad bellum* are also invoked in response to non-State armed groups. Before World War I, the right of States to resort to war was generally regarded as a matter of sovereign discretion, although in most cases States did justify their war efforts referring to self-defence or self-help. In cases where States resorted to armed measures short of war, customary international law, derived from the Caroline Case, dictated that a justification for the armed force was provided. Also in that context, proportionality was considered to be part of the legal requirements governing such armed measures.

The most important sources of the contemporary *ius ad bellum* are the Charter of the United Nations (UN Charter), complemented by customary international law that has developed from State practice since the adoption of the UN Charter. The starting point is article 2(4) of the UN Charter, which prohibits the threat or use of force. The exceptions to this are contained in Chapter VII of the Charter, including the collective enforcement measures of the Security Council as well as self-defence. Article 51 of the UN Charter restricts the right to self-defence to cases where an armed attack has taken place. Some commentators have claimed that a customary right of self-defence beyond Article 51 exists. The ICJ concluded in the Nicaragua Case that the customary right of self-defence complements the right as it is described in Article 51 of the UN Charter.

Article 51 of the UN Charter dictates that a State under attack must fulfill a number of conditions for the legitimate use of armed force in self-defence. First, there needs to be an armed attack, which must be both immediate and in the present. The attack must also be real and imminent. Further, the attack must be directed against the State itself. Finally, the State must be unable to obtain the Security Council's concurrence in the use of armed force in self-defence.

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44 See for example Dinstein 2012, p. 272 and Judge Kooijmans' Separate Opinion in the Armed Activities DRC-Uganda, para 30: "It would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker state, and the Charter does not so require". See Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, ICJ Reports 2005, p. 306. Examples include the incursions of the Turkish armed forces into Northern Iraq against Kurdisch PKK fighters and the attack by the Colombian armed forces into Ecuador against a base of the FARC-rebels in 2008. See also Ruys.

45 Bryde, p. 331.

46 The ICJ has dealt with questions of the *ius ad bellum* in a number of cases, for example in the Nuclear Weapons Advisory Opinion, the Oil Platforms Case between Iran and the U.S. and the Armed Activities Case.

47 Dinstein calls the prohibition to use force the "bedrock of the contemporary international legal system." See Dinstein 2005, p. 326. For a thorough study of the scope and content of article 2(4) of the UN Charter, see Stürchler.

48 See Article 51, which notes that "(n)othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures to maintain international peace and security." For the subsidiary role the United Nations General Assembly may play, see Stein and Morrissey, pp. 1232-1235.

49 See in particular Bowett, p. 184-185. See also Bryde, p. 363 and Brownlie 1963, p. 272.

50 "The court does not consider that, in the areas of law relevant to the present dispute, it can be claimed that all the customary rules which may be invoked have a content exactly identical to that of the rules contained in the treaties which cannot be applied by virtue of the United States [multilateral treaty] reservation. On a number of points, the areas governed by the two sources of law do not exactly overlap, and the substantive rules in which they are framed are not identical in content. But in addition, even if a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability. Nor can the multilateral treaty reservation be interpreted as meaning that, once applicable to a given dispute, it would exclude the application of any rule of customary international law the content of which was the same as, or analogous to, that of the treaty-law rule which had caused the reservation to become effective." The Nicaragua case, para 175, p. 94. Brownlie came, writing in 1963, to the same conclusion as the ICJ did in 1986. See Brownlie 1963, p. 274

51 See also Ducheine 2008, p. 148 for a discussion (in Dutch).
armed attack. Once an armed attack is under way, the UN Charter sets a procedural condition that the attacked State needs to fulfil: the attacked State needs to inform the UN Security Council that an armed attack has occurred. Thirdly, there is a temporal requirement to halt the use of armed force in self-defence as soon as the Security Council has taken measures necessary to maintain international peace and security. Three more conditions, though not spelled out in article 51 apply. These are the substantive conditions of immediacy, proportionality and necessity, which are derived from the famous Caroline Incident.  

The principle of proportionality in the *ius ad bellum* is closely connected to the notion of necessity. Both are "inherent in the very concept of self-defence." One commentator notes that "if a use of force is not necessary, it cannot be proportionate and, if it is not proportionate, it is difficult to see how it can be necessary." However, it seems appropriate to consider necessity separately, before the proportionality of an attack is assessed, in particular for a response in self-defence against an isolated attack. In that situation, the attacked State is obliged to "verify that a reasonable settlement of the conflict in an amicable way is not attainable." Necessity thus refers to the existence of an armed attack and the lack of feasible alternatives. Proportionality relates to the qualitative and quantitative elements of the response to halt and repel the initial armed attack.

### 5.3.2 Proportionality in the Use of Force in Self-Defence

The principle of proportionality regulating the right to self-defence by States is "well established under general international customary law and has to be regarded as implicit in the very notion of self-defence." This is obvious, because when the main rule is that the use of force between States is prohibited, it would make no sense to leave the exception to that rule to be unlimited. Secondly, from the primary purpose of self-defence, which is to restore the situation as it was before the act occurred that provoked the right to self-defence, it also follows that the response must be restrained. Proportionality must be applied to determine the scope of the right to self-defence and "serves to determine the intensity and the magnitude of military action."

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53 See for example Gardam 2004.

54 Nuclear Weapons Advisory Opinion, para 41, p. 245.

55 Gray, p. 150.

56 Dinstein 2012, p. 262.

57 Bryde, p. 362.

58 Bryde, p. 363.

In order to determine whether the use of armed force in self-defence is proportionate, the notion of self-defence itself must be defined as much as is possible, for “if left undefined and unregulated, [it] could virtually deny to the prohibition [of the use of force] any meaning.” For States, the principle of proportionality plays an important “role in modulating the escalation of conflict” and with the objective to preserve the international order. The limit of self-defence is the situation where the continuation of the use of armed force would amount to punitive measures. In that situation, the use of force is no longer motivated by an armed response out of self-defence, but as a reprisal and the legality of the applied force must thus be determined on the basis of the legal framework for reprisals.

In State practice, sometimes other interpretations of the moderation of the use of armed force are encountered. For example, the so-called ‘Powell doctrine’ aims to guide decision makers entering into a war, following an armed attack. Sullivan states that “[t]he Powell doctrine calls for massive or overwhelming force to be used. This is to ensure that U.S. casualties are minimized and the military objective is accomplished without delay.” The use of the terms “massive” and “overwhelming” in this doctrine seem to stand at odds with the requirements of the principle of proportionality. Sullivan notes that the principle of proportionality should be used to effectively critique the “massive force” of the Powell doctrine, as well as the pre-emptive strike doctrine of the Bush Administration.

### 5.3.2.1 Components of the *Ius ad Bellum* Proportionality

The amount of armed force that may be legally applied in response to an armed attack in accordance with the right to self-defence is thus not unlimited. Its exact scope has been extensively debated. The ICJ was confronted with the proportionality test in the *Ius ad Bellum* in the 2003 *Oil Platforms* Case. In that case, the ICJ determined that the attack on two Iranian oil platforms was not a proportionate use of force in self-defence “as a response to the mining of, by an undetermined agency, of a single United States warship, which was severely damaged but not sunk, and without loss of life in the circumstances of this case.”

As a proportionality equation implies that there must be a balance between different values, it must be determined of which components the *Ius ad Bellum* proportionality equation

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60 Bowett, p. 4.
61 Franck 2008b, p. 3-4.
62 Greenwood 1989a, note 22 on page 278.
63 See also Section 7.5 below.
64 Sullivan, p. 5.
65 Sullivan, p. 6.
67 *Oil Platforms* Case.
68 *Oil Platforms* Case, para 77, p. 198-199.
consists. This issue is, according to Gardam, “rarely carefully analysed.”

69 Gardam proposes to use four factors for assessing the proportionality of a response in self-defence: (1) the geographical and destructive scope of the response; (2) the duration of the response; (3) the selection of means and methods of warfare and tactics and (4) the effect on third States.

According to Gray, proportionality in the *ius ad bellum* relates to the size, duration and target of the response. Dinstein describes the principle of proportionality in self-defence as “a standard of reasonableness in the response to force by counter-force” and as a comparison between “the quantum of force and counter-force used, as well as casualties and damage sustained.”

According to Dinstein, the proportionality comparison should be made *a posteriori*. However, he limits this standard to instances where there has been a limited attack or when there have been reprisals. In his opinion, once a full-scale war has started, the attacked State, while acting in self-defence, is not obliged to limit its reaction to the attack it has suffered, but instead it may continue its counter-attack until the attacking party has been defeated in total, with the exception of a legally binding resolution of the United Nations Security Council imposing a cease-fire. The approach advocated by Gazzini is based on the qualitative standard, or, as he calls it, a functional approach to proportionality. Under this approach, it is not on the magnitude of the reaction to an initial attack that is assessed, but the “the objective of the reaction – namely stopping the hostile military activities – and the force employed to achieve it.”

As a minimum, it seems that there is consensus on the proportionality equation in the *ius ad bellum* to mean that the use of armed force necessary to halt and repulse an armed attack that has occurred, is not disproportionate. For example, if as a result of the initial attack territory of the attacked State has been occupied, the ‘liberation’ of that territory is deemed to be a proportionate response to the attack. However, a more precise answer to the exact content of the principle of proportionality in the *ius ad bellum* depends to a large extent on the circumstances of the situation, such as the military capacity of the aggressor. It seems clear that proportionate use of force in this context does not only mean an equal use of force in the quantitative sense. For example, a part of the State’s territory that has been occupied with little resistance, may be liberated with a larger amount of armed force, assuming this is a legitimate end to use armed force.

Kretzmer is of the opinion that there should be room for both a quantitative and a qualitative approach. In the quantitative approach, the degree of force that was used in the

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71 Gray, p. 150.
72 Dinstein 2012, p. 233.
73 Dinstein 2012, p. 238.
74 Dinstein 2012, p. 262.
75 Dinstein 2012, pp. 262-267.
76 Gazzini, p. 148
initial attack by the attacking State is the standard for the maximal proportionate response to that attack.\textsuperscript{78} The qualitative approach seems to equate the functional approach taken by Gazzini. In this context, “proportionality relates to an assessment of the harm caused by means used to further legitimate ends (means-ends proportionality).”\textsuperscript{79} Thus, if the magnitude of the counterattack needed to achieve the desired result, which is to halt and repulse an initial armed attack, is below the level of the initial attack, this is the maximum of armed force that may be used. This is a qualitative proportionality assessment. If the magnitude of the counterattack needed is above the level of the initial attack, the next check is a quantitative approach that evaluates whether the counterattack has reached its objectives when a similar magnitude is reached as that of the initial attack. After the quantitative approach has been assessed, but the State that was initially attacked cannot reasonably be claimed to have halted and repulsed the initial armed attack, it may still not be disproportionate to use more armed force than the initial attack did.

\textbf{5.3.2.2 The Temporal Component}

The temporal condition for the use of armed force in self-defence is relevant both before the actual use of armed force in self-defence and during that use. In the former case, the deciding factor is the question whether the measures that have been taken by the Security Council (if any), have been effective.\textsuperscript{80} If that is not the case, the armed force in response cannot be delayed indefinitely, but action must be taken rather quickly. This requirement of immediacy means, that there “must not be an undue time-lag between the armed attack and the exercise of self-defence in response.”\textsuperscript{81}

Although the \textit{ius ad bellum} is sometimes explained as the legal framework regulating the right of States to go to war, the question remains of whether there are still proportionality requirements once the armed conflict is already under way. On this issue, different approaches are advocated.\textsuperscript{82} Dinstein states that the proportionality of the response should be considered at the beginning of the war, and has to be “predicated on the gravity of the

\begin{itemize}
  \item Kretzmer calls this the ’tit for tat proportionality’. See Kretzmer 2013, p. 238.
  \item Kretzmer 2013, p. 238. See also Cannizzaro 2006, p. 785: A qualitative test looks not so much at the extrinsic correspondence between attack and response, but instead seeks to establish whether the means employed are appropriate in relation to the aim sought by the response.
  \item Gill 2007, p. 119. A related question is the issue of whether there is also a proportionality restriction in an armed conflict that is by definition fought in accordance with the \textit{ius ad bellum}, such as an UN mandated peace enforcement mission. Is there a point where continuing a UN mandated use of armed force becomes disproportionate, because the initial strategic objectives of the UN Security Council authorisation have been met? Although UN mandated missions are not based on self-defence, it seems that there is no reason for the proportionality restriction to be inapplicable. The issue may however arise whether this calculation is to be made by the UN or by the States who have contributed parts of their military to the UN-mission.
  \item See Dinstein 2012, p. 233. See also: Gill 2007, pp. 154-155.
  \item For an overview, see Lieblich 2019.
\end{itemize}
isolated armed attack and the degree to which it affects the victim State.\textsuperscript{83} He thus denies the continued applicability of a proportionality requirement after the armed conflict has actually evolved into a full-scale war.\textsuperscript{84} Gazzini holds that the proportionality requirement “must be constantly kept under review while the military operations persist”\textsuperscript{85} This means that an initially legitimate use of armed force in the sense of the \textit{ius ad bellum} can no longer be deemed to be proportionate once a certain level of destruction and military gain has occurred, and the continued use of armed force thus becomes illegal. Applying the qualitative approach of the \textit{ius ad bellum} proportionality, the symmetry may disappear between the result sought by the use of force in self-defence and the quantity of the armed force. An example may be the use of force that was needed to expel Iraqi armed forces occupying Kuwait from Kuwaiti territory and beyond a certain distance beyond the borders, and the subsequent retreat by the US-led Coalition forces in 1991. It must be noted that in that event, the proportionality and necessity of the use of armed force in self-defence are closely connected, since it does no longer seems to be necessary to apply armed force once the enemy has been expelled from the territory it occupied.\textsuperscript{86}

\subsection*{5.3.2.3 Necessity and Proportionality in the \textit{Ius ad Bellum}}

Where the proportionality requirement regards the magnitude of the armed response to an armed attack, the necessity requirement regards the question of whether the use of armed force is necessary in the first place.\textsuperscript{87} As Ago noted: “the state attacked must not, in the particular circumstances, have had any means of halting the attack other than recourse to armed force.”\textsuperscript{88} Like the proportionality requirement, the necessity requirement is confirmed by the ICJ to be part of the law on use of self-defence both under the UN Charter and customary international law.\textsuperscript{89} It must also be deemed to remain applicable once the conflict is already on-going. In general, the definition of necessity of the use of armed force in self-defence is derived from the Caroline formula, which states that the ‘[n]ecessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.’\textsuperscript{90} In contemporary terms, this must be understood as being subject to the requirements of article 51 of the UN Charter. This means, as a strict interpretation of necessity, that if the UN Security Council is taking action, there is no need to use armed force in self-defence and if the attack is already over, there is no necessity to use armed force in self-defence and

\begin{itemize}
\item \textsuperscript{83} Dinstein 2012, p. 263.
\item \textsuperscript{84} Dinstein 2012, pp. 262-267.
\item \textsuperscript{85} Gazzini, p. 147.
\item \textsuperscript{86} But see Dinstein 2012, p. 262.
\item \textsuperscript{87} Ducheine 2008, p. 238.
\item \textsuperscript{88} Ago, p. 69.
\item \textsuperscript{89} Nuclear Weapons Advisory Opinion, p. 226, p. 245, para 40.
\item \textsuperscript{90} See the Caroline Case, pp. 1137-1138.
\end{itemize}
the attacked State must rely on the Security Council to take measures. However, this strict view is not followed in State practice in a consistent manner and it may be argued that the authority to use armed force in self-defence is dependent on the condition that the measures the UN Security Council has taken are effective. In any case, there is a link with the temporal component here. Tibori-Szabó explains that the armed attack must "create an immediate need for action." In addition, there is a necessity requirement that needs to be satisfied during the armed conflict. If it is no longer necessary to continue the armed response, for example because the threat has ended, the necessity requirement prescribes that the armed response is halted.

The link between proportionality and necessity is clear in this context. Once it is no longer necessary to use armed force, any type of armed force that is used nonetheless, will be disproportionate in comparison to the objective of the use of that armed force. That does not make the use of that force disproportionate because it is unnecessary, but also disproportionate because the distinct requirements of the *ius ad bellum* proportionality test are not satisfied. As is noted in the Caroline Case: "self-defence must involve ‘nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within that.’" And if there is no necessity to take action in self-defence, any use of force is simply illegal, whether it is proportionate or not.

5.3.3 Other Proportionality Equations in the *Ius ad Bellum*

Except for the use of armed force by States for reasons of self-defence, a number of other justifications for the use of armed force may be possible. These include: the protection of nationals abroad, humanitarian intervention, reprisals, the protection of vital national or international interests, aid to national liberation movements and reprisals. It must however be noted that there is no unanimity amongst States or scholars on the legality of any of these justifications for the use of armed force. If accepted as legal justifications for the use of armed force, the proportionality requirements in those situations may differ from the proportionality requirement as discussed above. For example, in situations where the protection of nationals abroad is relevant, it seems clear that proportionate use of force in self-defence for this reason is limited to the function of this specific use of force.

91 Gardam 2004, p. 150.
92 Gardam 2004, p. 150.
93 Tibori-Szabó, p. 122.
94 See the Caroline Case, pp. 1137-1138.
95 Greenwood 1989a, p. 274.
96 See Waldock, who notes that the humanitarian consideration could be decisive to invoke the general principle of self-protection, which could lead to a necessity to use armed force in self-defence. Waldock finds three conditions under which intervention for the safety of own nationals is justified: "(1) an imminent threat of injury to nationals, (2) a failure or inability on the part of the territorial sovereign to protect them and (3) measures of protection strictly confined to the object of protecting them against injury." See Waldock, pp. 467-468. See also Dinstein 2012, pp. 255-258.
The use of force with the objective to stop a certain human tragedy to continue, such as the use of armed force by an oppressive government against its own population that includes gross human rights violations, has not developed into an agreed exception to the prohibition to use armed force. A clear example is the use of armed force by NATO against Yugoslavia, during the Kosovo-crisis in 1999. However, in the event that an intervention is executed with a UN-Security Council mandate, a similar type of operation would obviously be legitimate. Similarly, the use of force to protect nationals abroad could have consequences for the type of force that may be used, in order to remain proportionate under the *ius ad bellum* because the use of force that affects civilians is directly contrary to the objective of the armed force that is used. However, to claim that no civilians may be hit at all, or only proportionate under the *ius in bello*, implies an inescapable mix-up between the *ius ad bellum* and the *ius in bello* proportionality principles. From a military perspective, a legal obligation that would amount to an absolute prohibition on civilian casualties during an armed conflict waged against military objectives, is unacceptable, because it is unrealistic. As an example, Francioni proposed that the prohibition to use force may be violated in order to prevent another State from committing gross human rights violations against its own citizens. The principle of proportionality in this context "entails that the use of force be strictly limited in its scope and intensity to what is absolutely necessary (a) to achieve the stated goal of protecting the life and security of innocent victims of other States massive violations of human rights and (b) to promote the objective of improving the overall legitimacy of the system by permitting an exceptional recourse to force to halt unacceptable atrocities."  

Reprisals in the *ius ad bellum* may be defined as "counter-measures that would be illegal if not for the prior illegal act of the State against which they are directed." According to the majority of authors, armed reprisals in the *ius ad bellum* must be deemed to be prohibited since the adoption of the UN-Charter, unless they would fall within the scope of measures of self-defence in accordance with the UN-Charter. The objective of armed reprisals in the *ius ad bellum* in the pre-UN-Charter period was to punish States for illegal acts. It is important to point out that armed reprisals under the *ius ad bellum* are distinct from belligerent reprisals, which is a type of operation governed by the rules of the *ius in bello*.

It seems that the legality of the justifications to use armed force mentioned in this section is not settled today, nor will it be in the foreseeable future. However, it seems that

97 This justification has been labelled as ‘humanitarian intervention’. See generally Gill 2010, pp. 221-227.
98 Francioni 2005, p. 291. Francioni applies his conditions to the 2003 invasion of Iraq by the US led coalition. He concludes that “[a]s to the conditions of proportionality and respect for humanitarian law, the hard reality of the US led intervention in Iraq is that in no way it can be characterized as a limited use of force intended to stop large scale violations of human rights: it rather constitutes an all-out war aimed at taking control of the whole target state and to coercively impose a new government, nominally in the name of democracy, but, in reality, in the pursuit of an hegemonic design of power politics.”
99 Schachter, p. 168.
101 But it must be noted that unarmed reprisals are not prohibited by the UN-Charter. Examples include the freezing of the assets of the offending State. See Schachter, p. 169.
102 See Chapter 7, Section 7.5 below.
Invocation of one of these justifications will also invoke the application of proportionality as a regulating factor for the use of that armed force, to prevent further escalation.

5.3.4 Sub-Conclusion

The aim of the *ius ad bellum* is to put restraints on the use of armed force. Therefore, the exceptions to the prohibition of the use of armed force by States are strictly regulated. The principle of proportionality plays an important role in these exceptions, which makes it vulnerable to misuse by States whose aim it is to justify their recourse to armed force. The application of the principle of proportionality in the *ius ad bellum* works best when it is a clear case, or in other words: “the principle can deal with the easy cases.”\(^{103}\) The problem presents itself when it is confronted with a hard case, or when proportionality is used to pursue the political aims of a State. When it is a close call or when there is insufficient information to make an informed decision, the principle of proportionality “will tend to be permissive.”\(^{104}\)

The circumstances of the individual case will dictate to a large extent what kind of response is still proportionate. The size, duration and effect of the armed attack are relevant factors. In addition, a proportionate response is the use of armed force against an armed attack that “is required under the circumstances to repel it and put an end to the threat of further attacks”\(^{105}\), thus also the military capacity and expressed intention of the opponent to repeat or sustain its armed attack are relevant factors to the proportionality equation in the *ius ad bellum*.

In addition, it must be kept in mind that there are different types of proportionality equations applicable in the *ius ad bellum*, depending, for example, on the type of opponent, the question whether the armed attack is still ongoing and the objective of the use of armed force in self-defence. As Kretzmer summarises:

“The diverse types of situation in which a state might use force in self-defence, and the different ends that might be legitimate in those situations, lead to the conclusion that differing tests of proportionality might be appropriate in different cases. This is not a case of ‘one size fits all’. Several variables may affect the ends of the force used in self-defence, and hence the test for assessing its proportionality; whether the attack is ongoing, completed, or imminent;

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\(^{103}\) Fotion, p. 93.

\(^{104}\) Fotion, p. 93.

\(^{105}\) Gill 2007, p. 124. Gill explains that “[i]f an attack is simply an isolated incident, restricted in scale, location and time, self-defence will correspondingly be limited to what is necessary to ward off the attack. If, however, an armed attack consists of a series of related incidents over a period of time, proportionality would allow for a larger scale response aimed at putting an end to what is in effect a phased attack. In the case of a large scale attack, designed to significantly disrupt the target State, or take over (part of) its territory, proportionality would allow waging a full scale war in self-defense to reduce or eliminate the attacker’s capacity to conduct military operations, or otherwise continue the attack. This could necessitate, in some cases, the total defeat of an attacking State and the replacement of its government with one which is ready to meet its international obligations.”
whether it was carried out by non-state actors and, if so, whether it can be imputed to a state; and, finally, the scale and effects of the attack, when judged in the context of the relations between those responsible for the attack and the victim state.”

In addition, although even proportionate reprisals are deemed to be illegal because of their punitive character, a certain retaliatory component and a desired deterrent effect is often present when armed force is used in self-defence. There may thus in some cases be only room for a relatively straightforward quantitative, or ‘tit for tat’ approach, for example when two States who are in a permanent state of war with each other perform rather limited attacks and counter attacks. In other situations, the objective of the self-defence may be the deciding factor for the proportionality of the use of armed force in self-defence. These situations call for a qualitative approach, which dictates that the magnitude of the use of armed force in response to an initial attack is dependent on the question whether the use of armed force is necessary to halt and repulse the armed attack.

5.4 The Concept of Proportionality in International Human Rights Law

This section provides a short overview of the manifestation of the principle of proportionality in IHRL. The main focus is on the application of the principle with regard to the use of force, inside or outside the context of an armed conflict. This concerns thus in particular the right to life. For that reason, after two introductory paragraphs that deal with the more general issues of proportionality in IHRL, the applicability of IHRL during armed conflict is briefly discussed and reference is made to the application of the principle of proportionality in the context of a ‘conduct of hostilities’ situation and the use of armed force in peacetime, which is referred to as a ‘law enforcement’ situation.

5.4.1 Introduction

IHRL is the framework of international law obligations that regulates the authority States exercise over individuals, governing the rights and obligations of individuals in order to protect them. IHRL regulates different types of rights, which aim to respect, protect or to fulfil

106 Kretzmer 2013, p. 267.
107 A case in point here could be the attack by North Korea on the isle of Yeonpyeong and the subsequent armed attack in return by the South Korean forces on 23 November 2010. See below, Section 12.2.3 for a description.
108 An example of this situation could be the response by the allied forces to the occupation of Kuwait by Saddam’s Hussein’s Iraqi forces in 1990-1991.
109 See generally, Schabas, pp. 365-386.
110 These different situations have also been labeled ‘paradigms’. See Melzer 2010a, p. 36 and pp. 40-41 and Pouw, p. 331.
the rights of individuals. IHRL is concerned with the vertical relationship between a State and the individuals under its jurisdiction and the purpose of IHRL is to provide “a number of freedoms and protection from arbitrary or discriminatory interference and treatment by the state and its agents, and to require the state to provide a legal framework to secure these rights and freedoms as well as (to undertake) to provide essential social, economic and cultural safeguards and security to its population.” IHRL is based on numerous international and regional treaties and rules of customary international law. States may however in certain cases derogate from some of their IHRL obligations. The international instruments that are based on the human rights conventions have developed a considerable body of jurisprudence that assists in the interpretation of IHRL obligations.

There are many different manifestations of the principle of proportionality in IHRL. Firstly, proportionality has been applied in order to restrict States’ interference with the rights of individuals, for example in the European Convention of Human Rights. Proportionality is also applied as a means to balance the effects of the measures taken by a State to the standards of democratic society, which is sometimes referred to as the ‘margin of appreciation’ doctrine. Cannizaro refers to these two types respectively as ‘qualitative’ and ‘quantitative’ proportionality. In addition, proportionality is applied in IHRL to the determination of a certain punishment in criminal proceedings. But according to Christoffersen, the principle of proportionality is used in IHRL in a much wider sense, constituting an independent means of interpretation. He argues that “the proportionality principle is, or is likely to become, a central interpretative principle in [IHRL].” This central principle would be divided into three sub-principles:

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111 Kleffner 2013, p. 72.
112 Gill 2014, p. 337.
113 The most important international human rights conventions are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Important regional human rights conventions include the European Convention on Human Rights (ECHR) and the American Convention on Human Rights (ACHR).
114 Arai-Takahashi, p. 14. Arai-Takahashi provides different definitions for the principle of proportionality and the concept of ‘margin of appreciation’ in Human Rights Law. According to Arai-Takahashi, the term ‘margin of appreciation’ is “used to indicate the measure of discretion allowed to the Member States in the manner in which they implement the [ECHR]’s standards, taking into account their own particular national circumstances and conditions.” The principle of proportionality is described to “restrain the power of State authorities to interfere with the rights of individual persons, and hence it should be regarded as a device for the protection of individual autonomy.” In other words, the principle of proportionality in general Human Rights Law is “inherent in evaluating the right of an individual person and the general public interests of society.” Additionally, the organs of the ECHR have also applied a more specific notion of proportionality, that concerns the balance between “the means employed and the aim pursued in order not to overburden the rights of individual persons in return for social goods.”
115 See for example Cannizzaro 2000, p. 459.
116 D’Amico, p. 307: “[t]he principle of proportionality (...) concerns the severity of penalties in relation to the criminal offense that has been committed. This principle is widely enforced in the European legal systems, although it is not as omnipresent in their constitutions as the principle of legality is.”
117 Christoffersen 2010, p. 17.
Chapter 5: Proportionality and the Use of Force

5.4.2 Applicability of International Human Rights Law during Armed Conflict

When the situation in a State is developing from an ordinary peacetime situation to an armed conflict, the discussion will start which rules must be applied to the use of force by police or armed forces to counter the unrest and restore order, and which rules take precedence. It is evident that civilian protection by the rules of IHRL is under pressure when a situation of armed conflict emerges. This pressure becomes evident not only with regard to the use of lethal armed force, but also in other situations in which a proportionality test must be applied to other human rights. Proportionality is then used as an instrument applied to determine the extent to which a State may still be expected to possess the ability to protect the human rights of its citizens once an armed conflict exists on its territory. For example, the State may no longer be able to guarantee the right to education once it is no longer able to control certain parts of its territory. In addition, the existence of an armed conflict could be a reason for the State to decide that measures that restrict the privacy and freedom of movement of its citizens must be put in place. These measures must be taken in a proportionate manner.

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118 Christoffersen 2010, p. 17. Christoffersen comments that in particularly the context of the European Convention of Human Rights, the principle of proportionality is (mis)understood as a means of limiting existing rights. Proportionality, in his view, should be seen as a means of interpretation of the balance between the interests that are behind the rights. (he quotes Sebastian van Drooghenbroeck, who introduces the phrase ubi interpretation, ibi proportionalitas). See also Christoffersen 2010, p. 43.

119 Cannizzaro and De Vittor, p. 137.
in comparison to the necessity of those measures. In addition, it may happen that certain persons who pose a threat to the State are deprived of their liberty because of that threat. In that case, provided these persons are not being held on the basis of regular criminal charges, a proportionality calculation must be made which takes into account the necessity to keep a person in administrative detention and the threat he may or may not continue to pose to the government.\textsuperscript{120}

It is now without debate that the start of an armed conflict does not mean that the rules of IHRL cease to be applicable, even if simultaneously the rules of IHL become applicable.\textsuperscript{121}

For some types of human rights, the applicability of IHL does not make a difference, either because the protection is commonly afforded by both legal frameworks, such as the prohibition of torture\textsuperscript{122} and other inhumane treatment, or because the existence of an armed conflict is normally irrelevant for the protection of these human rights. Examples of the latter category include some civil liberties, such as the right to marry, and certain political rights.\textsuperscript{123}

The territorial reach of IHRL obligations is not limited to only a State’s own territory, but may also be exported to other areas, for example when a State deploys its agents, military or other, outside its own territory and exercises jurisdiction. The ICCPR states in article 2(1) that the human right obligations of States apply “to all individuals within [their] territory and subject to [their] jurisdiction.”\textsuperscript{124} This extraterritorial applicability of IHRL obligations, focussing on the interpretation of the term ‘jurisdiction’, has been the subject of deviating jurisprudence of Human Right Courts and debates within the academic community. The Human Rights Committee has said in General Comment No. 31, that any State party to the ICCPR must “respect and ensure the rights laid down in the [ICCPR] to anyone within the power or effective control of that State Party, even if not situated within the territory of that State Party. (…) This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement

\textsuperscript{120} See for example Kleffner 2010, pp. 465-479, Deeks, pp. 403-436 and McGoldrick, pp. 507-530.

\textsuperscript{121} See for example the ICJ Nuclear Weapons Advisory Opinion, the Wall Advisory Opinion, the ICJ Case Concerning Armed activities on the territory of the Congo, The UN Human Rights Committee, General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the ICCPR. See also Drooge 2008, Hampson 2008, and Gill 2014.

\textsuperscript{122} See articles 1 and 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in IHRL and for the IHL protection: common article 3(1) (a) of the Geneva Conventions and article 75 (2) (a) (ii) API. Note however that the prohibition of IHRL is more restricted than the IHL prohibition of torture: where article 1 defines torture as acts committed by State agents, IHL protection does not include the requirement that the torture is executed by a State agent.

\textsuperscript{123} Schindler, p. 939-940. See also Bethlehem, p. 190.

\textsuperscript{124} The wording in the regional IHRL instruments differs slightly, but both also refer to the ‘jurisdiction’ of states. See article 1 ECHR and article 1(1) ACHR.
Chapter 5: Proportionality and the Use of Force

5.4.3 Proportionality Restraining the Use of Force in International Human Rights Law

Once a State has jurisdiction over a certain territory or person, it may take measures including the use of lethal force, thus risking the violation of the right to life of individuals. Proportionality plays an important role in the assessment of whether an individual’s right to life has been violated by the use of lethal force by a State agent. Because during an armed conflict the rules of IHL may be simultaneously applicable to the situation, this situation will be dealt with in Chapter 8. The ordinary circumstances where the IHRL principle of proportionality finds application, is peacetime, where the police is authorised to use lethal force within strict limitations, in their duty to enforce the law, and thus violate the right to life in case this force is used arbitrarily. The legitimate use of force is then restricted by both international human rights standards and national law. The international rule could emanate from customary international law or from international agreements that the State in question is a party to, such as the UN, European or Inter-American human rights treaties. The right to life may not be derogated from and is considered to be a rule of international

126 See for example the position of Milanovic 2011: “the state obligation to ensure human rights is not limited territorially; however, the obligation to secure or ensure human rights is limited to those areas that are under a state’s effective overall control.” See Milanovic 2011, p. 263.
127 See for example the position of Israel, The Netherlands, the United Kingdom and the USA quoted in Droege 2007, p. 326. See also Conte 2013, p. 233-258.
128 See the Wall Advisory Opinion, paragraphs 108-111.
129 See for example ECHR Bankovic, paragraph 70 and 80, Öcalan, paragraph 91, Loizidou, paragraph 52, Al-Skeini, paragraph 130-142 and Hassan, paragraph 80.
131 IACiHR, Brothers to the Rescue, Report No. 86/99, Case no 11.589, 29 September 1999, paragraph 23.
132 ECHR, Bankovic and others v Belgium and others, application no. 52207/99, Judgement of 12 December 2001, paragraph 80. See also the Jaloud Case, in which the Grand Chamber of the European Court of Human Rights extended the notion of jurisdiction to cover the presence of armed military personnel at a roadblock. See Case of Jaloud v. The Netherlands (Application no. 47708/08), Judgement, 20 November 2014, para 152-153, p. 64.
133 Article 6 of the ICCPR: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” See also article 2 ECHR and article 4 ACHR.
customary law. The right to life serves as a foundation of democratic society and must therefore be subject to strict regulations. Accordingly, “[u]nder human rights law, the planning of an operation with the purpose of killing is never lawful.” The strict regulation of the use of lethal force is complemented by standards like the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions and the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (the 1990 Basic Principles).

An early manifestation of the IHRL principle of proportionality as a restriction on the use of force in peacetime is found in the jurisprudence of the Prussian Supreme Administrative Court, which applied the principle to police powers first in 1882, reviewing the police powers in law enforcement. The principle’s premise is that there must be a balance between the means used and the result desired. It must be noted that the use of proportionate force is also possible in circumstances where the objective is to arrest persons or even seize goods. IHRL requires that lethal force is used in a proportionate manner with the objective to protect life, including the life of the suspect. The right to life leaves uncertainty when deprivation of life must be deemed to be ‘arbitrarily’. Even if there would be a provision of national law in a certain situation that would permit the taking of one’s life, it could still be deemed to be arbitrary on the basis of IHRL: “[t]he prohibition of ‘arbitrary’ taking of life connotes that an individual must not be deprived of his life in unreasonable or disproportionate circumstances.”

There are a number of exceptions, which do not render

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134 Bantekas and Oette, p. 316, Rodley, p. 176, see also Henckaerts & Doswald-Beck 2005a, rule 89, pp. 311-314.
135 Skinner, p. 37.
136 Droege 2007, p. 345.
138 The Basic Principles were adopted by the UN Congress on the Prevention of Crime and the Treatment of Offenders and subsequently welcomed by the UN General Assembly in resolution 45/166 in 1990. They include the following regulations in Principle no. 5:
   Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall:
   (a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved;
   (b) Minimize damage and injury, and respect and preserve human life;
   (c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment;
   (d) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment.
6. Where injury or death is caused by the use of force and firearms by law enforcement officials, they shall report the incident promptly to their superiors, in accordance with principle 22.
7. Governments shall ensure that arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence under their law.
8. Exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles.
139 Emiliou p. 23-24, referring to the Decisions of 14 June 1882, 9 PROVG 353 and 10 April 1886, PROVG 424.
140 See the Saiga Case of the International Tribunal for the Law of the Sea (ITLOS), as an example outside ordinary law enforcement in the domestic situation, where the Tribunal states that “[a]lthough the [UNCLOS] Convention does not contain express provisions on the use of force in the arrest of ships, international law (...) requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law. These principles have been followed over the years in law enforcement operations at sea. See Judgement of 1 July 1999, concerning the M/V Saiga (no. 2) Case between Saint Vincent and the Grenadines v. Guinea, paragraph 155-156.
141 Rehman, p. 94.
the right to life as absolute as it may appear at first sight. For example, the ECHR permits the use of lethal force (a) in defence of unlawful violence, (b) to arrest a person or to prevent a detained person from escaping or (c) to restore order in situations of riots or insurrection. In addition, a person is deemed not to be arbitrarily deprived of his life if his killing was lawful under IHL.\footnote{Article 6 (1) ICCPR, Article 4 (1) ACHR, Article 4 ACHPR and article 2 (2) ECHR. For an overview, see also Bantekas and Oette, pp. 342-345 and Melzer 2006, pp. 91-102.} One could argue that there could be no question of introducing a proportionality test on top of these exceptions, since the right to life is such an important right,\footnote{Article 6(1) ICCPR speaks of the ‘inherent’ right to life. It has also been labeled as the ‘supreme human right’ by the HRC, see HRC, general Comment 6, HRI/GEN/1/Rev.9 (Vol I) 176, paragraph 1.} similar to the right not to be subjected to torture or inhumane treatment.\footnote{For a discussion, see Palmer, p. 438-451.} However, proportionality plays a very important role in the determination of whether an individual was deprived arbitrarily of his right to life. Principle 6 of the 1990 Basic Principles states that:

“Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

International human rights courts have dealt with the proportionality principle in the context of the right to life on a number of occasions.\footnote{See Melzer 2006, note 55 on page 98 for an overview.} Under the jurisdiction of the ECHR, the leading case is the McCann case of the ECtHR, that deals with the shooting of known IRA operatives by UK soldiers in Gibraltar.\footnote{McCann v UK, Application No. 18984/91, Judgment of 27 September 1995, Series A No. 324, 21 EHRR 97.} In the case, the Court found that as far as the temporal component is concerned, the consideration of proportionality may include the planning and conduct of the operation. For that reason, the Court decided that in the planning phase of the operation, the UK soldiers did not take sufficient precautionary measures, and as a result, the use of lethal force had not been absolutely necessary.\footnote{McCann, paragraph 202-214.} The proportionality of the action must be judged with reference to the means used (lethal force), which must not be "out of proportion to the aim pursued."\footnote{Bantekas and Oette, p. 316.} Another clear example of the application of proportionality by the ECtHR is the case of Nachova.\footnote{Nachova et al. v Bulgaria, 2006 42 EHRR 43.} In this case, the ECtHR stated that “recourse to potentially deadly force cannot be considered as ‘absolutely necessary’ where it
is known that the person to be arrested poses no threat to life or limb and is not suspected of having committed a violent offence.”

From the jurisprudence, it follows that first, if a legitimate aim to deprive a person of his right to life does not exist, the use of force is, besides being unnecessary, *a priori* disproportionate. But also the use of potential lethal force in pursuit of a legitimate aim is not unrestricted. However, since the deprivation of life must be proportionate, the law enforcement officers are obliged to consider non-lethal options first. Melzer defines this manifestation of the principle of proportionality of IHRL as follows:

> “the use of lethal force violates the human right to life if the nature and scale of the concrete threat to be addressed does not justify putting human life at risk, regardless of whether this would be objectively necessary to remove the threat in question.”

From this test it follows, that an appreciation is required of the balance between the values that must be attributed to two factors in a given situation, at a given moment in time. The two factors that must be evaluated are (1) the expected scale of the risk to human life (of the suspect) of the contemplated use of (potentially) lethal force and (2) the nature and scale of the concrete threat to the law enforcement officer who is planning to use the armed force, and third persons.

It must be noted that in essence, there is a double requirement of proportionality applicable, because in addition to the proportionality requirement that relates to the scale of the armed response to a threat, there is also a proportionality calculation in the requirement of absolute necessity. The requirement of the absolute necessity of the use of lethal force entails that the circumstances at hand are decisive for the appreciation of the situation. This means that as a minimum, the perceived threat must be sufficiently concrete and imminent, as opposed to hypothetical. Three aspects of armed lethal force must be assessed to verify the absolute necessity of its use: the qualitative, the quantitative and the temporal aspects.

The qualitative aspect demands there to be a causal link between the concrete threat and the use of lethal force contemplated. In other words, it must be clear that less harmful means are not available or have been proven to be ineffective. The quantitative aspect of absolute necessity is in essence the requirement of proportionality *stricto sensu*. It means that no more armed force may be used than is required to attain the legitimate objective of removing the existing threat. The armed force that is thus used because it has become unavoidable to do so, must be limited to what is strictly necessary, based on the available information of the situation, and “State agents must endeavour to minimize damage and injury to human

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150 Nachova, paragraphs 71-74.
151 Pouw, p. 246.
152 Melzer 2006, p. 98.
life."\textsuperscript{154} Thirdly, the temporal requirement means that once it is clear that the threat has passed, or is indeed not present yet, the armed force may not be used because it is no longer necessary to achieve the purpose of the operation. This means that under IHRL, lethal force can only be used if there is an ongoing or "an imminent danger of serious violence that cannot be averted save for such use of force."\textsuperscript{155} This also implies that under IHRL, it is unlawful to use lethal force against a person because he is a member of a certain group. This is especially relevant in situations of armed conflict, as will be explained in the next section. Moreover, although it is not illegal as such, it is difficult to justify collateral damage under IHRL.\textsuperscript{156}

Closely related to both the necessity and the proportionality requirements as explained above, is the requirement of precaution. If lethal armed force is used during an operation that was not adequately planned, organised and if the equipment or training of the armed forces that executed the operation was not sufficiently appropriate, it may be that an otherwise proportionate and necessary deprivation of life is nonetheless unlawful.\textsuperscript{157} The ECHR found in the Moscow Theatre Case that the use of an unknown poisonous gas during the storming of the Theatre, after Chechen kidnappers had occupied the theatre, taking a large number of hostages, was in the circumstances not a disproportionate measure because in its preparations, the government had failed to provide hospitals with adequate information and an anti-dose against the gas.\textsuperscript{158} This implies that if members of the military are deployed in circumstances where they are expected to execute law enforcement tasks, they must be properly trained in such operations and thus be aware of the fact that different rules apply when they are not engaged in hostilities against an opposing military force in the context of an armed conflict. In addition, when they are deployed in law enforcement operations, they should be provided with not only fire arms, but also with equipment that is fitting to conduct crowd and riot control operations, such as batons and other non-lethal weapons. Another measure that may be obligated during law enforcement operations on the basis of the requirement of precaution is the issue of an effective warning. The requirement of precaution is not absolute, but very much dependent on what is feasible and reasonable under the circumstances at hand. This means that the forces must take into account all information that is reasonable available to them, but they have not violated the requirement of precaution if after the operation the information that they relied on, proves to be faulty.

In addition, part and parcel of the use of lethal armed force under IHRL is also the duty to

\begin{thebibliography}{10}
\bibitem{footnote154} Melzer 2010b, p. 283.
\bibitem{footnote155} Droege 2008, p. 525. Italics in original.
\bibitem{footnote156} According to Geiss, it is even more difficult to justify collateral damage under IHRL than it is under IHL. See Geiss 2010, p. 125.
\bibitem{footnote157} See McCann, mentioned above. See also Pouw, p. 247.
\bibitem{footnote158} Finogenov and others v. Russia, No. 18299/03 and 27311/03, Judgment of 20 December 2011, para 236 on p. 59 and para 266 on p. 68. The Court noted that: "in the circumstances the rescue operation of 26 October 2002 was not sufficiently prepared, in particular because of the inadequate information exchange between various services, the belated start of the evacuation, limited on-the-field coordination of various services, lack of appropriate medical treatment and equipment on the spot and inadequate logistics. The Court thus observed that the [Russia] breached its positive obligations under Article 2 of the Conventions."
\end{thebibliography}
conducted a thorough \textit{ex post} investigation into an operation that led to a deprivation of life that is attributable to a State.

\section*{5.4.4 Sub-Conclusion}

There are many manifestations of the principle of proportionality in IHRL and it has even been suggested that proportionality must be applied as a general interpretative tool to the rules of IHRL. The applicability of IHRL rules that violate the right to life is dependent on the existence of jurisdiction. Also, the exact circumstances under which these rules apply during extraterritorial operations are still under debate. The IHRL proportionality principle applicable during law enforcement operations during peacetime puts considerable restraints on the use of lethal armed force. It is used to assess whether the use of lethal force is an arbitrary violation of the human right to life and consists of a balance between the nature and scale of a concrete threat and the nature and scale of the contemplated use of lethal armed force objectively necessary to remove it. It contains a temporal component, a component of absolute necessity and the proportionality \textit{stricto senso} requirement. Furthermore, the proportionality requirement is part of an entire system that applies to the use of lethal force outside armed conflict, including the requirement of precaution and the duty to investigate after an operation. As put by Pouw: "IHRL offers only a very limited permissible scope for targeting, which, as a rule, is prohibited, and may only be resorted to in exceptional circumstances."\textsuperscript{159}

The existence of an armed conflict may lead to a shift in the authority to use lethal armed force from the conduct of an individual, consisting of the threat the concerned individual may pose, to the status. Here, the decisive issue may be whether the use of force is governed by an armed conflict paradigm or a law enforcement paradigm. It thus seems that the proportionality equation in IHRL is directly influenced by the existence of an armed conflict. This means that once the rules of IHL become applicable, the State may also have to deal with proportionality equations with regard to the extent to which the State is still able to guarantee certain human rights. The relationship between proportionality in IHRL and in IHL can only be meaningfully explored after an analysis of the principle in the latter legal framework (see Chapters 6 and 7). This relation is analysed in Chapter 8.

\textsuperscript{159} Pouw, p. 254.
5.5 Conclusion

In this chapter, the manifestations of the principle of proportionality in Just War theory and in the legal frameworks of the *ius ad bellum* and IHRL have been analysed.

It is established that the proportionality requirement is found in both the *ius ad bellum* and the *ius in bello* components of Just War theory, but the meaning of the notion of proportionality is different in the two components. According to a commonly accepted understanding of Just War theory, the *ius ad bellum* and the *ius in bello* must be judged separately. Yet, there is a connection between the *ius ad bellum* and the *ius in bello* with regard to proportionality, because the use of armed force “is not justified where the necessary means to be employed to achieve the object would be inherently excessive or indiscriminate.” 160 Whether a similar connection is also present in international law is explored below in Chapter 8.

With regard to the legal framework applicable to the resort to use of armed force by States, or the *ius ad bellum*, it is concluded that different standards of proportionality apply in different situations. These situations usually present themselves as exceptions to the general prohibition of the unilateral use of armed force by States, as codified in the UN Charter. In general, in any *ius ad bellum* proportionality calculation, the size, duration and effect are relevant factors of determining the legality of an armed attack in response.

Finally, it is established that there are various manifestations of proportionality in IHRL and proportionality puts considerable constraints on the legitimate use of lethal force under IHRL. In situations where an armed conflict is ongoing, the legal framework of IHL is also applicable. It is to the manifestations of proportionality in the legal framework of IHL that the following chapter turns.

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160 Shearer, p. 1.
Chapter 6
Chapter 6: The Concept of Proportionality in International Humanitarian Law

“There is a lot of misunderstanding about the principle of proportionality”

“If the proportionality principle does fail to protect civilians, one suspect is the highly subjective and discretionary phrasing of the principle”

“As a rule of international humanitarian law, proportionality features a number of design flaws and remains extremely vague”

6.1 Introduction

The focus of this chapter is the principle of proportionality in IHL, or, more precise, the IHL rule on proportionality.

Today, with the Hague Conventions of 1907 still in force, the applicable treaty law of targeting is codified in particular, but not exclusively, in the 1977 Additional Protocol to the Geneva Convention. The definition of the IHL rule on proportionality as it stands today in treaty law reads that an attack is indiscriminate if it “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

The IHL rule on proportionality is a typical component of IHL, in the sense that it requires participants in an armed conflict to conduct the balance between humanity and military necessity. It is a crucial factor in any targeting decision taken during armed conflict. The IHL rule on proportionality is meant “as a last line of defence” for civilians and objects which do not qualify as military objectives. The rule is also included in the law pertaining to the use of landmines: article 3 of Protocol II, as well as Amended Protocol II, to the 1980 Conventional Weapons Convention, expressly prohibits the use of landmines, booby-traps and other devices laid outside military zones, that are used indiscriminately because they may be expected to be disproportional. For the purpose of understanding the origin of the provision in the Mines Protocol it may be noted that the wording of the IHL rule on

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1 Rogers 2008, p. 189
2 Fellmeth 2010, p. 8.
3 Dill 2010, p. 2.
4 See article 51 (5) (b), article 57 (2) (a) (iii) and article 85 (3) (b) API.
5 United Kingdom Manual of the Law of Armed Conflict, p. 25. See however Greenwood 1989a, note 22 on page 278: Greenwood states that the principle as codified in API is “based on purely humanitarian considerations.”
6 Kalshoven 1992, p. 42.
proportionality in the three articles of API and the wording used in Protocol II to the CCW 1980 is “deliberately identical.” Finally, the rule is also included in article 8 (2) (b) (iv) of the Statute of the International Criminal Court (ICC), in a slightly different wording. The reasons for the different formulation in the ICC Statute and whether that has any further impact on the content of the IHL rule on proportionality as embodied in API are discussed in Section 6.3.5.

The existence of the IHL rule on proportionality is without debate. But its content and application in practice is not straightforward. This chapter first clarifies the relation between distinction, precautions in attack and proportionality in Section 6.2. Subsequently, Section 6.3 contains an overview of the development of the IHL rule on proportionality, which led to its present codification in treaty law. In addition, the existence of the IHL rule on proportionality in customary law is discussed in Section 6.4.

6.2 Proportionality, Distinction and Precautions

The IHL proportionality rule does not stand on its own, but is part of a larger framework, particularly the principles of distinction and precautionary measures.

The principle of distinction is the crucial requirement in IHL protecting civilians and civilian objects. Without distinction, the IHL proportionality rule is pointless. Through the identification of the civilian population and those individuals who participate in the armed conflict, it is possible to set them apart and direct attacks only to the latter category. The IHL rule on proportionality acknowledges that civilians will be affected by armed conflict, but it has to be borne in mind that they may not be directly targeted. The fact that they may be affected is contingent to the obligation that the attacks can only be aimed at military objectives. Or, in other words, the IHL rule on proportionality supplements the principle of distinction in the protection of civilians. The IHL rule on proportionality logically has only been recognised after the principle of distinction was firmly established. The relevant provisions of the 1907 Hague Convention prohibit the attack of undefended places and encourage commanders of the attacking force to warn the authorities in order to protect civilians. In spite of the existence of the distinction rule, during the First World War, numerous land, air and naval bombardments were executed on undefended towns, where sometimes only civilians and civilian objects were hit. The existence of the distinction

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7 Sandoz et al., paragraph 2205, p. 684.
8 In the words of Fenrick: “The main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied.” See Fenrick 2000, p. 58 and the ICTY OTP Kosovo Report, paragraph 48.
11 See Garner, p. 417-433, discussing among others the attacks by naval bombardment by the German Navy of the English coast towns of Scarborough, Whitby and Hartlepool on 16 December 1914.
principle was nonetheless accepted. As Garner wrote in 1920: “there is a substantial unanimity of opinion that belligerents should, so far as possible, confine their attacks to the fortifications, military works, depots, etc., and do all in their power to spare private houses, hospitals, educational and religious institutions, and the like.” Nonetheless, the civilian population was again heavily affected in the Second World War. The principle of distinction was reaffirmed in clear terms in the 1977 Additional Protocols, prohibiting the direct attack of civilians.

The rules concerning proportionality and the duty to take precautions in attack are also rules of common sense. A professional member of the military “will respect the principles underlying articles 51, 52 and 57 [of API] simply as a matter of sound military judgement (...) [and] serve not so much to limit military effectiveness as to provide legal reinforcement for professional military values.” As far as the relationship between the proportionality principle and precautions in attack is concerned, the conclusion must be that there is no clear separation. As such, the IHL rule on proportionality is by nature an obligation that needs to be adhered to before an attack is actually executed, or whilst the attack is going on, in order to spare the civilian population. Therefore, the IHL rule on proportionality is a precaution in itself.

Because of the way targeting procedures work, it is necessary to conduct the proportionality assessment several times during the planning and execution of an attack. If it is clear, already in an early stage of a planning process of a certain attack, that the attack will be disproportionate, continuation of the planning process would be pointless. This is the precautionary proportionality of article 57 (2) (a) (iii) API. However, at the end of a planning process it is necessary – as the last check before the attack is carried out – to check on the prohibition of article 51 (5) (b) API. When it becomes clear during the execution of an attack that the attack will be disproportionate, article 57 (2) (b) API dictates that it has to be cancelled or suspended.

The difference between the two provisions is therefore that the IHL rule on proportionality is phrased both as a prohibition (in article 51 (5) (b) API) and as an obligation (in article 57 (2) (a) (iii) API). However, there is no difference in content and components of the rules found in the two provisions. This is supported by the fact that the wording of the principle as codified in the two articles was agreed upon during the deliberations of article 57 API, and then copied to article 51 API. In practice, the precautionary obligations of article 57 API “support the general prohibition in Article 51 by placing obligations on attackers.”

It could also be said that Article 57 clarifies in practice the obligations imposed by article 51 and identifies

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13 Article 48 API.
14 Carnahan, p. 868.
15 For an overview of precautions in attack, see for example Quéguiener 2006, and Van Den Boogaard and Vermeer.
16 According to Rogers, the precautionary provisions are ‘expressed more as an exhortation.’ See Rogers 2008, p. 189.
what precautions must be taken and by whom before launching an attack.\textsuperscript{18} However, the proportionality assessment is always the final step. Even in the event all precautionary requirements are complied with, “there is an additional obligation not to undertake the attack if it is apparent that the civilian losses and damage to civilian objects are likely to be excessive in light of the anticipated military advantage.”\textsuperscript{19} Conversely, a planned attack on a military objective that is not expected to be disproportionate, may still violate the rules concerning precautions, when civilian casualties and damage could have been avoided or minimised if the attacker would have taken feasible precautions.\textsuperscript{20}

To sum up: the IHL rule on proportionality is already for logical reasons closely connected with the IHL rules concerning distinction and precautionary measures. The following section addresses the drafting history of the IHL proportionality rule.

6.3 The Development of International Humanitarian Law Proportionality

6.3.1 The First Codifications of International Humanitarian Law

The Lieber Code of 1863 is the first attempt to codify modern IHL rules for land warfare. It notes the fact that collateral injury and death to civilians may be the effect of hostilities. Article 15 reads that “[m]ilitary necessity admits of all direct destruction of life and limb of armed enemies, and of other persons whose destruction in incidentally unavoidable in the armed contests of war.” In the following articles, the citizens of the opponent are first defined as enemies, and as such it is considered lawful that they are “subjected to the hardships of the war.”\textsuperscript{21} The following articles however recognise that it is “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”\textsuperscript{22}, but this protection “was, and still is with uncivilized people, the exception.”\textsuperscript{23}

The first multilateral treaty law concerned with the way parties to an armed conflict are to conduct their operations on land, is the 1899/1907 Hague Convention.\textsuperscript{24} There is no specific rule on proportionality contained in this document, but there are a number of provisions, particularly articles 22-28, that contain the basis of the presently applicable provisions on targeting. In turn, these provisions are based on articles 12-18 of the 1874 Brussels

\begin{itemize}
\item \textsuperscript{18} Gardam 2004, p. 96.
\item \textsuperscript{19} Gardam 2004, p. 98.
\item \textsuperscript{20} Margalit, p. 158.
\item \textsuperscript{21} Article 21 Lieber Code.
\item \textsuperscript{22} Article 22 Lieber Code.
\item \textsuperscript{23} Article 24 Lieber Code.
\item \textsuperscript{24} The 1907 IV Hague Convention and the annexed Regulations on the Laws and Customs of War on Land is slightly different from the 1899 Hague Convention II Respecting the Laws and Customs of War on Land. See Scott, p. 529-532, for a juxtaposition of the articles of the two Conventions.
\end{itemize}
Declaration.\textsuperscript{25} In these articles, the protection of the civilian population and civilian objects
is clearly not a priority for the belligerents. In the words of Kalshoven: “not a word is spent
on the inhabitants of a defended place and their homes.”\textsuperscript{26} The War Book of the German
General Staff, published in 1902, which is based on the 1899 Hague Convention, states on
the subject of sieges and bombardments that “[w]ar is waged not merely with the hostile
combatants, but also with the inanimate military resources of the enemy. This includes not
only the fortresses but also every town and every village which is an obstacle to military
progress.”\textsuperscript{27} It may well be argued that this is a manifestation of the ‘Kriegsraison geht vor
Kriegsmanier’ doctrine that has been defended at some point in time, but that doctrine ‘has
never had a place in international law’.\textsuperscript{28} Yet, still in 1926, McNair wrote with regard to land
warfare that “the fact that non-combatants are besieged together with the combatants, and
have to endure the same hardships, may, and very often does, exercise pressure upon the
authorities to surrender”\textsuperscript{29} and thus perceived as a military advantage. The responsibility
for collateral damage was generally placed on the defending side of the conflict, for locating
military objectives too close to the civilian population.\textsuperscript{30} The reason for the absence of a rule
devoted to the protection of incidental casualties and damage may also be explained by the
way Western armies fought their battles at close range in open fields, with a limited civilian
presence.

The IHL rules on the subject of the protection of the civilian population made huge
strides since then, following technological developments which increased the distance from
which enemies engaged each other. One major cause for increasing attention to this subject
is the rise of air warfare.\textsuperscript{31} The expected development of air warfare was reason for a 5-year
prohibition for the use of bombing from the air at the 1899 Hague Peace Conference.\textsuperscript{32} At the
1907 Hague Conference, the development of air warfare had already progressed so much,
that although a new moratorium was adopted, it was not ratified by all States that had been
a party to the 1899 Declaration, which had expired.\textsuperscript{33} There were attempts though to replace
the 1899 Declaration by a permanent prohibition, but these were unsuccessful.\textsuperscript{34} Agreement
could be reached on placing some restrictions on air warfare, and these were incorporated in

\textsuperscript{25} Scott, p. 145. For the text of the articles of the Brussels Declaration, see Schindler and Toman, pp. 24-25.
\textsuperscript{26} See Kalshoven 2007, p. 434.
\textsuperscript{27} Grossgeneralstab, p. 34.
\textsuperscript{28} Garraway 2010, p. 215.
\textsuperscript{29} McNair, p. 283.
\textsuperscript{30} Parks 1990, p. 21.
\textsuperscript{31} See McNair 1926, pp. 368-370 and Lauterpacht in consecutive editions of Oppenheim’s International Law, for example
For an overview of the use of air warfare until 1920, see Garner, pp. 458-465.
\textsuperscript{32} Declaration IV.1 (signed 29 July 1899), to Prohibit, for the Term of Five Years, the Launching of Projectiles and Explosive
form Balloons, and Other Methods of a Similar Nature. See Schindler & Toman, p. 309.
\textsuperscript{33} Declaration XIV (signed 18 October 1907) Prohibiting the Discharge of Projectiles and Explosives from Balloons. See
Schindler & Toman, p. 309. See also Garner, p. 466, and Ronzitti, pp. 4-5.
\textsuperscript{34} Although the 1907 Declaration XIV remains in force until today, it is regarded as “having no legal significance.” See Parks
1990, p. 17.
article 25 of the 1907 Hague Convention on Land Warfare, by adding the words “by whatever means” to the existing text which prohibits the attack or bombardment on undefended towns. There can be no doubt therefore, that this article also applies to air warfare.35

Simultaneously to the law on aerial warfare, the law pertaining to bombardment from the sea developed. The 1907 Convention on naval bombardment also contains a prohibition to attack undefended ports and towns.36 Additionally, article 2 of the Convention provides that the commander “incurs no responsibility for any unavoidable damage which may be caused by a bombardment” of both military and civilian naval installations that are present in undefended ports and towns, but that may be used for military purposes.

An early reference to the proportionality rule as it is today is included in the Hague Rules on Air Warfare of 1923. Article 23 (4) reads: “[i]n the immediate vicinity of the operations of the land forces, the bombarding of cities, towns, villages, habitations and buildings is legitimate, provided there is a reasonable presumption that the military concentration is important enough to justify the bombardment, taking into account the danger to which the civil population will thus be exposed.”37 The Hague Rules on Air Warfare never entered into force, but the content may still be seen as part of the development of the law on targeting. At the time, however, the provisions were criticized, even labelled “unrealistic”.38 Parks notes that the proposed article 24, which requires care for collateral civilian casualties, was a “180-degree change of course in then-existing bombardment philosophy.”39

Another reference to proportionality before World War II started can be found in a resolution adopted by the League of Nations Assembly on aerial warfare in 1938.40 It prohibits the “intentional bombing of civilians” and reiterates that “[a]ny attack on legitimate military objectives must be carried out in such a way that civilian populations in the neighbourhood are not bombed through negligence.”41

In summary: the codification efforts of the Hague Peace Conferences and other developments before World War II reflect an increased acceptance of distinction. A rule on proportionality increasing the protection of the civilian population was however still far away, although an awareness that some care had to be taken for the civilian population against the effects of the hostilities was emerging.

35 Garner, p. 467.
36 Convention IX (signed 18 October 1907), concerning Bombardment by Naval Forces in Time of War. See Schindler & Toman, p. 1079.
37 For the text of the Hague Rules on Air Warfare, see Schindler & Toman, pp. 315-325.
38 Rogers 2008, p. 194. Rogers also notes that if the Hague Rules on Air Warfare would have been binding law, the area bombing practice during World War II would have been illegal. Parks labels the Hague Rules as “an immediate and total failure.” See Parks 1990, p. 31-36.
39 Parks 1990, p. 32.
41 See Fenrick 1982, p. 96. Fenrick points to the fact that the resolution could also be read as an absolute ban on casualties among the civilian population. For the text of the resolution, see Schindler & Toman, p. 1079.
6.3.2 Legal Doctrine before World War II

Still, the principle of proportionality had in the meantime also surfaced in legal doctrine. Spaight emphasizes the principle of distinction, but he goes further than that. He comments in 1930 that “even a military objective in an urban area may not lawfully be bombed if, by reason of its restricted area or its situation in a densely populated district, the natural and reasonable probable result of an attempt to bomb it will be widespread and wholly disproportionate loss of non-combatant life throughout the district. Subject to this reservation (...) the bombing of military objectives must be held to be lawful even if the incidental result is loss of innocent life.”

Spaight is less concerned about civilian property, and argues in favour of a new rule that would allow the bombing of civilian property, subject to some restrictions.

Royse was of the opinion that the civilian population was already normally a lawful military target. He concludes in 1928 that “in the realm of war, populations whether actively engaged in combat or whether remote from all hostilities are subject to whatever force the enemy can apply.” Harm done to civilians when legitimate military objectives are attacked he regards as “an unavoidable incident of warfare.” The general attitude towards air warfare in the period between the two World Wars paid little consideration to the effects of air warfare on the civilian population. The development of air warfare was feared, and its potential devastation effects to civilians were recognised, even anticipated as soon as the next war would break out.

Hall is very clear about the protection of civilians under the law of air warfare. According to him the civilian population of a country engaged in armed conflict is “exposed to all the injuries to person and property resulting from military or naval operations directed against the armed forces of their State.” That does not mean however that direct attack of the civilian population is permitted. Hall discusses the possible bombardment of London and concludes that the indiscriminate bombardment of the city as such is prohibited, but adds that there are certainly military objectives present in London that could be legally targeted. However, the “difficulty is to get sufficiently close to such objectives to obtain any reasonable

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42 Spaight 1930, p. 201. Emphasis in original.
43 Spaight 1924, p. 257-259 and Spaight 1933, p. 239-259.
44 Royse, p.v.
45 Royse, p. 241.
46 One commentator on air warfare notes in 1930: “[h]itherto the non-combatants’ part has been to pay up, work hard at what is given them to do, try to keep smiling, draw their belts, disbelieve enemy propaganda, and replace casualties. But now, and in the future, the non-combatants’ role is quite different, for the avowed object of each contestant is to cripple the economic life of each other.” See Charlton, p. 168. Mumford notes that “Europe had progressed beyond civilian massacre for many centuries before the invention of the aeroplane; that invention, used nationally, has restored the curse.”
47 Mumford, p. 66. Writing in 1936, Mumford anticipated “diabolic death and disastrous destruction undreamed of by Genghis Khan or Alexander the Great.”
48 Hall, p. 77.
chance of hitting them, but the difficulty of this and the consequent danger to innocent people in the neighbourhood does not make such attacks illegal.\textsuperscript{49}

The general feeling towards air warfare was that at the time, the rules of international law regulating it were inadequate.\textsuperscript{50} The application of the principles of the law of warfare on land to air warfare was contemplated, but there was no unanimity on the subject at that time.\textsuperscript{51} The situation had apparently changed in 1940, when according to Lauterpacht: “Although the Hague Rules on Air Warfare have not been ratified (…), air warfare, while calling for rules of its own regulating in detail the specific situations to which it gives rise, is subject to the general principles of a customary or conventional character which underlie alike the law of war on land and at sea.”\textsuperscript{52}

When World War II started, there were certainly a number of rules of customary IHL applicable that protected civilians. However, the rule of proportionality was not among them, considering the practice of aerial bombardment during World War II. As for the reason why this was so, Rogers concludes that there was no balance between military necessity and humanitarian considerations, because the latter were not contemplated at all during World War II.\textsuperscript{53} Spaight writes in 1944, that “nothing was done [to regulate air warfare], and the omission was, in part at least, the result of a determination that nothing should be done.”\textsuperscript{54} The applicable rules of IHL with regard to the regulation of the conduct of hostilities could be summarised as a prohibition to attack the civilian population directly, and an obligation to take some care to spare the civilian population when military objectives were attacked.\textsuperscript{55}

Nonetheless, the heated debate between Churchill and Eisenhower with regard to the choice between two separate bombing plans aimed at paralysing the movements of German troops in Belgium and Northern France just before D-Day shows that there was at least some sensitivity towards preventing civilian damage and civilian casualties in the conduct of air operations.\textsuperscript{56}

\textsuperscript{49} Hall, p. 80. The issue was discussed in the newspaper ‘The Times’ in the early part of 1914.

\textsuperscript{50} See the overview in Rogers 2008, pp. 195-202. See also Royse, p. 237.

\textsuperscript{51} There had however been cases, such as Coena Brothers vs. Germany, decided in 1927 and Kiriadolu vs. Germany, decided in 1930, both by the Greco-German Mixed Arbitral Tribunal, that had applied article 26 of the 1907 Hague Convention on Land warfare to German air operations in Greece. See Lauterpacht 1935, p. 417. Royse however, argues that there cannot be such an extension to air warfare. See Royse, p. 241.

\textsuperscript{52} Lauterpacht 1944, p. 410.

\textsuperscript{53} Rogers 2008, p. 203.

\textsuperscript{54} Spaight 1944, p. 19.


\textsuperscript{56} See generally Gaughan, pp. 229-285.
6.3.3 After World War II: the Red Cross Draft Rules

After World War II, the principle of proportionality enters the scene in the Red Cross Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War.\textsuperscript{57} The Red Cross Draft Rules, including a commentary, were drawn up by the ICRC with help of experts of national Red Cross and Red Crescent societies, after a number of expert meetings held in Geneva in 1954.\textsuperscript{58} The Red Cross Draft Rules were published in 1956, with a view to be discussed at the XIXth International Red Cross Conference to be held in New Delhi in 1957.\textsuperscript{59} The incentive to draft these rules was “the fact that recourse has been had very generally to the system of indiscriminate bombing [which] seems to have led to its becoming, as it were, an accepted practice, and given right to a kind of fatalism.”\textsuperscript{60} The Red Cross Draft Rules were meant not to replace the rules already codified in the Hague Conventions, but to bring detail to the existing rules.\textsuperscript{61}

Article 8 of the Red Cross Draft Rules, that deals with precautions in attack in the planning of an attack, states: “The person responsible for ordering or launching an attack shall, first of all: (…) take into account the loss and destruction which the attack (…) is liable to inflict upon the civilian population. He is required to refrain from the attack if, after due consideration, it is apparent that the loss and destruction would be disproportionate to the military advantage anticipated.”

The commentary to article 8 states that the experts drafting the Rules sought to underline the general principle found in doctrine that there must be a balance between the anticipated military advantage and the risks for the civilian population.\textsuperscript{62} It adds that what is new in this proposed article is the obligation to conduct the proportionality calculation in all circumstances.\textsuperscript{63} It therefore seems that the principle of proportionality was already seen as a “general doctrinal principle” which was also underlined by the experts who had prepared the Red Cross Draft Rules.\textsuperscript{64} The Commentary to the Red Cross Draft Rules makes it clear that the drafters viewed the calculation between the military advantage on the one hand and the harm to civilians and damage to civilian objects on the other hand to constitute “the principle of proportionality in the laws of war”\textsuperscript{65}

\textsuperscript{57} Hereinafter: the Red Cross Draft Rules.
\textsuperscript{59} International Review of the Red Cross, Supplement IX, 1956, p. 164.
\textsuperscript{60} See also Rogers 2008, p. 203.
\textsuperscript{61} International Review of the Red Cross, 1956, p. 558.
\textsuperscript{63} See also Rogers 2008, p. 203.
\textsuperscript{64} International Review of the Red Cross, 1956, p. 701.
\textsuperscript{65} “le principe de la proportionnalité dans les lois de la guerre.” See International Review of the Red Cross, 1956, p. 702.
The resolution containing the Red Cross Draft Rules that was discussed during the International Red Cross Conference in New Delhi “does not call for a formal approval of theDraft Rules.” There was extensive discussion on the Draft Rules themselves during the Conference, however much of that debate was allocated to issues that were of particular importance at that time, such as nuclear weapons. The reaction of the major powers to the Draft Rules was “adverse”. As a result, there was simply no reaction to the Draft Rules from States. Sandoz noted later that this was because the Draft Rules “directly addressed the question of nuclear weapons.”

But at least as far as the proposed article on the proportionality rule was concerned, that does not mean that the Red Cross Draft Rules were a pointless effort. On the contrary, its inclusion in the Draft Rules was noted. Even though the text of the proportionality rule as it would later be adopted in Additional Protocol I has a different wording than the one proposed in the Red Cross Draft Rules, the basic significance of the provisions on the proportionality principle is not fundamentally different. Both require the balance between the expected military advantage and the civilian costs that were expected from the planned attack. The text of the article on proportionality and its commentary in the Red Cross Draft Rules may be seen as the first explicit reference to the IHL rule on proportionality as it would be adopted about twenty years later.

6.3.4 Additional Protocol I

The IHL rule on proportionality is mentioned in three separate, yet closely related articles in Additional Protocol I: articles 51 (5) (b), article 57 (2) (a) (iii) and 57 (2) (b). In addition, article 85 (3) (b) refers to the violation of the rule of article 57 (2) (a) (iii) as a grave breach when committed wilfully and causing death or serious injury to body or health.

During the international conference that lead to the adoption of API, “it was a widely held view that a general affirmative obligation on the part of combatants to consider in advance
the relationship between incidental civilian losses and expected military advantage, would inure to the benefit of civilians and provide increased protection.”

Some delegations to the international conference that lead to the adoption of API had their doubts about including the IHL rule on proportionality in the treaty. They feared it could lead to abuse and that it would blur the clear and unambiguous principle of distinction. However, given the fact that the conduct of hostilities inevitably will cause injury, loss of life and damage to civilians and civilian objects, “[t]he view prevailed that it was preferable that the law should reflect this reality and be used to enjoin constraint, rather than be silent on the matter and leave it entirely to the practice of the belligerents.”

6.3.4.1 Draft Article 46 (the present article 51 API)

The text of article 46 of the draft Protocol I, as proposed by the ICRC, has a different wording than the text that is now codified in article 51 API. The formulation of the draft-article was clearly derived from the Red Cross Draft Rules, promulgated by the Red Cross Movement in 1956. Draft article 46 (3) (b) provides that in particular it is forbidden “to launch attacks which may be expected to entail incidental losses among the civilian population and cause the destruction of civilian objects to an extent disproportionate to the direct and substantial military advantage anticipated.”

In the draft version of Protocol II, the IHL rule on proportionality was embodied in draft article 26, which dealt with the protection of the civilian population. Draft article 26 (3) (b) provided that it is forbidden in particular “to launch attacks which may be expected to entail incidental losses among the civilian population and cause the destruction of civilian objects to an extent disproportionate to the direct and substantial military advantage anticipated.”

In the General Discussions in the Plenary Meetings in 1974, the discussions were hardly concerned with the principle of proportionality. A number of delegates mentioned the need to enhance the protection of the civilian population, but the focus was in this regard on the enhancement of the principle of distinction. See for example the statement of the Government of Sweden, who mentioned the increasing civilian casualties caused by war, ranging from 5 per cent in the First World War, 50 per cent in the Second, 60 per cent in the...
Korean War and 70 per cent in the Vietnam War. Additionally, the statement mentioned the “heavy casualties” caused by air warfare.  

The draft-provisions containing the proportionality principle were discussed in Committee III. Explaining the proposed article, the representative of the ICRC said that “[t]he Red Cross was conscious of the fact that the rule of proportionality contained a subjective element, and was thus liable to abuse. The aim was, however, to avoid or in any case restrict the incidental effects of attacks against military objectives.”

In the subsequent discussions on the matter, there was a clear difference between the opinions of the ICRC and of a number of Western States on one side, and some Eastern European States and a number of States from the Middle East (Egypt, Iraq, Syria) on the other side. The former supported the inclusion of a rule of proportionality in the new Protocol I, the latter were opposed to that idea. In the words of the representative of the German Democratic Republic: “because it considered that protection of the civilian population could not be improved if the concept of proportionality was retained. To permit attacks against the civilian population and civilian objects if such attacks had military advantages was tantamount to making civilian protection dependent on subjective decisions taken by a single person, namely, the military commander concerned.”

To illustrate the substance of the debate, the interventions of the representative of the United States of America and of Hungary may be compared:

According to the representative of the United States of America, the “rule of proportionality [as proposed] was based on existing international law. (...) Collateral damage to civilians and civilian objects was often unavoidable and it was unrealistic to attempt to make all such damage unlawful: the rule of proportionality was as far as the law could reasonably go.”

On the other hand, the representative of Hungary said that “a rule well established in international law should be reflected in practice and should produce the intended effects. Yet the number of civilian victims had increased alarmingly over the past few years: accordingly, either the rule was not well established and hence not binding; or it existed and could not be applied in armed conflicts; or it was applied, but the results of its application provided the best argument against it.”

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80 Canada, Federal Republic of Germany, United Kingdom, France and others.
81 Romania, Hungary, Czechoslovakia and the Democratic Republic of Germany.
Chapter 6: The Concept of Proportionality in International Humanitarian Law

Being unable to reach consensus on the article, the matter was thus referred to the Working Group, which discussed article 46 of draft Protocol I. The Report to Committee III of the Working Group summarised the issue of article 46 (3) (b) as follows: “The principle of proportionality ... received a mixed reaction. Some delegations considered it a necessary means of regulating the conduct of warfare and of protecting the civilian population. Other delegations rejected that principle as a criterion and asserted that in humanitarian law there should be no condonation of casualties among civilians. Some who took the latter view considered that it would be desirable to delete subparagraph 3(b) as a whole, while others of the latter view proposed the deletion of the words “to an extent disproportionate to the direct and substantial military advantage anticipated”. Eventually, paragraph 3 (b), containing the IHL rule on proportionality, was “drafted only after article 50 [of draft Protocol I, on the subject of precautions in attack] had been settled, since both concerned the same issue.” Eventually, article 46, as amended, was agreed upon, and adopted by consensus during the Second Session of Committee III, on 14 March 1975. Subparagraph 3(b) of article 46 only referred to article 50. The question of whether there would be a cross-reference between the two articles, in which of the articles the text of the IHL rule on proportionality would appear (or indeed in both as it is today), was referred to the Drafting Committee.

6.3.4.2 Draft Article 50 (the present article 57 API)

The proposed article on precautions in attack contained a number of references to proportionality. Article 50 of the draft Protocol I reads:

1. Constant care shall be taken, when conducting military operations, to spare the civilian population, civilians and civilian objects. In the planning, deciding or launching of an attack the following precautions shall be taken:

   (Proposal 1) those who plan or decide upon an attack shall (Proposal 2: those who plan or decide upon an attack shall take all reasonable steps to ...)

   • ensure that the objectives to be attacked are duly identified as military objectives within the meaning of paragraph 1 of Article 47 and may be attacked without incidental losses in civilian lives and damage to civilian objects in their vicinity being caused or that at all events those losses or damage are not disproportionate to the direct and substantial military advantage anticipated;

   • those who launch an attack shall, if possible, cancel or suspend it if it becomes apparent that the objective is not a military one or that incidental losses in civilian lives and damage to civilian objects would be disproportionate to the direct and substantial advantage anticipated; (...

2. All necessary precautions shall be taken in the choice of weapons and methods of attack so as no cause losses in civilian lives and damage to civilian objects in the immediate vicinity of military objectives to be attacked.\(^87\)

In explaining the draft of article 50 of draft Protocol I, on precautions in attack, the representative of the ICRC held that “there was always a risk that any attack, even when directed against a clearly determined military objective, might affect the civilian population: it could arise from such factors as the configuration of the terrain (danger of landslide, or of ricocheting); the relative accuracy of the weapons used (relative dispersion according to trajectory, firing range, ammunition used, condition of the equipment); meteorological conditions (the effect of the wind, of atmospheric pressure, of cloud); the specific nature of the military objectives (ammunition stores, fuel tanks, army nuclear stations); or the combatants’ mastery of techniques (the standard of technical training and technical ability in handling weapons).\(^88\)

This article repeats the formula of proportionality that was proposed in article 46 of draft API. The ICRC proposed the article with the ideal in mind of the “complete elimination, in all circumstances, of losses among the civilian population.”\(^89\) However, the ICRC recognised that an explicit rule to that extent would be impracticable and it was unrealistic to expect it to be credible or effective. Therefore, the ICRC proposed a limited rule to formulate that ideal, “offering a balance of the various factors involved” and with “the advantage that it could be observed.”\(^90\)

It took the Working Group to Committee III many heated discussions to work out paragraph 2(a) of draft article 50 of draft Protocol I.\(^91\) It was eventually agreed upon after inserting two paragraphs containing additional precautions and after the term ‘disproportionate’ was deleted from the text. In the new draft of the article, the rule referred to “excessive in relation to the concrete and direct military advantage anticipated”. According to Frits Kalshoven, it was his proposal to use the word ‘excessive’ which eventually solved the deadlock and therefore became the standard that is now applied as the IHL rule on proportionality.\(^92\) Additionally it was supplemented by paragraph 50 (5) of the draft article “to make clear that it


\(^{91}\) See also Brown, p. 138.

\(^{92}\) As Frits Kalshoven claimed during a meeting of the Kalshoven-Gieskes Forum on International Humanitarian Law on 27 November 2012, following a presentation on the principle of proportionality of the present author.
may not be construed as authorization for attacks against civilians.”\textsuperscript{93} Article 50 was adopted by Committee III on 14 March 1975.

In the end, it appears that in the report Working Group there is nothing more about the reasons why the principle is phrased as we know it today than the remark that it “required much time and effort”.\textsuperscript{94} At the time the codification of the IHL rule on proportionality was indeed seen as important, because it filled the gap\textsuperscript{95} between the prohibitions to attack civilians directly\textsuperscript{96} and the prohibition to attack military objectives without distinction.\textsuperscript{97}

\subsection*{6.3.5 The Rome Statute of the International Criminal Court}

There is a small difference in the wording of the war crime of violating the IHL rule on proportionality as it is codified in the ICC Statute and the wording in the other treaty provisions mentioned above. The prohibition in the ICC Statute provides that it is prohibited during international armed conflict to: “intentionally launching an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians or damage to civilian objects ... which would be clearly excessive in relation to the anticipated direct overall military advantage anticipated.”\textsuperscript{98}

It has been debated whether the IHL rule on proportionality as it is codified in Additional Protocol I is exactly identical to the IHL rule on proportionality as it is recognised in customary international law, or that the formulation in the ICC Statute should prevail.\textsuperscript{99} Rogers reaches the conclusion that the formulation of article 8, paragraph 2(b)(iv) of the ICC Statute is the correct formulation of the IHL rule on proportionality, because that article “was drafted with states not party to Protocol I very much in mind and involved in the negotiations (...) and the drafters of this article took into account the various statements made on ratification of Protocol I and, by adopting a middle way, have tried to accommodate the requirements of military necessity without abandoning humanity, by allowing one to look at the bigger operational picture.”\textsuperscript{100} According to Dörmann, the different formulation in the ICC Statute was caused by a general feeling during the negotiations of the ICC Statute that the wording

\begin{itemize}
\item\textsuperscript{94} Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Volume XIV, p. 183. Reminiscing about the Diplomatic Conference, the Rapporteur of the Working Group notes that essential to the resolution of a number of problems, such as the codification of the principle of proportionality, was the fact that he had established personal relations with the Soviet and Vietnamese delegations during the Vietnam peace negotiations and several agreements concluded with the Soviet Union. See Aldrich 1984, p.134.
\item\textsuperscript{95} Brown, p. 155.
\item\textsuperscript{96} As prohibited in article 51 (2) API.
\item\textsuperscript{97} As prohibited in article 51 (4)(a), (b) and (c) and article 51 (5) (a) API.
\item\textsuperscript{98} Article 8 (2) (b) (iv) ICC Statute. (emphasis added) It should be noted that the principle is only included in the ICC Statute as a war crime in international armed conflicts.
\item\textsuperscript{99} For example by Watkin 2007, p. 19 and Rogers 2008, p. 208.
\item\textsuperscript{100} Rogers 2008, p. 208.
\end{itemize}
as included into that Statute was the state of affairs in international customary law at the time. McCormack and Mtharu however call the addition of the word “clearly” an “additional requirement” for the prohibition of disproportionate attacks in order to constitute a war crime under the ICC Statute. The question of whether the adjective ‘clearly’ must be deemed to be part of the IHL proportionality rule, is discussed in Chapter 13.

6.4 IHL Proportionality in International Customary Law

If the 1977 Additional Protocol I to the Geneva Conventions would have been universally ratified instantly after their conclusion, there would be no discussion about the question whether the IHL rule on proportionality is applicable during armed conflict. However, a number of States did not, or not immediately, ratify the protocol. The universal acceptance of the 1949 Geneva Conventions therefore has not (yet) been achieved for its three Additional Protocols. Also, although the existence of the principle of proportionality was not challenged, a number of States accompanied their ratification of Protocol I by reservations or declarations that also concerned the application of the IHL rule on proportionality. The customary status of the rule is particularly relevant for the rules regulating non-international armed conflicts. There is no specific reference to ‘the principle of proportionality’ in the Geneva Conventions and its Protocol applicable to non-international armed conflicts. More generally spoken, there are only few treaty rules applicable during non-international armed conflicts. As a result, the rules of customary IHL applicable during a non-international armed conflict are the prevalent source of law for the parties to those types of conflicts. Therefore, the question whether the IHL rule on proportionality has achieved the status of customary international law remains relevant.

The representative of the United Kingdom during the negotiations of Additional Protocol I and II, Sir John Freeland, stated with regard to the status of the IHL rule on proportionality at the moment of its codification in the Additional Protocols, that it “was a useful codification of a concept that was rapidly becoming accepted by all States as an important principle of international law relating to armed conflict.” One commentator notes that the result in the applicable provisions of API “probably combines elements of codification and progressive development” while others conclude that the IHL rule on proportionality was already

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102 McCormack and Mtharu, p. 196. See also See also Olasolo, p. 83-84 and R.J. Barber, p. 479.
103 See Schindler & Toman, pp. 792-818. See for example the declarations of Australia, Canada, The Netherlands and others made at the time of ratification.
104 For the relevance of customary IHL in general, see J-M Henckaerts 2005, p. 177-178.
105 Rogers quotes Aldrich with regard to the status of the principle of proportionality as a rule of customary IHL during the negotiations if the Additional Protocols to the Geneva Conventions as holding the view in 2006 that “John Freeland stated it best.” See Rogers 2008, footnote 103, pp. 214-215.
part of customary international law in 1977. On the other hand, Parks writes in 1990 that in the view of the United States Department of Defense, the text of the draft article of API, presented to the diplomatic conference was not a reflection of customary international law. In any case, it seems clear from the records of the diplomatic conference, as discussed above, that when Additional Protocol I was concluded, there was no universal agreement yet on the exact content of the IHL rule on proportionality. The question remains whether it may be considered as a part of customary international law today.

6.4.1 Challenges in Establishing a Customary IHL Proportionality Rule

The existence of rules of customary IHL is sometimes not straightforward. This is because there is no unanimity among scholars, courts and States about the method to identify rules of customary international law. As a result, it is unclear what the exact required level and character of the State practice and opinio juris is to conclusively determine the customary status of a rule of IHL. Even though these two components of customary law are widely acknowledged, the importance of the one factor over the other is subject to debate. The authors of the ICRC Study on customary IHL had to deal with this issue when they compiled the collection of 161 rules of customary IHL. Although the Study is an impressive piece of work, its methodology has received both criticism as well as acclaim. The experience of its drafting process illustrates the difficulties that are encountered in the identification of customary rules of IHL. The methodology which the International Tribunal for the former Yugoslavia has used to identify rules of customary international law was similarly

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108 Parks 1990, p. 174. Fellmeth states that “International practice has proven impervious so far not only to all attempts to identify the content of the rule of proportionality in any detail, but to assessing the status of the principle itself as a binding custom.” See Fellmeth 2010, p. 2.
109 Fenrick notes that “there was some debate” on the customary status of the principle of proportionality at the time of the conclusion of API. See Fenrick 1982, p. 125. Greenwood regards the principle of proportionality part of customary IHL prior to 1977, but feels that the principle is “expressed in the Protocol in more precise language than that was used hitherto.” He concludes “that Article 51(5) (b) should be treated as an authoritative statement of the modern customary rule. See Greenwood 1991, p. 109. Meron, writing in 1989, affirms the customary status of the principle and adds that it is “perhaps also a general principle of law”. See Meron 1989, note 178 on p. 65.
110 Part of the discussion in this section was published in the book chapter ‘Fighting by the principles: principles as a source of international humanitarian law’, See Van Den Boogaard 2013, pp. 13-16.
111 See for example Shaw 2014, pp. 51-66 and the accompanying notes.
112 See for an overview: Ronen, pp. 482-495. See also generally Wood, pp. 727-736.
113 See article 38 (3)(b) of the ICJ Statute: “international custom, as evidence of a general practice accepted as law”. See also Shaw 2014, pp. 53-54.
114 This subject has been debated, for instance, during the launching events of the ICRC Humanitarian Law Study that have taken place worldwide. A summary of the proceedings of a number of these events is available: http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/section_ihl_customary_humanitarian_law?OpenDocument.
The specific character of IHL makes the methodological problems even more prominent. IHL is a preventive framework, meant to regulate the hostilities as soon as they begin. The rules of IHL are the user’s manual for the use of the arms that the parties to the conflict deploy in their operations, as well as for the methods they may use. The problem in terms of the creation of State practice is that it is difficult to get access to the practice during the operations for reasons of operational security. Also in terms of the creation of *opinio juris*, there is no reason to pay attention to those instances when just nothing happens since an attack has been cancelled. Therefore, States will normally only express their opinion if something has gone wrong. The State that is under attack, however, for propaganda reasons, will be likely to declare an attack during which there has been damage to civilian objects or death or injury to civilians as grossly disproportionate.

The existence of State practice can be determined on the basis of the “duration, consistency, repetition and generality”\(^{117}\) of State behaviour. However, this leaves uncertainty concerning the question of which behaviour constitutes State practice. Legal scholarship concerning the methodology to establish customary international law revolves around the question whether actual State practice applying a rule is required to constitute a customary rule, or that other types of practice could suffice to satisfy the requirement of State practice. According to some writers, only actual physical acts, through the agents of a State, count as State practice.\(^{118}\)

The State practice one would therefore typically search for in order to identify a rule of customary law is the battlefield practice, such as the actual targeting behaviour of States during armed conflict.\(^{119}\) This practice could, for example, be derived from After Action Reports containing the deliberations of the military commanders demonstrating their argumentation before the attack, including both the reasons for proceeding with and cancelling an attack. Conclusive proof of the practice should draw from a large collection of these types of reports from various States and conflicts, providing proof as to how various factors were weighed in the decision-making process and the subsequent behaviour of operational planners and commanders. Preferably, the After Action Reports should also include Collateral Damage Assessments of those planning, ordering and executing the attack and how the different factors under the specific circumstances of the attack were evaluated, before a decision to attack was taken. Unfortunately, in practice, these assessments are not

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\(^{116}\) For example Kalshoven and Zegveld 2011 extend criticism to the way the ad-hoc tribunals for Rwanda and the former Yugoslavia have identified customary international law and conclude that the tribunals should actually have been referring to principles: “In particular, this more recent extension of the scope of customary law of armed conflict appears to rest on the assumption that for this type of armed conflict, general opinion about preferred behaviour outweighs the requirement of demonstrable practice seen as law. To the extent that this ‘general opinion of preferred behaviour’ reflects accepted principle, we would prefer to call it that”. And with regard to the ICRC Customary Law Study: “in particular with respect to internal armed conflict not all of these rules may rest on the type of actual field practice traditionally required of rules of customary law. Yet they may well reflect existing principles and thus deserve to be promoted under that heading”. See Kalshoven and Zegveld 2011, p. 5; See also Baker 2010, Ratner 2017 and Stahn.

\(^{117}\) Shaw 2014, p. 54.

\(^{118}\) See for example D’Amato 1971, p. 88.

always publicly available, if they are made in written form at all.\textsuperscript{120} There are a number of reasons for this,\textsuperscript{121} the most important reason being that those who would be best placed to conduct a thorough assessment of targeting decisions are not among those with a particular interest in the outcomes of the assessment.\textsuperscript{122} With regard to the application of the IHL proportionality rule, it has been suggested that on every occasion that civilian casualties occur as a result of a specific attack, an inquiry should always be conducted into the possible disproportionate use of force.\textsuperscript{123} These inquiries could be helpful, if they would be published in full, to assess whether, and how the proportionality rule is applied in practice. This does however not seem to be an obligation which would be welcomed by the parties to an armed conflict. Parties to an armed conflict are generally reluctant to “expose the decision process to public view [because] it could enable current or future adversaries to predict the military organization’s strategy and tactics, undermining its effectiveness and exposing its personnel to danger”.\textsuperscript{124} Other authors however claim that actual behaviour is not necessary to identify State practice, and that “it is artificial to distinguish between what a State does and what it says.”\textsuperscript{125}

The second component of customary law is that of \textit{opinio juris sive necessitates}, which is also known as the psychological component of customary law. It may be defined as the “belief by a state that that behaved in a certain way that it was under a legal obligation to act that way.”\textsuperscript{126} Different indications of State practice or \textit{opinio juris} have to be used in determining the customary character of rules of IHL, for example military manuals.\textsuperscript{127} Of course, how States

\begin{footnotes}
\item[120] That does not mean, of course, that there is no oversight at all. For example, there was a practice of relatively independent oversight in the armed forces of the Kingdom of the Netherlands by the Royal Military Constabulary (Koninklijke Marechaussee) and the office of the Public Prosecutor of the Arnhem District Court with regard to instances where the members of the military used armed force during the deployment of Dutch troops in the Afghan province of Uruzgan from 2006 to 2011. Another example is the investigation into the bombing of two stolen fuel tankers on 4 September 2009 in Kunduz, Afghanistan. It was investigated by the German prosecutor and by the German Bundestag; See for the report of the Bundestag: http://dip21.bundestag.de/dip21/btndat/17/074/1707400.pdf.
\item[121] Fellmeth mentions four reasons: the fact that the concept of sparing the civilian population in armed conflict emerged only rather recently; the fact that the way military operations are conducted is usually contingent on confidentiality restrictions; the fact that “few states are eager to publicize their own crimes” and, finally, the fact that most armed conflicts nowadays have a non-international character, and States regard the treatment of their own civilians as a “matter of sovereign internal control”. See Fellmeth 2010, pp. 2-3.
\item[122] Shamash 2005, p. 146.
\item[123] See Cohen 2010, pp. 29-36.
\item[124] Fellmeth 2010, p. 3.
\item[125] Akehurst, p. 3. See however Van Steenberghe 2017, p. 897: “the material or verbal nature of any State manifestation does not impact its description as State practice; it may only influence the weight to be attributed. Moreover, although one normally must be more cautious when grounding a customary rule on State speeches rather than on State material behaviours, some declarations, particularly those taking the form of international or internal legal acts, carry more weight because States commit themselves to abide by what they said. In addition, material acts are often deprived of much weight unless they are associated with a legal explanation, usually in the form of a declaration which enables an understanding to be had of the legal significance of the conduct.”
\item[126] Shaw 2014, p. 53. See also the ICI in the Nicaragua Case, pp. 108-109, and the Continental Shelf cases, ICJ Reports 1969, p. 44.
\item[127] Particularly in the ICRC Customary Law Study, see Henckaerts and Doswald-Beck 2005b, Volume II, Practice. See also above, Chapter 3, Section 3.3.1, in which it was noted that 7 out of the 8 military manuals that were assessed, included a reference to the principle of proportionality.
\end{footnotes}
instruct their military is certainly relevant for the practice in the context of the conducting of hostilities in armed conflict. It seems to be more logical, however, to classify the way States have phrased the obligations for their militaries in their military manuals as an expression of opinio juris rather than State practice. Military manuals indicate how States would want their armed forces to conduct their operations, or what they regard as legal behaviour. But often, military manuals express no opinion at all, but merely restate the States’ treaty obligations, and should be considered as nothing more than that. This is particularly the case for the military manuals of States that have not been involved in armed conflict for a long time. In case of incidents involving (alleged) violations of the rules, the reaction of States to that incident may also be regarded as opinio juris. But then many factors are still unclear, such as the question whether the practice of non-State actors should be taken into account.

In the author’s view, a variety of indicators and methods may be considered to assess the customary status of a rule of customary IHL. The following sections assess the customary status of the IHL rule on proportionality through a number of sources. As a starting point, the outcome of the updated ICRC Customary Law Study will be discussed. Next, a selection of cases is discussed in which the customary character of the IHL rule on proportionality is addressed. Furthermore, it will be assessed how the customary character of the IHL rule on proportionality is regarded in a number of other sources.

### 6.4.2 The ICRC Customary Law Study

The ICRC Customary Law Study, published in 2005, identifies the IHL rule on proportionality as a rule of customary IHL. Rule 14 reads:

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

It may be noted that the rule is formulated identical to the treaty provision in API. The same is true for most of the formulation in Rules 15, 17 and 18, which deal with precautions to be taken before and during attacks in order to respect the IHL rule on proportionality.

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128 See for example Schmitt 2007, p. 133.
130 See Fellmeth and Sylvester for a study of the practice during the Colombian civil war, concluding that opinio juris that the proportionality rule was upheld during the conflict by the Colombian Army was “has been lacking.” See Fellmeth and Sylvester, p. 556.
The State practice that the ICRC has collected to support the statement that the rule is indeed of a customary nature includes treaty texts and other official instruments, military manuals, national legislation, official statements by States, submissions by States to international courts, and the reported practice of States. The collected practice also includes practice of States not a party to Additional Protocol I, such as India, Israel, Pakistan, the Philippines and the United States. In addition, some other types of practice are mentioned, for example resolutions of international organisations like the United Nations and the Council of Europe.

The list of military manuals containing the IHL rule on proportionality is impressive: thirty military manuals contain the principle. In the military manuals of many of these States, the principle “has been copied verbatim, or by adopting its essence, according to which civilians are not to be attacked, unless they are taking a (direct) part in the hostilities. It may however be assumed that many, but not all, of these thirty States have incorporated the IHL rule on proportionality in their military manual because the relevant State ratified API. The ICRC study has been criticised for its methodology and the types of practice that was used, but for the IHL rule on proportionality the amount of State practice and other indicators seems to be quite comprehensive.

6.4.3 Case Law on the IHL Rule on Proportionality

Case law is a subsidiary source of international law, but does not constitute State practice by itself. Case law may however serve to clarify and assist in the interpretation of the primary sources of international law, such as customary IHL. Especially when rulings of (international) courts receive general agreement by States and in legal doctrine, its findings may provide “persuasive evidence” of the customary character of a rule. Although case law often mentions the IHL proportionality rule, cases in which the rule is actually applied are sparse. Since the principle was not codified before 1977, jurisprudence on the subject prior to that date is virtually non-existent. Nonetheless, a number of international and national
Courts have mentioned the IHL proportionality rule. The following Sections provide an overview of those cases, which were adjudicated both before national and international courts. Cases in which the IHL proportionality rule is actually applied are discussed in Chapter 12.

6.4.3.1 The Shimoda Case (1963)

In the case of Shimoda vs State, concerning the bombing of the Japanese cities of Hiroshima and Nagasaki in 1945, the Japanese District Court ruled that an indiscriminate attack on an undefended city is prohibited under customary international law, on the basis of the Hague Rules on Air Warfare of 1926. The Court acknowledged that the bombardment from the air of a military objective will also lead to destruction of civilian property and casualties to non-combatants, but that this is “not unlawful as long as it is an inevitable result incidental to the aerial bombardment of a military objective. Nevertheless, (...) aerial bombardment without distinction between military objectives and non-military objectives (the so-called ‘blind aerial bombardment of an undefended city’) is not permissible (...)”.

The Court held that the aerial bombardment using nuclear weapons was in essence a blind aerial bombardment because of the “tremendous destructive power” of the atomic bomb and therefore contrary to the applicable rules of IHL in 1945. As such, the Shimoda Case does not contain a specific reference to the IHL rule on proportionality. Of course, at the time, the rule had not been codified yet, and the applicable...
law to the case was the law as it stood in 1945. Yet, the case does seem to make an attempt to strike a balance between the presence of military objectives and the damage to civilians and civilian objects that could be expected from bombardment by atomic bombs on the two cities. The Court concludes, basing its ruling on customary law, that the attacks were indiscriminate, but it does not express whether this conclusion is based on excessive civilian casualties and damage (due to the means of warfare that was used) or on the basis of a lack of distinction.

6.4.3.2 The Nuclear Weapons Advisory Opinion (1996)

The IHL rule on proportionality was considered again in relation to nuclear weapons in the Nuclear Weapons Advisory Opinion of the International Court of Justice.143 This case was instigated by the World Health Organisation and the United Nations General Assembly, which asked the ICJ to consider the legality of nuclear weapons. In its Advisory Opinion of 8 July 1996, the Court did not make any direct reference to the IHL rule on proportionality, but a number of judges noted in the explanation of their vote that they considered the IHL rule on proportionality to be a part of customary law.144 Additionally, proportionality is addressed by some of the States who intervened in the case.145 Judge Schwebel provides two examples where nuclear weapons may be used without violating the IHL rule on proportionality, namely when used against military objectives in the middle of the ocean, or the desert.146 Judges Higgins and Guillaume note that in order to use a nuclear weapon, the military advantage that arises from the attack will necessarily have to be very huge, to outweigh the anticipated collateral damage form the attack.147

Judge Higgins also states in a widely quoted statement that “the law of armed conflict has been articulated in terms of a broad prohibition - that civilians may not be the object of armed attack - and the question of numbers or suffering (provided always that this primary obligation is met) falls to be considered as part of the “balancing” or “equation” between the necessities of war and the requirements of humanity. Articles 23 (g), 25 and 27 of the Annex to the Fourth Hague Convention have relevance here. The principle of proportionality, even

143 For a general description of the case, see for example David 1997.
145 For example by the United Kingdom, as stated during the oral pleadings and quoted in the Dissenting Opinion of Judge Schwebel on page 321 of the Advisory Opinion. See also the Written Statement of The Netherlands, p. 13, the Written Statement of the United Kingdom, paragraphs 3.70 and 3.71 on pages 53 and 54. See also Henckaerts & Doswald-Beck 2005a, note 14 on p. 48, listing also Egypt, India, Iran, Malaysia, New Zealand, Solomon Islands, Sweden, United States and Zimbabwe.
146 Dissenting Opinion Judge Schwebel, page 320-322 of the Advisory Opinion. These examples are also mentioned in the Written Statement of the United Kingdom, see paragraphs 3.70 and 3.71 on pages 53 and 54.
if finding no specific mention, is reflected in many provisions of Additional Protocol I to the Geneva Conventions of 1949. Thus even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack.\(^\text{148}\)

The Court notes that the use of nuclear weapons would be “scarcely reconcilable” with the principles of IHL, but it does not draw the conclusion that the use of nuclear weapons would always be disproportionate. Rather, it concludes, though the views of the judges diverge on this point, that under the circumstances of a particular attack, the use of nuclear weapons could be lawful.\(^\text{149}\) In conclusion, it is fair to say that the Nuclear Weapons Advisory Opinion underscores the existence of the IHL rule on proportionality as a rule of customary IHL.

6.4.3.3 ICTY Case Law (1995-present)

It is clear that the ICTY regards the IHL rule on proportionality as part of international customary IHL.\(^\text{150}\) ICTY Trial and Appeals Chambers have addressed the IHL rule on proportionality in a number of cases.\(^\text{151}\) However, as Bartels notes, the ICTY judges would usually mention the rule without actually applying it to the facts of the case.\(^\text{152}\) The ICTY Trial Chamber provides “the first actual application of this principle by the ICTY to date”\(^\text{153}\) in the Gotovina Case,\(^\text{154}\) however, the decision was overturned by the Appeals Chamber.\(^\text{155}\)

Of particular significance is the Kupreskić Case.\(^\text{156}\) The Trial Chamber holds that the rules of API that contain the IHL rule on proportionality, “it would seem, are now part of customary international law, not only because they specify and flesh out general pre-existing norms, but also because they do not appear to be contested by any State, including those which have

\(^{148}\) Nuclear Weapons Advisory Opinion, p. 587.
\(^{149}\) See Greenwood 1997, p. 70.
\(^{150}\) See also Rogers 2008, p. 208.
\(^{151}\) See for example Prosecutor v Blaškic, ICTY Case nr. IT-95-14, Trial Chamber Judgement, 3 March 2000, paragraph 307-310 and Appeals Chamber Judgement, 29 July 2004, paragraph 439-441; Prosecutor v Galic, ICTY Case nr. IT-98-29, Trial Chamber Judgement, 5 December 2003, paragraph 58-61, and Appeals Chamber Judgement, 30 November 2006, paragraph 190-194; Also, in the Martic Case, the Trial Chamber considered whether the shelling of Zagreb by M-87 Orkan Rockets should be considered a disproportionate attack. The Trial Chamber decided that instead the attacks amounted to a direct attack on the civilian population, even though there were military objectives in Zagreb, due to the nature of the means of warfare that was used. See Prosecutor v Martic, ICTY Case nr. IT-95-11, Trial Chamber Judgement, 12 June 2007, paragraph 463 and 469 and Appeals Chamber Judgment, 8 October 2008, paragraph 245-271.
\(^{152}\) See Bartels at the EJILTALK blog: http://www.ejiltalk.org/prlic-et-al-the-destruction-of-the-old-bridge-of-mostar-and-proportionality/; Bartels notes that “[e]xamples of such cases are Kupreškić, Galić, Strugar, Martić, and Dragomir Milošević.”
\(^{153}\) Bartels 2013, p. 272.
\(^{154}\) ICTY, Prosecutor v Gotovina, Cermak and Markac, Judgment, IT-06-90-T, Trial Chamber 1, 15 April 2011 (Gotovina Trial Judgment).
\(^{155}\) ICTY, Prosecutor v Gotovina, Cermak and Markac, Judgment, IT-06-90-A, Appeals Chamber, 16 November 2012 (Gotovina Appeals Judgment).
\(^{156}\) Kupreskic Trial Chamber Judgement
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not ratified the Protocol.”

This statement, that has been characterized as “sweeping” does not come accompanied by a lengthy analysis detailing the line of argumentation in support of the statement.

In the Galić Case, the IHL rule on proportionality is discussed by the Trial Chamber in relation to 23 different incidents. The proportionality principle is also discussed by the Chamber evaluating the attack on a football match in Sarajevo. In these incidents, however, it seems that the Trial Chamber used the incidents to prove that there was an ongoing “campaign of sniping and shelling against civilians” rather than prosecuting the accused for violation of the IHL rule on proportionality.

The ICTY OTP Report on the NATO campaign in Kosovo in 1999 also considers the IHL rule on proportionality. Although the opinion of the Prosecutor can obviously not be equated to a judgement of an international court, the Report is nevertheless significant. The report notes the statement of the Kupreskic, but regards it as “a progressive statement of the applicable law with regard to the obligation to protect civilians.” The Report however finds that there is no doubt about the existence of the IHL rule on proportionality, but that it is difficult to assess how it should be applied. The report reviews a number of incidents, such as the proportionality of the attack by NATO on the Radio and Television Tower in Belgrade on 23 April 1999, killing at least 10 people. The Report found that as a part of the overall attack with the objective to disrupt Serbian command, control and communications system, it did not to appear to be manifestly excessive in relation to the key military advantage expected from the disruption.

6.4.3.4 The Eritrea-Ethiopian Claims Commission (2000 – 2005)

In the cases before the Eritrea Ethiopian Claims Commission (the Commission), a number of cases also dealt with proportionality issues. The claims concerned the armed conflict between Eritrea and Ethiopia in the period of 1998 until 2000. Eritrea maintained that the Ethiopian bombings were, among other things, disproportionate. In these claims, Eritrea

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157 Kupreskic Trial Chamber Judgement, paragraph 524.
158 See Boivin, footnote 151, p. 41.
159 Olasolo, p. 179.
160 See the Trial Chamber Judgment in the Galic Case, paragraph 387. See also Kravetz, p. 532-533 and Olasolo, p. 180-182.
161 Galic Trial Chamber Judgement, paragraph 594.
162 See the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (hereafter: the ICTY OTP Kosovo report), paragraph 52.
163 Idem, paragraph 48.
164 The ICTY OTP Kosovo report, paragraph 77-79. See also Olasolo, p. 129-131. On the subject of the principle of proportionality in the ICTY OTP Kosovo report, see also Benvenuti, p. 517-519, Bring, p. 44-45, Murphy, p 65-75, and Voon, p. 6-13. For further analysis, see Chapter 12.
165 For an overview of the work of the Eritrea Ethiopia Claims Commission, see Aldrich 2003. See also Van Houte, p. 391, and accompanying notes for a short overview of the cases where the conduct of hostilities of the parties to the conflict was scrutinized. The Awards are available on http://www.pca-cpa.org/upload/files/FINAL%20ER%20FRONT%20CLAIMS.pdf.
relied particularly upon the provisions of API. Since Eritrea is not a party to Additional Protocol I, the Commission assumed the provisions referred to by the parties to be part of customary IHL: “[a]lthough portions of Geneva Protocol I involve elements of progressive development of the law, both Parties, with one exception, treated key provisions governing the conduct of attacks and other relevant matters in the claims decided by this Partial Award as reflecting customary rules binding between them. The Commission agrees and further holds that, during the armed conflict between the Parties, most of the provisions of Geneva Protocol I were expressions of customary IHL.”

The Commission summarised the applicable provisions of API as follows:

“[t]hey emphasize the importance of distinguishing between civilians and combatants and between civilian objects and military objectives; they prohibit targeting civilians or civilian objects; they prohibit indiscriminate attacks, including attacks that may be expected to produce civilian losses that would be disproportionate to the anticipated military advantage; and they require both attacker and defender to take all feasible precautions to those ends.”

The Commission did “generally not find indiscriminate or disproportionate bombing where it was foreseeable that civilian losses would be excessive in relation to the military advantage anticipated.” The Commission does not elaborate any specific proportionality calculations it may have reviewed in order to support this conclusion. According to the Award, this is due to the fact that the claimant (in this case: Eritrea) failed to provide the necessary proof to support its statement. Generally, it is concluded, the civilian casualties and damage to civilian objects was in some cases the result of unfortunate targeting mistakes from the side of the Ethiopian armed forces. Other losses could have been avoided if the legitimate military objectives that were under attack would have been located at greater distance from civilian objects.

166 Particularly articles 48, 51, 52 and 57 API. See Eritrea Ethiopia Claims Commission, Partial Award Western Front, Aerial Bombardment and Related Claims, Eritrea’s Claim 26, 19 December 2005, paragraph 93, p. 27.
167 Eritrea Ethiopia Claims Commission, Partial Award Western Front, Aerial Bombardment and Related Claims, Eritrea’s Claim 26, 19 December 2005, paragraph 14, p. 5. Eritrea questioned the customary status of article 54 API, since at the time of the adoption of API, it was considered to be an innovative element of IHL. The claims commission ruled however that by 2000, the provision had achieved the status of customary IHL. See paragraph 105, pp. 29-30.
168 Eritrea Ethiopia Claims Commission, Partial Award Western Front, Aerial Bombardment and Related Claims, Eritrea’s Claim 26, 19 December 2005, paragraph 95, p. 27 (emphasis added).
169 See Van Houtte, p. 391, and accompanying notes for a short overview of the cases where the conduct of hostilities of the parties to the conflict was scrutinized.
170 Eritrea Ethiopia Claims Commission, Partial Award Western Front, Aerial Bombardment and Related Claims, Eritrea’s Claim 26, 19 December 2005, paragraph 97, p. 28.
171 Eritrea Ethiopia Claims Commission, Partial Award Western Front, Aerial Bombardment and Related Claims, Eritrea’s Claim 26, 19 December 2005, paragraph 96, p. 27.
In one specific case, the attack of the Hirgigo Power Station, there is a reference to proportionality in the separate opinion of the President Van Houtte. In the text of the claim itself it is held that since Eritrea has not claimed any damages for sustained civilian casualties, and since the object was a legitimate military objective, the extent to which the attack had been proportionate did not have to be considered. In his separate opinion, Van Houtte concludes that the power plant was a civilian object, and therefore it had to be considered whether the attack on the Eritrean batteries that were placed there to protect the power station was proportionate.

In summary: the Commission did conclude that "[t]he provisions of Geneva Protocol I relevant to this Claim, which are found in Articles 48, 51, 52, 57 and 58 of that Protocol, expressed customary IHL during the 1998–2000 armed conflict between the Parties." The only incident in which a proportionality calculation was conducted concerned the damage to a civilian object (the Hirgigo power station), which Van Houtte found to be excessive in his separate opinion on the basis of a failure of the Ethiopian forces to comply with the obligation to take precautionary measures when attacking a military objective. The Commission did not, regrettably, provide detailed analysis for its conclusion that the bombing efforts of the Ethiopian armed forces were generally not disproportionate.

6.4.3.5 The Supreme Court of Israel Sitting as the High Court of Justice (2005)

In the so-called Targeted Killings Judgment of 11 December 2005, the Israeli Supreme Court treats the principle of proportionality in a more general way, summing up a number of areas of law where proportionality is applicable. As far as IHL is concerned, the Court refers to ‘proportionality strictu sensu’, which is defined as “the requirement that there be a proper proportionate relationship between the military objective and the civilian damage.” The Court acknowledges the customary character of the IHL rule on proportionality, referring to the ICRC Study of customary IHL and the Kupreskic Case of the ICTY. The Court adds that it...
is a “value based test” and that even though “[p]erforming that balance is difficult ... there’s no choice but to perform it.”

### 6.4.3.6 Sub-Conclusion on Case Law

The judgements of the courts, commissions and tribunals that have reviewed the customary character of the IHL rule on proportionality all confirmed the customary status of the IHL rule on proportionality. The Prosecutor of the ICC has referred to a potential prosecution for violations of the criminal law version of the proportionality rule in its Korea Report. Future prosecutions for this crime at the ICC, the ICC Prosecutor would presumably not need to make an assessment of the customary status of the IHL proportionality rule, since these prosecutions would be based on the text of the crime as embodied in article 8(2)(b)(iv) of the ICC Statute.

It is striking to note that none of the courts or tribunals provides a detailed method how to conduct the proportionality calculation in the circumstances put before them, which would have facilitated a more detailed conclusion on the exact content of the principle. As a result, the exact meaning of the components of the principle remains under debate. This is further explored in Part IV of this study, in Chapters 11 and 13.

### 6.4.4 Other Indicators

In addition to the conclusions of the ICRC Customary Law Study and the statements made by (international) courts, other indicators to ascertain the customary status of the IHL rule on proportionality can also be mentioned. Obviously, many expressions of State practice have already been examined by the ICRC Customary Law Study. In this section, a number of additional indicators will be reviewed.

First of all, it is important to note that also States that have not ratified API have expressly acknowledged the customary status of the IHL rule on proportionality, including Israel.

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179 The Targeted Killings Case, paragraph 45.
180 The Targeted Killings Case, paragraph 46.
182 Israel for example, acknowledges the customary status of the principle in its report on operation Cast Lead in Gaza, see http://www.mfa.gov.il/EN/NR/rdonlyres/E89E699D-A435-491B-82Do-017675DAF07O/GazaOperation.pdf, paragraph 120-
and the United States of America.\textsuperscript{183} Despite the fact that the exact content of the principle and the interpretation of its components does not seem to be universally agreed upon, this is certainly a clear indication that the rule is indeed part of customary international law.

Another indicator of the customary character of the principle is the reports of experts, especially if States have been consulted or participated in the process of the drafting of the report. The Manual on Air and Missile Warfare, published in 2010, is a good example.\textsuperscript{184} The Manual on Air and Missile Warfare recognises the IHL rule on proportionality as part of the existing legal framework regulating air and missile warfare. It is defined as: “[a]n attack that may be expected to cause collateral damage which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited." The significance of this report is not only that it has been prepared by a group of prominent experts, including representatives from the ICRC, but also that States have been consulted extensively in order to enhance the acceptability of the rules contained in the Manual. The Sanremo Manual on International Humanitarian Law Applicable to Non-International Armed Conflict also confirms the IHL proportionality rule.\textsuperscript{185}

Furthermore, the Report of the International Law Association Study Group on the Conduct of Hostilities in the 21st Century, published in 2017, is composed by a group of notable experts in the field of IHL. The Report refers to the ICRC Customary law Study, acknowledging the customary status of the IHL proportionality rule: “[b]y virtue of customary international law, parties to an armed conflict are under an obligation to abide by the principle of proportionality in both international as well as non-international armed conflicts”.\textsuperscript{186} Some of the experts that were part of this Study Group, were also part of the ‘Amici’ who send an Amicus Curiae brief to the ICTY Appeals Chamber in the Gotovina case before the ICTY. In this brief, the Amici confirm that “commanders who choose to target enemy objectives co-mingled among a civilian population must scrupulously comply with the IHL principles of distinction and proportionality.”\textsuperscript{187} Similarly, the Tallinn Manual 2.0,\textsuperscript{188} published in 2017, notes the IHL proportionality rule as a rule that is generally accepted as customary international law applicable in international and non-international armed conflicts.\textsuperscript{189}

\textsuperscript{183} See Matheson, p. 419.  
\textsuperscript{185} Sanremo Manual on the Law of Non-International Armed Conflict, p. 22-25.  
\textsuperscript{186} For the report, see the ILA website (http://www.ila-hq.org/index.php/study-groups?study-groupsID=58), 19 YIHL (2016) pp. 287-336 and http://stockton.usnwc.edu/ius/volg3/iss1/12/. See p. 351. This author was part of this process, although the part on the IHL proportionality rule was not specifically drafted by this author.  
\textsuperscript{187} For the text of the Amicus Curiae brief, see http://icr.icty.org/LegalRef/CMSDocStore/Public/English/Application/NotIndexable/IT-06-90-A/MSCT958RR000353013.pdf  
\textsuperscript{188} The Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations, second edition, 2017, which was the result of a group of 19 renowned experts and a large number of other participants and peer-reviewers in the field of international law.  
\textsuperscript{189} Tallinn Manual 2.0, p. 471.
A clear indication of the acceptance of the IHL rule on proportionality as a rule of customary IHL has also evidenced in State practice resulting from the deliberations in forums of the United Nations with regard to weapons. For example, in the context of the Conventional Weapons Convention 1980, it was established that “[t]he rule on proportionality was identified by 97 percent of Respondent States as relevant to the use of munitions that may result in explosive remnants of war.” McCormack and Mtharu therefore conclude that States regard the proportionality equation as a crucial obligation in targeting procedures for their armed forces.

Other practice originating from the United Nations acknowledging the customary status of the IHL proportionality rule can be derived from reports by UN fact finding committees and expert panels, such as the panel of experts that has reviewed the final phase of the conflict between the Government of Sri Lanka and the LTTE, the United Nations Fact Finding Mission on the Gaza Conflict (the Goldstone Report) that reported on the 2008-2009 Gaza war and the Independent International Commission of Inquiry on the Syrian Arab Republic.

Furthermore, as a subsidiary source of international law, legal doctrine may be mentioned. The opinions of international legal scholars should be reviewed with some reservations, however. Firstly, it could be that a scholar merely echoes the position of a certain government or organisation, or serves to justify that position from an academic point of view. Also, the choice of an author to present the opinions of some, and ignoring and disregarding the opinion of others is highly subjective. Thirdly, opinions of scholars often contain not only lex lata, but also traces of the way the author would like the law to become. However, with regard to the customary status of the IHL rule on proportionality, the opinions of authors who have written on the subject are uniform in accepting the IHL rule on proportionality as customary IHL.


193 See http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf. The reference to the proportionality rule is in para 362, on p. 92.


In addition, organisations like Human Rights Watch, and Amnesty International, also regard the IHL rule on proportionality as part of the IHL. However, some reports of non-governmental organisations such as Human Rights Watch and Amnesty International have received criticism in the past, and have been accused of applying the applicable standards incorrectly when reviewing the behaviour of parties to an armed conflict in their reports.

6.4.5 Customary Law both in IAC and NIAC?

As for the question of whether the IHL rule on proportionality would also be applicable in non-international armed conflicts (NIACs), the ICRC Customary Law Study is very clear. It concludes that the principle is also part of customary international law in non-international armed conflicts. Logically, it would be absurd if, in a civil war, the ‘own’ civilians would not benefit to the same extent of the protection of the IHL rule on proportionality as ‘enemy’ civilians would in an international armed conflict. However, this logic conclusion is problematic because of “the primary assumption in international relations, and indeed international law, (...) that the relationship between a state and its own citizens is a matter exclusively for the domestic legal order.” On the other hand, since IHL generally applies between the parties to the conflict, this assumption in unpersuasive to discharge applicability of the IHL proportionality rule during NIACs.

The IHL proportionality rule is not included in common article 3 of the Geneva Conventions, nor is it codified in Additional Protocol II. However, in their commentary on the 1977 Additional Protocols, Bothe, Partsch and Solf state that the IHL rule on proportionality was deleted from the draft text of APII by Committee III [of the CDDH] before the simplification process that stripped APII of most provisions on the conduct of hostilities. However, in their opinion, “[n]evertheless, (...) the principle of proportionality is inherent in the principle of humanity which was explicitly made applicable to Protocol II under the

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197 See for example Amnesty International’s Report on the war between Israel and Hezbollah, AI Index MDE 18 July 2006, published August 2006, p. 5. Amnesty acknowledges the principle, but notes there is a difference of opinion in their interpretation and the interpretation of the Israeli Government.
199 See generally for the typology of armed conflicts: Vité.
200 As the ICTY noted in the famous Tadić Case: “What is inhumane, and consequently proscribed, in international wars, cannot be inhumane and inadmissible in civil strife.” See ICTY, Prosecutor v. Tadić, IT-94-1-1, Appeals Chamber Decision, 2 October 1995, paragraph 119.
201 Wells-Greco, p. 409.
202 There was an article (draft-article 26(3)(b)) containing the principle of proportionality in the draft Protocol II that the ICRC prepared for the diplomatic conference that adopted the Additional Protocols in 1977. The provision was however deleted, together with most other draft articles on the conduct of hostilities. See Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Volume XV, p. 321.
fourth clause of the Preamble. Thus, the IHL proportionality rule cannot be ignored in applying Protocol II.”

The Sanremo Manual on International Humanitarian Law Applicable to Non-International Armed Conflict confirms that “the relative absence of express mention of proportionality in instruments governing non-international armed conflicts should not be construed as meaning that it is inapplicable in such conflict.” Furthermore, the IHL proportionality rule is included in a number of other treaty rules applicable in NIACs, more particularly in the Amended Protocol II to the Conventional Weapons Convention of 1996 and the 1999, Second Hague Protocol for the Protection of Cultural Property in the Event of an Armed Conflict.

State practice of the United States of America points in the same direction, as evidenced in declaring the principle applicable in all types of conflicts in “longstanding policy, through directives, instructions, and operational rules of engagement (…) Proportionality from the U.S. perspective, among other States, is customary international law regardless of designation of the armed conflict as international. This conclusion is also supported by a number of authors. For example, Corn states with regard to the IHL rule on proportionality that “[i]t is universally accepted as a customary norm of the jus in bello, applicable to all armed conflicts.”

6.4.6 Sub-Conclusion: the Customary Character of the IHL Rule on Proportionality

Even though the type of practice that was found is not always of the most telling character, it is my conclusion that there can be no doubt about the existence and applicability of the IHL rule on proportionality as a rule of customary international law. It is a rule that is well-established in treaty law, State practice, international case law, legal doctrine and other indicators. The quantity and character of the presented practice on Rule 14 of the ICRC Customary Law Study is certainly widespread, and given the additional indications of the existence of the principle, the applicability of the rule in customary IHL in any type of armed conflict today is established with certainty.

As argued in Part II, the IHL proportionality rule is one of the basic principles of IHL, and is thus also applicable in those situations where the rules of conventional and customary IHL would not be applicable. As such, the principles of IHL work as a safety net to ensure that the use of armed force amounting to an armed conflict is not unregulated, as confirmed by the Martens Clause. Also in these types of situations, the principle of proportionality shall apply with a view to curtailing disproportionate civilian casualties and damage to civilian objects.

203 Bothe et al., p. 677-678.
205 Maxwell and Meyer, p. 10.
206 See for example Byron, p. 208, Turns, p. 145 and Meron 1996, p. 243-244.
6.5 Conclusion

This chapter demonstrated that the IHL rule on proportionality has known a gradual development, but is currently considered to constitute a rule of customary IHL that applies similarly in international armed conflicts, as it does in non-international armed conflicts. It is remarkable how a rule that was virtually non-existent in 1945 has acquired such a widespread acceptance in IHL today. That being said, the exact content of the IHL rule on proportionality is still today not entirely clear. There continues to be much debate about the exact meaning of the different components of the IHL rule on proportionality, and also how these components need to be balanced.\textsuperscript{208} An inquiry into actual targeting behaviour in a significant large number of incidents in different armed conflicts by different types of armed forces\textsuperscript{209} would possibly provide the final proof of the existence of the rule, and also of its exact content. The question remains open to what extent the content and application of this rule is influenced by the types of proportionality as found in other areas of international law that regulate the use of armed force. But the IHL rule on proportionality is certainly not the only norm within IHL that requires the parties to an armed conflict to exercise restraint in the conduct of their operations. The next chapter deals with a number of these other standards of moderation in IHL.

\textsuperscript{208} Bothe concludes that there remains controversy not about the rule, but about “the yardstick of proportionality,” see Bothe 2007a, pp. 167.

\textsuperscript{209} Fellmeth 2010, p. 5 and see Fellmeth and Sylverster 2017 for an analysis of the application of the IHL proportionality rule during the internal armed conflict in Colombia.
Chapter 7
7.1 Introduction

As the principle of proportionality is understood traditionally in IHL, it deals with the balancing of military advantage and permissible collateral damage. The same rule also plays an important role in the rules with regard to precautions in attack, as well as in a number of weapons treaties. As such, the IHL proportionality rule is a standard that aims to moderate the effects of attacks for the civilian population, while acknowledging that these attacks are necessary to win the war. In other words, the proportionality rule in IHL safeguards the balance between military necessity and the requirements of humanity, but only in view of the collateral effects for civilians. IHL however also contains a number of other rules that fulfil a similar role as a standard of moderation and with a broader scope, including effects on enemy forces. Sometimes these rules resemble the IHL proportionality rule, although they are mostly strictly distinct. These other standards of moderation may be express or implied and they are often linked to one of the other principles of IHL. These standards then appear as a mechanism to limit the permissive scope of explicit references to military necessity in the applicable rules of IHL.

In fact, one of the basic premises of IHL, that “in any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited,” implies a certain moderation, and requires a balance between what a combatant might want to do, and what he is allowed to do. Nonetheless, there are authors who maintain that “[t]here is no general requirement under [IHL] to limit the level of force used against the enemy; and accordingly, the military principle of the use of overwhelming force to overcome the enemy is entirely consistent with [IHL].”

This chapter will discuss standards of moderation as they appear with regard to the killing of combatants (7.2), as a moderation to the destruction of enemy property (7.3) and with regard to blockades (7.4) and reprisals (7.5) and with regard to security measures taken during an occupation (7.6).

7.2 Combatants as Human Beings

It has been argued that the principle of proportionality consists not only of the rule on collateral damage to civilians, as discussed in Chapter 6 and in Part IV, but also of the
prohibition on the use of means of warfare that cause serious injury or unnecessary suffering. This latter principle is now codified in article 35 (2) of API and may also be seen as a separate principle of IHL, different from IHL proportionality rule. Some writers seem to be of the opinion that a broader principle of proportionality was already part of existing law at the time of the negotiations leading to the 1977 Additional Protocols. Brown, for example, notes that “although proportionality has yet to be codified as a principle of civilian protection, the idea that military means should be proportionate to their anticipated ends is widely recognized as a basic norm of the law of warfare.”

The ICRC commentary on the Additional Protocols mentions the “legal obligation on combatants to engage in “a balance between military necessity ... and the requirements of humanity” in order to preclude “a degree of violence which exceeds the level which is strictly necessary to ensure the success of a particular operation in a particular case.” As a result, it could be argued that there is a general proportionality principle that would bar the “deliberate and pointless extermination of the defending enemy.”

Kalshoven raises the question whether “the human beings who compose the armed forces constitute military objectives in all circumstances. Numerous Iraqi soldiers seem to have been buried alive in the course of the final ground operations [of operation Desert Storm, in the 1990 war in Iraq]. In such a situation, if combatants are not clearly expressing an intention to surrender and cannot be recognized as being hors de combat on other grounds either, they are not legally protected from attack. But what if they are in actual fact utterly defenseless; could it not be argued that for want of any military necessity to attack them, they cease to be military objectives? Should this matter be left open, so that no blame will attach to the commander who sticks to the chosen method of attack, while greater praise may be accorded a commander who desists from doing so?” Parks is of the opinion that this understanding of military necessity does not include the killing of enemy combatants and denies that the concept of proportionality can be applied in some way or was “intended to be applied in combat operations between combatants on a battlefield devoid of civilians.” Indeed, as far as the language of Additional Protocol I is concerned, there is little support for the proposition that combatants may not be killed lawfully wherever they may be found. On the other hand, since the legitimate objective of armed conflict is to win it, and nothing more, its objective is not to simply kill as many members of the opposing forces military

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4 See for example Gardam 2004, who refers to the principle that prohibits to use means and methods of warfare that cause superfluous injury and unnecessary suffering as ‘proportionality for combatants’ and the article 51 API proportionality as ‘proportionality for civilians’. See Gardam 2004, p. 15. See also Bothe et al., p. 195.
5 See also Oeter 2013, p. 122.
6 Brown, p. 136.
7 Sandoz et al., paragraph 1389 on page 392.
8 Sandoz et al., paragraph 1395 on page 396.
9 Sandoz et al., paragraph 1598 on page 477.
10 Kalshoven 1992, p. 42.
forces as possible. Rather, as was already stipulated in the preamble of the 1868 St Petersburg Declaration, IHL allows rendering the enemy hors de combat. That means that it is not illegal to kill the enemy, but it is certainly not obligatory either.

In the end, the standard of moderation with regard to combatants boils down to a continuous balancing of the notions of military necessity and humanity. After all, combatants are equally human as the civilian population is, with the exception of the belligerent privilege of the former and the legal protection of the latter. The question could therefore reasonably be asked whether humanity would not stand in the way of certain means and methods of warfare because of the inherent fact that human soldiers retain their humanity even when they are targetable on the basis of their status as combatants. This moderation with regard to combatants may be foreseen at two different levels: with regard to the method of attack and with regard to the type of weapon that is used (means). At least for the States that ratified Additional Protocol I, the obligation exists to assess the legality of new means or methods of warfare their armed forces study, develop, adopt or acquire.

7.2.1 Methods of Warfare

Combatants may be attacked on the basis of their status. This means that it is irrelevant whether combatants are actively participating in the hostilities or not, for example because they are on leave, asleep, or they are geographically dislocated from the battlefield. However, when combatants are unable to pose any threat at that particular time, or any time soon after that, it may be military unnecessary to attack them, and humanitarian considerations may put weight on the side of the equation that may make the opposing military commander refrain from attacking. In addition, military necessity may also point in the same direction. By capturing the combatant that poses no direct threat, the commander may be able to acquire valuable information of enemy positions, tactics, weaponry and strength. In addition, for reasons of economy of force, the kinetic assets may be used another day, against an enemy who does pose an active threat. Of course, the fact that the rules of IHL provide an authority to kill the enemy combatant does not mean that there is a duty to do so. Some would argue that there may also be extra-legal reasons of chivalry that would argue against attacking an adversary who is posing no threat and who may easily be captured. In any case, in article 40 API, the prohibition of the refusal of quarter may be understood as a manifestation of this underlying broad principle of proportionality applicable also to combatants.

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12 St. Petersburg Declaration Renouncing the Use, in Time of War of Explosive Projectiles Under 400 Grammes Weight, 11 December 1868: “Considering: That the progress of civilization should have the effect of alleviating as much as possible the calamities of war; That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; That for this purpose it is sufficient to disable the greatest possible number of men; That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; That the employment of such arms would, therefore, be contrary to the laws of humanity”.

13 See article 36 API.

14 Gill 2013, pp. 54-46.
It seems possible to construe a proportionality balance between the method of warfare that is chosen in some situations. A number of scenarios could be envisioned, where there seems to be an incongruity between the authority IHL provides to lawfully killing combatants and humanitarian considerations. An example could be the situation in which other methods of warfare may be used to reach the same – or a similar – result. One is perhaps the following: during the Gulf War in 1991, scores of Iraqi soldiers were killed at the frontline not by kinetic means, but they were simply buried alive in their bunkers by US tanks equipped with bulldozers. Another is the killing of fleeing combatants by air-power, where there is no possibility for the combatants to surrender, as may have happened on the so-called ‘high-way of death’. Another example could be the destruction of a sailboat used to train naval cadets in classic navigation techniques and sailing. Although the ship would qualify as a military target and the cadets are part of the regular armed forces, it is questionable what military advantage would be gained from its destruction, especially when it would also be possible to simply order the cadets to surrender.

Of course, the examples mentioned above are the result of the fact that combatants may be attacked on the basis of their status – not their conduct and the threat they pose as the result of that conduct. An important factor here, one that is indeed conduct-based, is whether the enemy has had the opportunity to surrender. If the enemy has in fact done so, it becomes simply illegal to attack him.

This type of proportionality, it could be argued, resembles what in military doctrine is called the principle of the economy of the use of force. It seems military practice not to use an overly destructive force when the use of a small amount of armed force will lead to the same result. It could be argued that because of this, a single enemy combatant should not be attacked by an overwhelming amount of armed force such as a large-scale artillery-attack. However, provided that there is no collateral damage expected from the attack, there seems to be no legal rule of IHL that prohibits using “a steam hammer to crack a nut, if a nutcracker would do.” It is the decision of a military commander to assess whether the military advantage of an attack is sufficient to allocate his limited military resources to it, or to save them for another, more militarily advantageous objective. Military commanders will therefore carefully consider the troops, type of weapons and munitions at their disposal before they waste them on a military objective of minor importance. In addition, as noted by Olasolo, there is a danger that if the principle of proportionality and the principle of the economy in the use of force become equated, the former loses its preventive force, and the

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16 See BBC News: http://news.bbc.co.uk/2/shared/spl/hi/middle_east/02/iraq_events/html/ground_war.stm

17 The US Department of the Navy recognises the economy of force as one of the ‘principles of warfare’, together with the military concepts of objective, mass, surprise and security. See for example the Annotated Supplement to the Commander’s Handbook on the Law of Naval Operations, NWP 9 (REV. A)/FMFM 1-10 (1989) p. 5-7.

18 Lord Diplock in R v Goldstein (1983) 1 WLR 151 at 155, as quoted in Arancibia, p. 297.
humanitarian considerations that form the basis of the principle of proportionality become secondary to tactical and logistic considerations.19

7.2.2 Means of Warfare

Another manifestation of a proportionality equation in IHL may be found in the law that applies to means of warfare, or in other words, weapons. The prohibition on the use of means of warfare that cause superfluous injury or unnecessary suffering is one of the two principles that determine the legality of means and methods of warfare, the other being the principle of distinction.

The prohibition on the use of weapons that cause superfluous injury or unnecessary suffering is particularly aimed at the limitation of the effects of weapons to combatants.20 The principle strikes a balance between the military advantages of the employment of a particular weapon, compared to the military necessity of the human suffering that type of weapon causes to opposing combatants.21 Oeter states that “[i]njuries can only be ‘superfluous’ either if they are not justified by any requirement of military necessity or if the injuries normally caused by the weapon or projectile are manifestly disproportionate to the military advantage reasonably expected from the use of the weapon.”22 It is therefore important to assess the inherent lawfulness of a weapon. This is not necessarily what unnecessary or superfluous harm that type of weapon is ultimately capable of inflicting, but “what it is actually designed and intended to do.”23

It is clear that certain types of weapons have been prohibited explicitly because the suffering they cause to the members of the armed forces, such as for example the permanently blinding laser weapons that are prohibited by Protocol IV to the Conventional Weapons Convention.24 They were prohibited because there was sufficient information on

19  Olasolo, p. 163.
21  According to the ICRC Commentary to article 35 API: “At the beginning of the first session of the Conference of Government Experts in 1971, the ICRC was already quite convinced that, from the point of view of humanitarian law, it would be difficult today to make provisions only with regard to the care to be given to the wounded and the sick, or even only to formulate rules of protection. It has become necessary to deal with the means which are available to the combatants. Article 35, paragraph 2, has this sole aim, although it merely announces the principle without detailing any specific points. The object of combat is to disarm the enemy. Therefore it is prohibited to use any means or methods which exceed what is necessary for rendering the enemy ‘hors de combat.’ This rule is the corollary to paragraph 1, which denies an unlimited right to choose the means to harm the enemy. Neither the combatants nor the Parties to the conflict are free to inflict unnecessary damage or injury, or to use violence in an irrational way. All in all, this is the position adopted by the ICRC. See Sandoz et al., paragraph 1411, on page 400-401(emphasis added)
22  Oeter 2013, p. 125.
23  Haines, S. “The Developing Law of Weapons: Humanity, Distinction and the need for Proportionality”, Academy Lecture Series, delivered 14 April 2010, Geneva Academy of International Humanitarian Law and Human Rights, on file with the author. This lecture is published as chapter 11 of the 2014 Oxford Handbook of International Armed Conflicts, p. 273. On p. 277, Haines notes that “[t]he key to determining the inherent lawfulness of a weapon or a means of warfare is to assess it in relation to its defined and designed purpose”.
24  For a short commentary of the Protocol: see Zöckler, pp. 333-340. See also Van Den Boogaard 2018b.
the “horrific effects of blinding laser weapons both on their victims and on society and the fact that such systems, being small arms, would be likely to proliferate widely.”

The principle exists as a general principle of IHL, but it is also found in a number of express prohibitions of types of weapons, which may be seen as codifications of the general principle. However, according to Oeter, “the relationship between these two sets of rules is far from clear. How far the definite prohibitions are only specific expressions or materializations of the general prohibiting provision, and to what extent they are, to the contrary, constitutive developments of a merely political programme, (...) is a question which still needs careful consideration.”

During the negotiations that lead to the adoption in 1995 of Protocol IV on permanently blinding laser weapons, it became clear that universal acceptance by States of the prohibiting force of the principle with regard to these types of weapons, was lacking.

7.3 The Destruction of Enemy Property

Another type of proportionality could be identified in the obligation to limit the destruction and seizure of enemy property to what is required by the mission. Article 23 (g) of the 1907 Hague Regulations, prohibits “to destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war.” This prohibition is repeated in similar words in rule 50 of the ICRC Customary Law Study. In addition, article 147 of the Fourth Geneva Convention, asserts that extensive destruction of property is a “grave breach” if “not justified by military necessity and carried out unlawfully and wantonly.”

Clearly, this rule refers to the restrictive military necessity principle that is deeply rooted in the rules of IHL, and that was already enshrined in the Lieber Code of 1863. As has been mentioned above, the principles of necessity and proportionality are deeply connected. In this case, the principle manifests itself as moderation on the general rules in armed conflict with respect to the targeting of lawful military objectives. It dictates the limits on the legality of an attack on, or the seizure of, enemy property, and when it is not military necessary, it must thus be considered excessive. The clearest example of a method of warfare that is illegal for this reason is the ‘scorched earth tactic’.

It must be noted that the situation for military objectives is different than it is for combatants. Once individuals qualify as combatants, the military advantage arising from their neutralization is considered to be a given, unless they surrender. The language of

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26 Oeter 2013, p. 124.
27 Henckaerts and Doswald-Beck, p. 175-177.
28 See also article 8 (2) (b) of the ICC Statute.
29 See for example Rogers 2004, pp. 7-10. See also N. Hayashi 2010b, p. 113-114.
30 Lieber Code, article 14: “Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.”
Chapter 7: Other Standards of Moderation in International Humanitarian Law

article 52 (2) API however refers to the fact that it is not sufficient only for a military objective to qualify as such on the basis of its nature, location, purpose or use, but adds the additional requirement that the total or partial destruction, capture or neutralization of that object in the circumstances ruling at the time, offers a definite military advantage. Thus, when it does not, the destruction of the enemy property lacks “a reasonable connection between the destruction of property and the overcoming of enemy forces.” In that case, the destruction would be illegal. As an example, Dinstein points to the setting on fire of hundreds of Kuwaiti oil wells in 1991 by retreating Iraqi armed forces which did not create any military advantage at that time of the war.

7.4 Blockades

The principle of proportionality as explained in the previous Chapters has mainly developed in the context of land operations. However, in the law that applies to other types of operations, there are also rules where a balance must be struck between the military utility of a military operation and the suffering this may cause to the civilian population. One manifestation of this is the rules that apply to blockades. Blockades are among the classic methods of naval warfare applicable in international armed conflicts. A blockade could for example be used before a landing operation, in order to surround the enemy or with the purpose of cutting off the supply lines of the enemy. Blockades are mentioned in the Charter of the United Nations as one of the actions the Security Council may authorise to maintain or restore international peace and security. As early as in the 1856 Paris Declaration, naval blockades were established as a method for warships to prevent other vessels from entering or exiting harbours and the coastal area. The result of such a blockade could be starvation among the civilian population. Although according to one writer, “starvation incidental to a naval blockade is not illegal,” it must be remembered that the restrictions on the means and methods of warfare that apply on land warfare, apply equally to naval warfare. Thus also for the method of the naval blockade, there is an obligation to minimise collateral civilian damage. The San Remo Manual on Sea Warfare therefore prohibits employing methods or

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32 Dinstein 2004, p. 218. It may of course be debated whether the oil-wells can be characterised as lawful military objectives in the first place.
33 Krüger-Sprengel, pp. 187-188.
34 Heintschel von Heinegg 2000, p. 204.
35 See article 42 UN Charter.
36 1856 Paris Declaration on Respecting Maritime Law, Section 4: “Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy”, in Roberts and Guelff, Documents on the Laws of War, Page 47-52.
38 See also Heintschel von Heinegg 2013, p. 479-480.
means of naval warfare which are indiscriminate.\textsuperscript{39} It follows, as far as a naval blockade is concerned, that there is a limit to the suffering to the civilian population that is allowed by a blockade. In other words: the military advantage blockade needs to be proportionate in relation to its effects on the civilian population. The purpose of this manifestation of a broader proportionality principle is thus equal to the IHL rule on proportionality. The San Remo Manual contains specific obligations implementing the principle. These require the parties to the conflict to prevent excessive effects on the civilian population. Paragraph 102 of the San Remo Manual states that a blockade is prohibited if:

\begin{itemize}
  \item [a.] it has the sole purpose of starving the civilian population or denying it other objects essential to its survival;
  \item [b.] the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade.\textsuperscript{40}
\end{itemize}

In addition, free passage must be given to humanitarian convoys that provide food and other essential supplies to the civilian population, subject to certain conditions, and medical supplies for the civilian population and wounded or sick members of the armed forces.\textsuperscript{41}

The proportionality principle in naval blockades may thus be understood as a balance between the military advantage of that blockade and the damage it causes to the civilian population. Thus, “[t]he gist of this principle is that the greater the military advantage anticipated from the naval blockade, the greater the damage to the civilian population that can be justified.”\textsuperscript{42}

A recent incident where the subject of the proportionality of a naval blockade has been under scrutiny, was the naval blockade of Gaza by the Israeli armed forces and the boarding of the Mavi Marmara (a vessel sailing under the flag of the Comoros) on 31 May 2010 that was part of the so-called “Gaza Flotilla”.\textsuperscript{43} In one of the reports that were drafted in the backlash of the incident, the proportionality equation mentioned above was, referring to the San Remo Manual, dealt with under the heading of the ‘principle of humanity’.\textsuperscript{44} The so-called Palmer-Report concludes that the naval blockade was not disproportionate, because of the fact that there is no commercial port in Gaza, therefore the suffering of the civilian population of Gaza was not the result of the naval blockade (but rather caused by the closed border crossings on land).\textsuperscript{45}

\textsuperscript{39} 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea, paragraph 42, in Roberts and Guelff, Documents on the Laws of War, Page 573-606.
\textsuperscript{40} 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea, paragraph 102.
\textsuperscript{41} 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea, paragraph 103-104.
\textsuperscript{42} Buchan, p. 271.
\textsuperscript{43} On the legality of the naval blockade of Gaza: see Sanger, p. 397-446.
\textsuperscript{44} For the Palmer Report, see http://graphics8.nytimes.com/packages/pdf/world/Palmer-Committee-Final-report.pdf. See also Buchan, p. 270-273.
\textsuperscript{45} Palmer Report, p. 43. See also Buchan, p. 273, who disagrees with this conclusion.
With the development of airplanes, the possibilities to enforce a blockade became wider than only by naval means. In addition, analogous to the naval blockade, effective aerial blockades became technically possible. According to the ICPR Manual on Air and Missile Warfare, an aerial blockade is "a belligerent operation to prevent aircraft from entering or exiting specified airfields or coastal areas belonging to, occupied by or under the control of the enemy." Aerial blockades are subject to the same proportionality equation as naval blockades.

### 7.5 Belligerent Reprisals

Belligerent reprisals are intentional violations of the rules of IHL with the purpose to stop ongoing violations of these rules by the adversary and with the objective to restore the situation as it was before the initial violations started. Belligerent reprisals are thus measures to enforce IHL. Belligerent reprisals must be set apart from reprisals under *ius ad bellum*, as an illegal use of armed force as a countermeasure. Belligerent reprisals are an instrument of IHL applicable to an international armed conflict, their applicability during non-international armed conflicts is subject to debate.

There are specific rules governing the legality of reprisals. First, under the rules of IHL, reprisals against many categories of persons are prohibited. These categories include wounded, sick and shipwrecked combatants, as well as medical and religious personnel and prisoners of war. There is no unanimity on the legality of reprisals against the civilian population under customary IHL, but the prohibition of reprisals against civilians does apply to the parties to Additional Protocol I.

Second, in order for belligerent reprisals to be legal, they need to meet five requirements, including the requirement that reprisals need to be proportional to the initial violation of IHL or the aim it pursues. The proportionality requirement that applies in the use of reprisals entails not only that the reprisals must not be excessive compared to the precedent unlawful act of warfare, but also that they must stop as soon as that unlawful act has been
It is thus important that the violence applied by way of reprisals does not exceed the initial violation, because this would be the start of a further escalation of the violations of the protective rules of IHL. On the other hand, the violence of the reprisal does not need to be exactly identical. Dinstein explains that “[s]ometimes there is no direct counterpart in State A for the struck in State B. It is also possible that State B lacks the technical capacity of meting out to State A measure for measure in the same field.” In any case, the comparison of the initial violation and the reprisal that responded to it must be viewed not on a strategic level but rather a more tactical level.

The difficulty is of course in an actual comparison between the initial violation and the reprisal that was executed in response. For example, in the Ardeatine Caves case, the court did not equate the life of one person to another, based on a difference in rank. In addition, the result of the reprisal may be very different than expected beforehand, for example when an attack by way of reprisal with prohibited weapons leads to many more casualties than expected and therefore becomes excessive in comparison to the initial violation of the adversary. McDougal and Feliciano adopt a slightly different position, stating that “the kind and amount of permissible reprisal violence is that which is reasonably designed so as to affect the enemy’s expectations about the costs and gains of reiteration or continuation of his lawful act so as to induce the termination of and future abstention from such act.” Although this latter approach is in line with the required objective of the reprisal, it is even more difficult to qualify (and quantify) than the approach that the reprisal must be assessed strictly in comparison with the initial violation that invoked it. It may therefore again cause a further escalation of the ongoing intentional violations of IHL. It is obvious that there must be a degree of discretion for the State that falls victim of a violation of IHL and that wishes to use a reprisal to stop that violation. Kalshoven notes that the principle of proportionality in this field is not a strict calculation, but must be understood as “the absence of obvious disproportionality (…) [and that] there is no alternative but to accept the flexibility and relative vagueness of the requirement of proportionality.” As a result, the proportionality calculation for belligerent reprisals remains always an assessment “on a very crude scale.”

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53  Kupreskic Trial Chamber Judgement, paragraph 535
54  Kalshoven 1971, p. 341. See also Mitchell, p. 160.
55  Hampson 1988, p. 823-824.
56  Dinstein 2004, p. 221.
58  The Ardeatine Caves case (also known as the Kappler Case) concerned the killing of 355 Italian prisoners as a reprisal against the killing of 33 German military policemen in a bomb attack by the Italian resistance. The court found the reprisal to be disproportionate not only on the basis of the quantity of the victims, but also on the basis of their different ranks. The Italian victims included five generals, eleven senior officers, twenty-one subaltern officers and six non-commissioned officers. See 15 Annual Digest & Reports of Public International Cases, 1948, p. 471.
59  McDougal and Feliciano, p. 682.
60  Kalhoven 1971, p. 341-342. An example of obvious disproportionality is given by Darcy, p. 195: “In the Einsatzgruppen case, (…) the Nazi’s executed 2100 people purportedly in reprisal for the killing of twenty-one German soldiers.”
61  Greenwood 1989b, p. 45.
7.6 Security Measures during Occupation

Occupation is the situation where a territory is actually placed under the authority of a hostile army. An occupying power is authorised to take measures that enhance its security, such as detaining persons who pose a threat to them or changing the law. However, this authority is limited to the measures that are necessary for military reasons and thus these measures may not be taken excessively by the occupying power.

In case of the internment of persons, for example, article 78 of Geneva Convention IV mentions explicitly that there may be an exception to the general rule. The question may arise what happens when the law does not provide for an explicit exception. For example, in the situation that an occupying power wishes to remove public officials from their post, occupation law gives that possibility. But does that count for any official the occupier wishes to remove, or only for some particularly influential ones? Surely an occupied territory may not be left without any public officials, because that would be contrary to the occupier’s obligation to “restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”

So absent of an explicit mention, one could argue that proportionality must be applied as a general principle, restricting the occupying power to remove officials from office randomly. It would in first instance be more prudent if the occupier would only remove those whose pose a significant threat to the security of the occupying force. It may also be argued that article 54 GCIV contains only the exception to the general rule, which is that an occupying power is allowed to remove any person from office the occupier deems necessary. The first sentence of article 54 GCIV then provides a restriction, or merely a warning, to the occupying power to make sure that in particular judges are spared from any major clean-up operation among government officials. However, it is unclear whether the source of this restriction is indeed the principle of proportionality, or military necessity. Carcano concludes that the de-Ba’athification of Iraq after the regime of Saddam Hussein was ousted, “does not appear to be proportionate to, and justified by, the security needs of the occupants.”

The relevance of the source of the exception becomes clear when the example of the Israeli security fence is assessed. The Supreme Court of Israel dealt with a number of petitions on concrete demarcations on the ground of the security fence. The Court deemed

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62 Article 42 Hague Regulations.
63 Article 78 GVIV: “for imperative reasons of security”.
64 Article 64 GCIV: “to ensure the security of the Occupying Power”.
65 See article 54 GCIV.
66 Article 43 Hague Regulations.
67 Carcano 2015, p. 217. As a result, Carcano finds the process violating the “principles of fairness and proportionality” See Carcano, p. 221.
68 See for example Dinsein 2009, p. 247-259, A.M. Gross 2006, p. 393-440 and Pertile, p. 678-734. See also the Wall Advisory Opinion, which concluded quite rigorously that the construction of the barrier in occupied territory was illegal.
69 See the Beit Sourik case (HCJ 2056/04, Beit Sourik Village Council et al. v. Government of Israel et al. 58(5) PD, or the English translation in 43 ILM 1099 (2004)), and the case of Alfei Menashe (HCJ 7957/04, Mara’abe et al v. Prime Minister of Israel
that the principle of proportionality is a general principle of international law and as such, there must be a proper balance between military necessity and humanitarian considerations to justify the route of the fence that was chosen. Dinstein disagrees with the finding of the court that the principle of proportionality must be seen as a principle applicable to the entire body of international law but he seems nonetheless prepared to accept that proportionality is central in this case. In the subsequent case of Alfei Menashe, the Supreme Court of Israel stated that security reasons must be counterweighed against humanitarian considerations, and this balance must be done through the principle of proportionality. This proportionality equation was further defined as a three-step analysis: “(1) a rational fit between means and ends; (2) a demonstration that Israel has chosen the least harmful means to secure its security objective and (3) a showing that damage caused to the individual must be of appropriate proportion to the benefit stemming from it.”

The point here is that it is generally agreed under international humanitarian lawyers that military necessity may not be invoked as “an exception to prohibitive norms” by a party to an armed conflict unless it is explicitly mentioned in the applicable rule. This restriction does not apply similarly to proportionality, which is used here as a mechanism to assess the proper balance between military necessity and humanitarian considerations, but only in those instances where there is a specific reference to military necessity in the relevant prohibitory norm. If there is no such reference, the proportionality equation is between the effect of a security measure (which is not prohibited) and humanitarian considerations.

7.7 Conclusion

As has been demonstrated in this chapter, IHL contains a number of standards of moderation that fulfil a similar role as the traditional IHL rule on proportionality that concerns the calculation of the expected collateral damage and the anticipated military advantage with regard to a planned attack during armed conflict. Some of these resemble a restrictive interpretation of the policy of military necessity, others seem to refer to mitigating superfluous injury or unnecessary suffering or may be construed as extra-legal moderations based on notions of chivalry. In the next chapters, it is assessed whether a general principle of international (humanitarian) law may be deduced from these standards of moderation, how the different manifestations of the proportionality principle interrelate and whether the other notions of proportionality may instruct us to improve the understanding of the IHL proportionality rule.

et al. or the English translation in 45 ILM 202 (2006)). See also the case note by Watson.
70 Dinstein 2009, p. 249-250.
71 Alfei Menashe case: The Supreme Court Sitting as the High Court of Justice, HCJ 7957/04 Mara’abe v. The Prime Minister of Israel paras 28-30, pp. 20-21.
72 Watson, p. 898.
73 Pertile, p. 713.
Chapter 8
Chapter 8: Interrelationship of Proportionality in Armed Conflict

8.1 Introduction

In the previous chapters of Part III, the origins and content of the different manifestations of proportionality in international law have been analysed. It is clear that proportionality plays an important role in situations where armed force is used. This chapter analyses the way the manifestations of proportionality in the different fields of international law. To that end, the manifestations of proportionality related to the use of armed force that have been encountered in the previous chapters are contrasted and compared, particularly those in the *ius ad bellum*, the *ius in bello* (international humanitarian law, IHL) and IHRL.

8.2 Proportionality in IHL and the *Ius ad Bellum*

As has been explained in the previous chapters, the proportionality principle in the *ius ad bellum* is understood differently than it is in IHL. Before any relationship between the two manifestations of proportionality may be examined, it must be stressed at the outset that the basic premise is that there is a clear separation between the *ius ad bellum* and IHL.¹

8.2.1 The Strict Separation between IHL and the *Ius ad Bellum*

Under IHL, the strict separation between the *ius ad bellum* and IHL is generally referred to as the ‘principle’ of equal application of the law to the belligerents. This separation entails that all norms of IHL apply equally to all parties to an armed conflict, regardless of “their respective standing in the eyes of the *ius ad bellum*”². The equal application principle is codified in the preamble to Additional Protocol I.³ The rationale of this concept is that it prevents armed forces from finding an excuse for violating the rules of IHL because the opposing party is perceived as the ‘bad guy’ in terms of the *ius ad bellum*. Such an excuse would obviously be contrary to the protective function of IHL, even in a situation where violating the rules would lead to a military advantage.

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¹ It is worth noting that the use of the terms *ius in bello* and *ius ad bellum* dates from the 1930ties, and that the pioneers of international law commonly saw the law of war as a single body of international law. Nonetheless, this field of law contained rules that we would today place in the separate fields of the *ius in bello* and the *ius ad bellum*. See Kolb 1997, p. 553-554.

² Dinstein 2016, p. 5. See also generally Sassoli 2007, pp. 241-264.

³ “the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, 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 to the conflict.”
During a number of criminal trials after the Second World War, for example in the Justice and the Hostage trials, the argument was dismissed that the aggression of Nazi-Germany would undermine the equal application of IHL. 4 A more recent example of conflation of the separation between the ius ad bellum and IHL is the Fofana and Kondewa case of the Special Court for Sierra Leone. The Trial Chamber reduced the sentences of the accused because the atrocities they had committed were, according to the Trial Chamber, for “a cause that is palpably just and defendable (…) [because their forces] defeated and prevailed over the rebellion of the AFRC that ousted the legitimate government (…) and that this contributed immensely to the re-establishment of the rule of law in Sierra Leone.” 5 The Appeals Chamber was quick to overturn the reduction of the sentences, quoting the Preamble to API and stating that “consideration of political motive by a court applying international humanitarian law not only contravenes, but would undermine a bedrock principle of that law.” 6

There are many reasons to regard ius in bello and ius ad bellum as totally distinct branches of international law, because “they are logically independent of each other, operate in different ways, with different degrees of precision and different sanctions.” 7 The operation of ius in bello must be regarded separate from the nature of origin of the armed conflict because “it is impossible to visualize the conduct of hostilities in which one side would be bound by the rules of warfare without benefiting from them and the other side would benefit from them without being bound to them.” 8

The following paragraph in the Nuclear Weapons Advisory Opinion of the International Court of Justice (ICJ) however became (in)famous because it seems to invoke considerations of ius ad bellum to regard the use of nuclear weapons as legal under IHL:

“(…) the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.” 9

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4 Dinstein also mentions the cases of Christiansen and Zuhlke in the Dutch courts that also followed World War II, where the courts observed the equal application of IHL. See Dinstein 2017, p. 182 and accompanying notes.
5 Prosecutor v. Fofana & Kondeva, Case No. SCSL-04-14-T, Sentencing Judgement (9 October 2007), para 86 and para 87.
7 Greenwood 1983, p. 31. See also Cannizzaro: “The particular structure of proportionality as a normative technique applicable in ius in bello, in which no interest can claim absolute priority over the others, explains why, in that particular system, proportionality cannot logically be measured by reference to the ultimate goals of a military mission, but instead to the more immediate aims of each single military action. This element makes proportionality in ius in bello appreciably different from the analogous technique applicable in ius ad bellum. In the latter, international law confers upon the attacked state a superior power to take defensive action, and the proportionality requirement serves only to determine the degree to which other values can be sacrificed to that higher value. Conversely, in ius in bello there is by definition no higher value, as the offensive or defensive character of the military action does not count as such for assessment of the proportionality thereof.” See Cannizzaro 2006, p. 786-787.
8 Lauterpacht 1954, p. 212.
9 Nuclear Weapons Advisory Opinion, p. 266. The ICJ replied to the question in this way by seven votes to seven, by the President’s casting vote.
Dinstein holds that the Nuclear Weapons Advisory Opinion may be regarded as a “dangerous departure from the concept that IHL applies equally to all belligerents, irrespective of their status under the *ius ad bellum*.”

Sassòli states that if would be accepted that the *ius ad bellum* requirement of “extreme circumstance of self-defence in which the very survival of a State would be at stake” would influence the application of the principles of IHL (including IHL proportionality principle), “would mean the end of IHL as we know it.”

Gill agrees that the way the ICJ phrased its conclusions on the threat or use of nuclear weapons “completely and incorrectly mixes the two sets of criteria pertaining to *ius ad bellum* and *ius in bello* in a way that misinterprets and undermines the law and has grave policy implications.”

Greenwood however understands the ruling of the ICJ to mean that “[i]n determining whether the use of a particular weapon in a given case was lawful, it was (...) necessary to look at both international humanitarian law and the requirements of the right of self-defense.” This means that the *ius ad bellum* must be understood as imposing “an additional level of constraint upon a state’s conduct of hostilities, affecting, for example, its choice of weapons and targets and the area of conflict.”

With regard to the conflation of *ius in bello* and *ius ad bellum*, Greenwood holds that the ICJ never meant to mix up the two legal frameworks, and that the ICJ merely meant to declare that the requirements of both frameworks apply cumulative.

He states that “[t]o allow the necessities of self-defence to override the principles of humanitarian law would put at risk all the progress in the law which has been made in the last hundred years or so and raise the spectre of a return to theories of the ‘Just War’ and the maxim embodied in the German proverb that ‘Kriegsraison geht vor Kriegsmanier’.”

It has been proposed to view the Nuclear Weapons Advisory Opinion on the relationship between *ius ad bellum* and *ius in bello* as a ‘judicial error’ and suggested to refrain from finding guidance in the Opinion on this point. However, the ICJ seems to have repeated its conflation of *ius ad bellum* and *ius in bello* in two later cases, namely in the Oil Platforms Case in 2003 and again in the 2007 Advisory Opinion on the Wall.

In the Oil Platforms Case, the ICJ assessed whether the right to self-defence was violated by the United States and the Court found it relevant in that context to state that “in order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, the United States has to show (...) that its actions were necessary and proportional to the armed attack made on it, and that the platforms were a
legitimate military target open to attack in the exercise of self-defence.” One way to look at this is that the ICJ merely added a new aspect into the ius ad bellum requirements of necessity and proportionality, namely that “that the target of the attack in self-defence should be a military target, which should be qualified according to IHL.” Dinstein is of the opinion that the ICJ “misread the applicable law” and he concludes that conversely, a failure to meet a requirement in ius in bello cannot lead to a different application “in any way” of the separate ius ad bellum requirements of proportionality and necessity. It is submitted here that the remark of the ICJ is neither new, nor a violation of IHL principle of equal application of the law to the belligerents. Already in 1989, Greenwood wrote that “the concept of self-defence may impose serious restrictions upon the right of a State to attack what, in terms of IHL, is a legitimate military target.” In addition, it is unclear why it would be undesirable that the qualification of an object as a military objective is judged by the rules of IHL, even when this is done to satisfy a requirement of the ius ad bellum. This does not seem to be any different than the widely held view that the legality of the use of deadly force by combatants in the context of an armed conflict must be decided “by reference to the law applicable in armed conflict,” thus by the rules of IHL, with a view to judge whether a use of force was an arbitrary deprivation of an individual’s right to life under IHRL. As long as the used terms are judged by reference to the correct legal framework, it is submitted that the ICJ did not conflate the two legal frameworks in the Oil Platforms Case in a sense that would upset the strict separation between the ius ad bellum and IHL and the ICJ thus ruled in accordance with the principle of equal application of the law to the belligerents.

In the Advisory Opinion on the Wall, the ICJ also examined whether violations of the rules of IHL, in this case rules related to the duties of an occupying power, could be justified by self-defence. Even though the ICJ eventually concluded that this was not the case because the requirements for self-defence were not met, Sassoli comments that the ICJ “should simply have explained that as far as violations of IHL were concerned, self-defence, belonging to ius ad bellum, could not justify violations of ius in bello.” Although this statement is correct, it is submitted that the fact that the ICJ did in fact look into the merits of the Israeli claim that article 51 of the UN Charter could be invoked to justify its actions as an Occupying Power, is insufficient to state that the ICJ sanctioned the conflation of ius ad bellum and ius in bello when it concluded very clearly that self-defense “has no relevance in this case.” This statement however, it is submitted, must be understood not as an application of IHL, but

21 Ochoa-Ruiz and Salamanca-Aguado, p. 517.
23 Greenwood 1989a, p. 279.
26 Wall Advisory Opinion, para 138-139.
28 Wall Advisory Opinion, para 139.
instead prove that the ICJ dismissed the applicability of the requirements of *ius ad bellum* on other grounds. By way of conclusion, it is submitted that although the ICJ has not always been overly cautious in phrasing the separation between *ius ad bellum* and *ius in bello*, it conversely also never claimed in clear and unambiguous terms that a conflation between the two legal frameworks must be assumed. The equality of the parties is one of the most clearly established and crucial underlying foundations of IHL. It must therefore not be disposed of only as a result of a vaguely formulated statement in the ICJ Nuclear Weapons Advisory Opinion. The equality of the parties to an armed conflict instead emphasizes the fact that for the proper functioning of IHL, its reciprocal element needs to be safeguarded, irrespective of the question who is the good, or the bad guy. The next section will examine whether a relationship between the two legal frameworks must be accepted nonetheless to exist on the level of the principle of proportionality.

### 8.2.2 Possible Relationships between the *Ius ad Bellum* and IHL Proportionality

The previous section stressed the existence and rationale of the strict distinction between the *ius ad bellum* and *ius in bello*. This strict separation also applies on the level of the principle of proportionality. As Dinstein puts it: “*In any event, it must be perceived that proportionality in the context of self-defence – and in the sense of the *ius ad bellum* – has little in common with proportionality as applied and understood by IHL. Consequently, any attempt to transplant rules or caveats from one domain to the other is likely to cause confusion.*” It is clear that both legal frameworks include a proportionality requirement, which must be satisfied within those legal frameworks in order for the use of force to stay within the boundaries proscribed by these legal frameworks. However, it could similarly be argued that on the level of the application of the rule on proportionality in the respective legal frameworks, a certain relationship exists nonetheless. The question of whether an attack is in accordance with the requirements of *ius in bello* could for example be relevant for the legality of an armed attack under the *ius ad bellum*. Conversely, factors of *ius ad bellum* “must equally be taken into account in determining whether specific types of targets may be attacked (...)” Since the legality of the selected targets and the type of weapons and tactics that are used is determined on the

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29 See Bianchi, p. 355. See also Bruha and Tams 2005 p. 89. An alternative solution could be that because the construction of the Wall cannot be defined as an armed attack in the sense of the *ius ad bellum*, it never became applicable to the situation in the first place.


31 Dinstein 2012, p. 233.

32 Dinstein admits in this context that “[w]hen considered in abstracto, there may be some merit in subdividing the *ius in bello* into several legal layers” See Dinstein 2012, p. 169.

33 See generally Gill 2016, pp. 101-119, concluding that factors of *ius ad bellum* “must equally be taken into account in determining whether specific types of targets may be attacked (...)."
basis of *ius in bello*, it seems as if there is, at least, a potential interaction here between issues of *ius in bello* and *ius ad bellum*.

In military ethics, the thesis has been defended that the proportionality equations in the *ius ad bellum* and IHL are closely connected. The Canadian philosopher Hurka, for example, concludes that: “it also follows that what counts as a proportionate tactic varies with the magnitude of a war’s benefits, and in particular with the moral significance of its just causes. A level of harm to civilians that would be permissible in war against a genocidal enemy such as Nazi Germany could not be permissible in the Falklands or Kosovo War.” Similar claims have been made by politicians, for example with regard to the armed conflict in Afghanistan that emerged after the 9-11 attacks on the Twin Towers in New York. When making the distinction between fighters and civilians is difficult, “there is a temptation to (…) insist that as the terrorists and their supporters caused the war, the blame for all its destruction must lie with them, a temptation to which US Secretary of Defence Donald Rumsfeld occasionally succumbed.” Similarly, in the eyes of the general public, “the tolerance of collateral damage would be very different for an invaded nation in the desperate state of survival compared to a state participating in war for economic gain.”

In legal terms, it may, first, be argued that if a military operation has been initiated with the purpose of defending, or even saving the civilian population, it seems contrary to the (*ius ad bellum*) purpose of that operation to apply the IHL proportionality rule that permits civilian casualties that are not excessive. Whether this is the case is explored in the following section. A second area where a relationship between IHL and *ius ad bellum* proportionality seems possible, is in the hypothetical situation in which a very large operation is launched that leads to huge, and extensive civilian damage, which is however not excessive compared to the military advantage that is sought with that operation. The expected devastation caused by this attack may however lead to the conclusion that the attack is disproportionate under *ius ad bellum*. An example could be a massive counter attack in response to a rather minimal initial attack. A number of legal difficulties are connected to the latter situation, including the fact that there is a different definition of the term ‘armed attack’ in the two legal frameworks, and also the divergence of opinion among experts of whether the question of proportionality under the rules of the *ius ad bellum* is still relevant after the armed conflict has started. This is the subject of Section 8.2.4.

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36 Reynolds, p. 88.
37 Cannizarro 2006, p. 785.
8.2.3 Proportionality in the *ius ad Bellum* Influencing IHL Proportionality in Operations to Protect Civilians

In the situation in which the goal of a military operation is to protect the lives of civilians, it seems counter-intuitive to allow for incidental civilian casualties, or damage to civilian structures. It would seem that in these types of situations, not only the proportionality principles of the *ius ad bellum* and IHL apply, but also the proportionality principle in IHRL plays a role.\(^{38}\) After all, it is disproportionate disregard for the (human) right to life of the suffering civilian population that may invoke other States to instigate a humanitarian intervention on behalf of these civilians. Leaving aside the question whether such an operation would be lawful under the *ius ad bellum*, the intervening forces are confronted with the dilemma that IHL would permit them to cause collateral civilian casualties even though the protection of these same civilians was the ultimate goal and purpose of the operation, instead of the usual goal of warfare, which is to overcome the enemy. It is precisely this different purpose of the operation that could theoretically call for a different application of the IHL proportionality rule, arguably because the military necessity component of the regulatory framework is different, in the sense that the purpose of the operation is not a military defeat of the enemy,\(^{39}\) but rather the protection the civilian population. That different purpose is at odds with the usual military necessity policy underlying IHL, which is usually balanced against that of humanity. It may be argued that when the military necessity policy component is different, this would also lead to a different balance between the foundational policies, and thus to different rules and principles. There were indeed critical comments on the application of IHL proportionality rule during the NATO air campaign in Kosovo in 1999, which caused significant damage to civilian infrastructure and civilian casualties.\(^{40}\) Even among the NATO allies and Members of the UN, disagreement emerged during the intervention because of “the destruction of civilian infrastructure and bridges, and damage to the environment.”\(^{41}\)

In an extreme case, it seems pointless to oust an abusive government from a certain territory, or urge it to stop its violations of human rights, if the operation leads to the non-excessive, but nonetheless widespread, perhaps even virtually total, destruction of the main cities, means of economic development, cultural heritage and other objects that are important to the survival of the civilian population. In that case, one may wonder which was

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38 See for example Francioni: “Closely linked to proportionality (to use force for the purpose of a non UNSCR mandated humanitarian intervention) is the condition concerning the respect of humanitarian law applicable to armed conflicts. It is axiomatic that recourse to military force in the name of advancing the moral and legal ideal of the rule of law and human rights cannot be practiced in disregard of the principles of humanity and of the rules of *ius in bello*. Adherence to these principles and rules must, thus, be considered a yardstick to measure the authenticity of the intent of the intervening state to improve the rule of law with respect to the international protection of human rights.” See Francioni 2005, p. 286.

39 St. Petersburg Declaration, preamble: “That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy”.

40 See for example Laursen: “If Operation Allied Force is legally justified as a humanitarian intervention, i.e. to save the Kosovar-Albanian population, it would be hard to justify an allocation of the risk of casualties onto the Kosovar-Albanian population in order to avoid losses among NATO pilots.” See Laursen, p. 811

the bigger evil. It could be argued that this would mean that the IHL proportionality rule in this type of operations should be understood to proscribe that the planned attack could only go ahead if no collateral damage at all is expected to result from it. It is submitted that this additional restraint would distort the traditional, and delicate balance in IHL between considerations of humanity and military necessity. In addition, requiring only one party to an armed conflict to apply a stricter IHL proportionality rule would be contrary to the principle of equal application of the law, which is crucial to the credible implementation IHL. Therefore, it is submitted, causing collateral damage in this type of operation that is not excessive under IHL, cannot in any case because of reasons outside IHL, be explained as a violation of the IHL proportionality rule, no matter the ultimate purpose of the operation.  

However, a unilateral decision of the humanitarian intervener to apply the IHL proportionality rule stricter in the situation where the armed conflict is conducted for 'humanitarian reasons', i.e. to stop mass violations of IHRL, is still possible for reasons of policy. Similar to this is the policy choice not to allow for any, or in any case less, collateral damage during a counter-insurgency operation, where a large component of the aim of the operation is to assure that the sympathy of the civilian population is won. In a counter-insurgency operation, causing collateral damage may still be in accordance with the law, but counter-productive in terms of the purpose of the operation. It is for this reason that the leadership of the ISAF operation decided in 2006 that there would be a zero-civilian casualty policy applicable in the conduct of the ISAF operation in Afghanistan. It must be noted that causing collateral damage that is non-excessive under IHL during an armed conflict of this type does logically not lead to a violation of the IHL proportionality rule, but it could in some instances be seen as a violation of national regulations instead.

Therefore, to conclude, even though it seems that there is a relationship between the manifestations of proportionality in the *ius ad bellum* and in IHL, this must certainly not be understood as an alteration of the IHL rule on proportionality. For that reason, the relation between these two manifestations of proportionality cannot be understood as an inspiration or interpretation of the IHL rule on proportionality. With regard to the *ius ad bellum*, it must be noted that it seems possible that extensive civilian collateral damage during a humanitarian intervention type of operation leads to a different outcome of the *ius ad bellum* proportionality calculation if that collateral damage is in direct contrast to the overall goal of the operation under the *ius ad bellum*. The next section explores the influence of the IHL proportionality rule on the proportionality requirement under the *ius ad bellum*.

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42 See also Kretzmer: “Use of force may be disproportionate under *ius ad bellum* even if all forcible measures are compatible with *jus in bello* in general, and the proportionality principle in *jus in bello* in particular.” See Kretzmer 2013, p. 240.

43 Bartels 2009a, pp. 223-226. According to Bartels, this could be done by using a restrictive definition of the concept of a military objective, by restricting the acceptance of collateral civilian damage and “force protection tactics should be weighed against this rationale”.

8.2.4 The IHL Proportionality Rule Influencing the Ius ad Bellum Proportionality in Terms of the Magnitude of the Permissive Collateral Damage

As discussed in Chapter 5, it is controversial whether the *ius ad bellum* proportionality requirement must be met not only at the outset of a defensive action, as Dinstein argues, or also throughout the ensuing military operation. Greenwood argued in 1983 that the modern *ius ad bellum* not only applies to the act of commencing hostilities, but also in an overall context during the course of hostilities. It is submitted that the latter view is more convincing because the magnitude of the armed force actually used does play a role in the requirement of proportionality under the *ius ad bellum*, thus it has logically to be applied not only before the actual start of the war, but also continuously during the course of it. This entails that the proportionality requirement applies throughout the use of force in self-defense, balancing the objective to stop the hostile actions of the intervener against the armed force employed to achieve that result. In this situation of concurrent application of the *ius in bello* and *ius ad bellum*, it may be argued that the application of the IHL proportionality rule plays a role in determining whether the use of armed force in self-defence is still proportionate under *ius ad bellum*.

In contrast to the IHL proportionality rule, the *ius ad bellum* proportionality requirement must take into account the total damage, including both the damage to the military capabilities of the opponent and to civilian objects as well as civilian casualties. This is valid for the purpose of the *ius ad bellum* both before the launch of an operation or an actual attack, as well as after the operation is concluded. For that reason, it seems that Greenwood was right when he wrote that “the concept of self-defence may impose serious restrictions upon the right of a state to attack what, in terms of IHL, is a legitimate military target”, including, again in terms of IHL, non-excessive civilian damage that may result from an attack on a valid military target under IHL. But that fact does as such not alter the separate outcome of that IHL proportionality calculation. Proportionality operates under the *ius ad bellum* both for the destruction of military objectives as it does for civilian objects, regardless of the question whether that civilian damage was caused during a direct attack on a civilian object, or on a military objective, and the civilian damage was non-excessive under the IHL proportionality rule.

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45 Dinstein 2012, p. 262.
46 Gazzini, p. 147, see also Gardam, 1993, p. 404.
47 Greenwood 1983, p. 16.
49 See for example Dinstein 2012, p. 216: “Unlike the *ius in bello*, the *ius ad bellum* does not recognize a difference between attacks against lawful targets (...) and unlawful targets”.
50 Greenwood 1989a, p. 279.
51 See also Gill 2016, pp. 101-119.
A situation during which this can manifest itself is when a very large operation is launched that leads to huge, and extensive civilian damage, which is however not excessive, compared to the military advantage that is sought with that operation. In theory, the situation is possible that the initial attack leads to a counter-attack in self-defence, which is planned to achieve a militarily very advantageous objective, for example to annihilate all military headquarters and senior military leaders of the opponent. Such an attack could lead to corresponding substantial civilian damage and casualties, because of the massive expected military advantage of that attack under IHL. Therefore, the IHL proportionality principle under is observed, but the sheer magnitude of the attack may nonetheless lead to a violation of *ius ad bellum* when the armed force employed in response exceeds what is necessary to stop the initial armed attack and the further threat. Greenwood notes that “particularly in a conflict that is still at a very limited stage, an attack upon a military target that causes serious loss of life and damage may again represent an unjustifiable escalation of the armed conflict.” Greenwood subsequently provides the example of the sinking of the Argentine cruiser *General Belgrano* during the Falklands conflict, maintaining that this was a necessary measure of self-defense in the context of that conflict.

One important difference is the applicability *ratione tempore* of the two rules. By definition, the IHL proportionality rule applies *ex ante* as well as throughout that attack, or series of related attacks. The proportionality rule under the *ius ad bellum* may be understood as applying throughout the use of armed force in self-defense, or even in retrospect. The application of the IHL proportionality rule *ex post* makes no sense as far as the rule is concerned, except for the fact that in cases where indeed collateral civilian damage has occurred that seems excessive at first sight, this may prompt the further investigation into the attack at hand. Relevant factors that need to be addressed in that investigation would then be the information that the commander who ordered the attack reasonably had to take into account. This also entails that the level of authority that may made a decision on proceeding with an attack may be different for the two legal frameworks. The military commander who decides to launch an actual attack is mostly on the tactical level, whereas the decisions on the proportionality of the overall operation under the *ius ad bellum* are taken on a more strategic level. As Lubell puts it: “[t]he *ius ad bellum* proportionality test is one that must be applied in a wider context, measuring the overall scale of the response in light of the legitimate aims, rather than focusing on specific military attacks.”

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52 Greenwood 1989a, p. 279.
54 Schachter, 1984, p. 1637.
In her critique on the Goldstone Report of the Israeli operation 2008-2009 *Cast Lead* in Gaza, Blank explains that the drafters of the Report misunderstood the way the proportionality principles in *ius ad bellum* and *ius in bello* may interact. She states that the Goldstone Report "uses conclusions about attacks purportedly violating the *jus in bello* principle of proportionality to conclude that Israel’s overall use of force was a disproportionate response under the *ius ad bellum*.56 Blank furthermore states that in the *ius ad bellum* proportionality requirement, “civilian casualties play no role."57 That last statement may be invalid, because there is no reason why the damage to civilian objects and civilian casualties would not be included in the estimation whether the attack it caused exceeds what is necessary to stop the initial armed attack of the intervening side.58 Blank however correctly adds that even if certain specific attacks were disproportionate under *ius in bello*, this has not necessarily any influence on the legality under *ius ad bellum*, because the factors that need to be balanced under *ius ad bellum* are manifestly different from those that are under consideration in the IHL proportionality equation.

It is submitted that, it is certainly possible that *ius ad bellum* proportionality considerations impact on the legality of the conduct of hostilities by a State under IHL.59 In particular, it seems that in operations that have as their purpose to protect the civilian population, such as a humanitarian intervention operation as described in Section 8.2.3, the fact that there is excessive collateral damage under IHL, does make a difference for the outcome of the *ius ad bellum* proportionality calculation.60 After all, since the *ius ad bellum* proportionality equation relates to the overall aim of the operation, which is protecting those civilians rather than defeating the opponent, causing collateral civilian damage will always impact on the legality of the operation under the *ius ad bellum* in a negative sense. This impact will obviously be larger when the collateral damage is excessive under the IHL proportionality rule, but that does not mean that there is necessarily a relation between the two proportionality calculations. If an attack causes excessive collateral damage on a tactical level under IHL, this is always illegal conduct under IHL, but not necessarily under the *ius ad bellum* proportionality requirement. If an attack is likely to cause non-excessive collateral damage on the tactical level, but is disproportionate on the level of the *ius ad bellum*, it is only a violation of the latter legal framework. As a result, the situation is also possible that an attack is illegal under both legal frameworks, or under neither, depending on the factual situation.

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56  Blank 2010, p. 381.
57  Blank 2010, p. 382.
58  See for example Dinstein 2012, p. 216: “Unlike the *ius in bello*, the *ius ad bellum* does not recognize a difference between attacks against lawful targets (...) and unlawful targets”.
60  See also Gardam 2004, p. 25.
8.2.5 Sub-Conclusion

Cannizzaro states that the humanitarian implications of the use of armed force by States must be considered in order to determine the standard of security international law allows them to pursue by that armed force. He then concludes that the proportionality rule “must be regarded as part of the proportionality test under *ius ad bellum.*" It is however submitted that this conclusion goes too far. Instead, since both proportionality requirements need to be satisfied within their own frameworks, the conclusion is that there is not necessarily an integrating relationship between the two rules on proportionality in the frameworks of the *ius ad bellum* and IHL, but that they operate in parallel. The result of this conclusion is therefore that not only the rules of IHL matter for the actual conduct of hostilities, but in addition also considerations of the *ius ad bellum* may impact on the overall legality of actual operations, albeit only under the *ius ad bellum.* This perhaps asks more from decision makers on the strategic level than they may realise. In particular, it may result in a conclusion that they need to realise that it is their responsibility to sometimes prevent their armed forces from executing certain attacks even though these would be perfectly legal under IHL, for example because they only attack military objectives, and expect to cause no excessive collateral damage to the civilian population. Here the *ius ad bellum* proportionality rule provides an extra layer of protection to the civilian population, but this protection is not based on IHL, but on the *ius ad bellum.* A last remark that may be relevant to indicate how the two types of proportionality analyses interrelate, is that in IHL, the analysis needs to be conducted not only on a tactical level, but also on a grand strategic level. It could be said that on that latter level, the analysis gets nearer to the *ius ad bellum* proportionality analysis, except for the fact that the *ius ad bellum* takes not only damage to civilian objectives into account, but all damage.

8.3 IHRL and IHL Proportionality

An alternative possible interaction may be found between the concepts of proportionality as they apply in the legal frameworks of IHRL and IHL respectively. As was explained above in Chapter 5, IHRL applies in both peacetime as during times of armed conflict, while (the

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61 Cannizzaro 2006, p. 792.

62 Cannizzaro disagrees with this conclusion: “this conclusion is not entirely persuasive. Indeed, the strict application of the standards of one system may prevent the purposes of the other from being fully realised. This consequence derives from the different historical origins and from the different logical structures of the two systems.” Therefore, Cannizzaro proposes that “the two groups of rules may be considered as sub-systems of a coherent and complete normative system regulating the use of force. In this context, proportionality must be applied as a unitary standard that takes into account the purpose of the military action as well as countervailing humanitarian interests.” See Cannizzaro 2000, p. 471.

63 For an illustration, see Gardam 2004, p. 21.

64 See for example Bohlander and Rothe 2011, pp. 245-261, for an overview of the history of the targeted killing of leadership, arguing that this would be a situation of “overlap” between *ius in bello* and *ius ad bellum.* See Bohlander and Rothe, p. 248.
by far largest portion of) the rules of IHL only apply in the latter situation. Therefore, both legal frameworks apply concurrently and both frameworks deal with the question whether lethal armed force may be used in a particular tactical situation. Although this chapter refrains from an analysis in extenso of the exact relation between IHRL and IHL,\(^6^5\) this section provides a short overview of the majority views and some alternative views that matter for the discussion at hand, which is the possible relation between the manifestations of proportionality in the two legal frameworks.

### 8.3.1 The General Relationship between IHL and IHRL

A preliminary question before a meaningful analysis of the manifestations of proportionality in IHL and IHRL may be conducted is the relation between these two legal frameworks in more general terms.

A first factor of note here is the fact that historically, the two legal frameworks have developed separately.\(^6^6\) The first major codifications of the rules of IHL\(^6^7\) took place in the years 1863-1868 with the adoption of the Lieber Code in 1863, the first Geneva Convention of 1864 and the St. Petersburg Declaration of 1868. IHRL was first codified in the aftermath of the Second World War with the conclusion of the Universal Declaration of Human Rights. Before its codification, human rights were mostly found exclusively in domestic law, as an exclusively internal affair of States.\(^6^8\) The first signs of a closer relationship between the two legal frameworks came to the surface during the 1968 Tehran International Conference on Human Rights.\(^6^9\) By that time, the majority of the basic rules and principles of both legal frameworks had already been adopted. However, subsequent treaties show the first signs of similar rules crossing over.\(^7^0\)

The type of legal relationship that IHL and IHRL regulate is inherently different on the conceptual level. The former is based on the basically horizontal situation in which two parties to the conflict acquire rights and obligations towards each other, both on the grand strategic level of States, and on the tactical levels of individuals. The rules of IHL thus regulate predominantly the relationship between two equal entities, as is exemplified by the principle of equal application of the rules of IHL to the parties to the conflict. The legal framework of


\(^{66}\) See however Van Dijk, unveiling a much closer link between the historic development of IHL and IHRL.

\(^{67}\) It must be noted that the codification of maritime ius in bello had already started earlier, through the adoption of the 1856 Paris Declaration Respecting Maritime Law, see Roberts and Gueiff, p. 47–52.

\(^{68}\) Droge 2007, p. 313.


\(^{70}\) See for example the codification of article 75 of API on fundamental guarantees that are inspired by IHRL and the reference to the rules of IHL in article 38 of the 1989 Convention on the Rights of the Child.
IHRL, on the other hand, regulates the relation between a State and the individuals under its jurisdiction. This relation may be characterised as a vertical relation between unequal entities: the relation between the State and the persons under its jurisdiction. In addition, as mentioned above, IHRL is designed to be applicable at all times, whereas IHL, with a few exceptions, only applies during armed conflict.

A substantial difference between IHL and IHRL is the stark contrast between the ground rules of the two legal frameworks. IHRL is built on the right to life and tailored to protect individuals, whereas IHL takes the right to kill as its basic starting point, in a balance between the protection of civilians and the military reality of armed conflict. Another difference is that many IHRL instruments may be derogated from in times of emergencies, including during armed conflict. IHL does not provide for such a possibility: once it is applicable, States cannot disregard the rules through a formal procedure. Even though the differences play a role to define the relationship between the two legal frameworks, there are clearly also important similarities between IHL and IHRL. The most basic similarity between both legal frameworks is their shared ideal, in the sense that they both aim to enhance the protection of human dignity.

8.3.2 Lex Specialis and Complementarity

As was mentioned in Chapter 5, it is now without debate that the start of an armed conflict does not mean that the rules of IHRL cease to be applicable, even if simultaneously the rules of IHL become applicable. This is proven by the fact that most, but not all, IHRL instruments contain a system of derogation that may be used in times of armed conflict. It would make no sense to allow States to derogate from their obligations under IHRL if these obligations...

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71 Some commentators are in favour of attributing IHRL obligations to non-State entities. See for example Clapham 2006, pp. 491-523, Fortin 2017 and Pouw, p. 331.
72 See also Sivakumaran 2010, p 524, explaining that the IHRL right to life is “fundamental to international human rights law, the supreme human right on which all others are built.”
73 Even if States would renounce their treaty-based obligations, rules of customary IHL continue to apply.
74 Droege 2007, p. 312. See also Sivakumaran 2010, p. 525.
75 “Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Recognizing that these rights derive from the inherent dignity of the human person”
76 See for example common article 3(1)(a) and (c) of the Geneva Conventions I-IV and article 75(1) and (2) of API.
77 See for example the ICJ Nuclear Weapons Advisory Opinion, the Wall Advisory Opinion, the ICJ Case Concerning Armed activities on the territory of the Congo, The UN Human Rights Committee, General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the ICCPR. See also the 2006 Report of the International Law Commission Study Group on the Fragmentation of International Law, para 104. See also Droege 2007, Hampson 2008, Kleffner 2013 and Gill 2014.
78 See for example art 4 ICCPR, art. 15 ECHR, article 27 ACHR.
would not be applicable in times of armed conflict in the first place. In addition, both article 72 API and the preamble to APII directly refer to IHRL. The simultaneous applicability of both legal frameworks thus follows both from the rules of IHL as it does from the rules of IHRL. As Droege puts it: “It also flows from the very nature of human rights: if they are inherent to the human being, they cannot be dependent on a situation.”

However, this does not mean that the application of IHRL during armed conflict “is a lock-stock-and-barrel exercise”. Instead, the analysis must focus on the specific rights and situations in which the applicability of IHRL during armed conflict is analysed, and it includes the question of “whether particular IHRL provisions are in common sense terms amenable to reasonable application in armed conflicts.”

The ICJ has pointed to the issue that in the event of the simultaneous applicability of IHRL and IHL to a certain situation, three scenarios are possible: “some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law, yet others may be matters of both these branches of international law.” In matters where only one, but not the other legal framework provides legal rules, the simultaneous applicability of both legal frameworks poses no difficulties. An example is the detailed IHL provisions to protect prisoners of war and medical personnel and installations. IHRL is silent on most of these matters. However, if a right is grounded in, and governed by, both the rules of IHL and IHRL, the concurrent application of both IHL and IHRL must be resolved to assess whether the IHL or IHRL rule takes precedence, or whether the concurrent rules complement each other. Examples of rights that are regulated by both bodies of law include the rules on torture and other cruel, inhuman, or degrading treatment of detainees.

It has been argued that there are generally more than one way to solve the legal problems that may arise from the concurrent application of the legal regimes of IHL and IHRL. The first is to maintain that IHL applies in armed conflict and IHRL in peacetime. Although this has been the prevailing view during preceding decades, this approach is presently the minority view. A second view, that also represents the majority view, is the view that there is a complementary relationship between IHRL and IHL.

The view that the rules of IHL and IHRL complement each other, it is submitted, is not only the most logical and intuitive solution to the concurrent application of the two legal framework, but in particular the legally sound solution, in accordance with
general international law, applying complementarity as method of interpretation." The complementary view entails that IHL and IHRL mutually reinforce each other, allowing both legal frameworks to be interpreted “in accordance with the ordinary meaning to be given (...) in their context and in the light of their object and purpose." Sivukamaran notes four factors that indicate the value added of the complementary application of the rules of IHRL to IHL: the difference in substantive content; the fact that often States deny the applicability of the rules of IHL because of claims that a situation fails to amount to an armed conflict; the IHRL-based duty to investigate when loss of life has occurred, and the IHRL enforcement mechanisms that are superior to those of IHL. Droege adds that thanks to complementarity, IHRL “can often benefit from the more narrowly applicable, but often more precise rules of humanitarian law [and IHRL] has become increasingly specific and refined through a vast body of jurisprudence and the details of interpretation can influence the interpretation of humanitarian law, which has less interpretative jurisprudence at its disposal.”

Nonetheless, in some instances, the concurrent applicability of IHRL and IHL leads to a conflict of norms. The ICJ has determined that for those situations, the *lex specialis* principle is one instrument to reconcile the rules of the two legal frameworks. It does not follow from the *lex specialis* rule that the entire body of IHRL is displaced in case of applicability of IHL. Instead, the *lex specialis* rule means that the applicable rules pertaining to the individual right need to be analysed in order to find the more specific rule. In addition, the existence of rules in both legal frameworks entails an analysis of whether these rules provide inconsistent or competing outcomes. In case the only difference is that the more specific rule elaborates a more general rule in the other legal framework, there is no conflict of rules, but merely a situation in which the rules of one legal framework complement the rules of the other. In these types of situations, however, the specific context of the applicable rule must be taken into account, but, “it makes sense to apply the rule which most closely relates to or was specially devised to apply to a particular situation and/or which provides the most detailed regulation of what is allowed or prohibited.” More in particular, the context is relevant when a situation concerns the conduct of hostilities, for which IHL is specifically designed,

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86 Article 31(3)(c) of the Vienna Convention on the Law of Treaties, see also Droege 2007, p. 337.
89 Sivakumaran 2010, pp. 526-529.
93 Gill 2014, p. 343: *lex specialis* “is part of a whole bundle or system of well-established legal means of interpretation, and methods of reconciling legal instruments and conflicts of obligation when they actually arise.” See also Sassoli and Olsen: “This principle seeks to establish, through an objective standard corresponding to the regulated subject matter, a preferential order for two rules that apply to the same problem but regulate it differently.” See Sassoli and Olsen, p. 605.
94 See for example the example of the definition of torture, as mentioned by Sivakumaran 2010, pp. 534-535.
or when the situation concerns law enforcement by State agents, for which situation IHRL was conceived to protect individuals.\textsuperscript{96}

With regard to the right to life, as was examined in Chapter 5, this is a non-derogable right under the ICCPR, and under other frameworks, such as the ECHR it can only be derogated from in very limited circumstances.\textsuperscript{97} It depends largely on the context of the situation whether the strict constraints on the use of armed force of the IHRL must be applied or the more lenient framework of IHL, which allows targeting on the basis of the status of combatants or the conduct of civilians who directly participate in hostilities.\textsuperscript{98} Examples of situations during which the stricter rules with regard to the use of armed force of IHRL may apply include situations of occupation, peace operations, and low intensity non-international armed conflicts.\textsuperscript{99} Hampson suggests that it could be necessary to distinguish between the applicability of the rules of the respective legal frameworks to a situation and to an incident.\textsuperscript{100} From this would follow that even if IHL is applicable to a situation, it does not mean that it must also be applied with regard to an incident that is clearly within the law-enforcement domain, such as policing a demonstration.\textsuperscript{101}

If the thesis is accepted that the applicability of the IHRL standards depends solely on the intensity of the conflict, this seems to create an incentive for State armed forces to conduct its operations during armed conflicts in the most intensive way possible, because less restrictive rules apply. This would seem to be a counterproductive effect of the applicability of IHRL to armed conflicts. On the other hand, Lubell observes the tendency of States’ unwillingness to admit the existence of an armed conflict.\textsuperscript{102} Moreover, in the event of an non-international armed conflict of high-intensity, the “strict human rights standards may be at odds with reality and military necessities”\textsuperscript{103}

\textbf{8.3.3 Proportionality Relationship between IHL and IHRL}

In case of armed conflict, the IHL proportionality rule applies and dictates that the relation between expected collateral damage on the one hand and expected military advantage on the other hand must be analysed in order to decide whether a planned attack can be launched

\textsuperscript{97} See article 15 of the ECHR: that allows “No derogation from Article 2 [the right to life], except in respect of deaths resulting from lawful acts of war.”
\textsuperscript{98} See generally Goldman 2013, pp. 104-116.
\textsuperscript{99} Lubell 2005, p. 750.
\textsuperscript{100} Hampson 2013, p. 209.
\textsuperscript{101} Hampson 2013, p. 211.
\textsuperscript{102} Lubell 2005, p. 749, note 52.
\textsuperscript{103} Vandenhole 2014, pp. 31-60, p. 46. See also Hampson 2008, p. 564. According to her, article 2 of the ECHR “list the only permitted grounds for opening fire. They are suited to a law and order paradigm but not to an armed conflict paradigm. In order to bring into play the additional circumstances in which it is legal to open fire in time of conflict, it would be necessary to derogate.”
or must be cancelled. The IHRL proportionality rule requires an appreciation of the balance between the values that must be attributed to two factors in a given situation, at a given moment in time. These factors are (1) the expected scale of the risk to human life (of the suspect) of the contemplated use of (potentially) lethal force and (2) the nature and scale of the concrete threat to the law enforcement officer who is planning to use the armed force, and third persons. IHRL “requires the taking into consideration of the concrete circumstances of a given situation irrespective of any categorical distinction between targetable combatants or fighters and protected civilians.”

The preliminary issue with regard to a meaningful analysis of the relation between the two proportionality principles is the question of whether there is concurrent application of the two legal rules. As we have seen, since the rules of IHRL apply at all times, this situation only exists during armed conflict, when the rules of IHL also apply. As was noted above in Chapter 5, both legal frameworks contain a proportionality principle with regard to the use of armed force. In case there is concurrent application of the norms, the next question is whether the application of the two rules in that situation would lead to different outcomes. If this is the case, the question remains which rule takes precedence.

The first point to be made is that even though the IHL proportionality rule applies during armed conflict, this does not necessarily mean that the IHL proportionality rule is relevant at all times. It has to be reminded that the IHL proportionality rule specifically needs to be applied to attacks, and not necessarily to other types of military operations. And even when an attack is planned in a situation of armed conflict, the proportionality principle, even though it applies, is still irrelevant for attacks in a context where no civilians are present, as far as the commander planning and executing the attack is reasonably aware. This leads to the conclusion that when an attack on a person is planned, the status of this person is crucial to the relevance of the IHL rule on proportionality. In cases where no civilians are present, there is thus no interplay, and thus no relation, between the proportionality rules of IHL and IHRL. Similarly, if an attack is planned on a military object where no individuals are expected to be present, the IHRL proportionality rule is irrelevant and the IHL proportionality rule only lays a role with regard to the destruction of civilian objects. The question however remains whether the IHRL proportionality rule is nonetheless relevant during armed conflict in the case the attack is directed to combatants or civilians who have lost their protection due to their direct participation in hostilities, or alternatively, the attack is aimed at a military objective, and may also be expected to affect combatants and civilians who participate directly in hostilities. In that situation, the question is whether the criteria of the IHRL

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104 Geiss 2010, p. 125.
105 See also Watkin 2004.
106 For the question whether IHRL would permit causing collateral civilian damage, see Henderson and Cavanagh, p. 90-93: “[i]t is unclear whether the requirement of reasonableness [under domestic criminal law] would extend to requiring a military member to do everything feasible to assess and minimise potential death or injury to civilians prior to acting in self-defence (...) [and] it is highly likely that reasonableness under the law of self-defence imposes a higher standard of care on a military member to avoid causing any injury or death to civilians.” Particularly, “domestic law of the US clearly provides that while acting in self-defence can excuse unintentional injury or even death to a bystander, self-defence does not excuse
proportionality rule, pertaining to the risk for human life and the threat these individuals pose to the attacker, still apply once IHL has become applicable. In that situation, it may possible be argued, that the IHRL proportionality rule could provide an additional restraint on the use of force against persons who are a legitimate target under IHL. This situation is further analysed in Section 8.3.3.1.

The second situation is when an attack is planned on a military objective, be it a person or an object, and civilians may be expected to be affected by the planned attack, and thus the IHL proportionality rule must be applied. The question is whether the IHRL rule on proportionality places additional restrictions on the attacker in this situation. It will thus need to be analysed whether in that situation, the IHRL proportionality rule would provide an additional restraint on the use of force against persons who are a legitimate target under IHL and on civilians who may be affected by a planned attack. This situation is further analysed in Section 8.3.3.2.

8.3.3.1 Continued Applicability of IHRL Proportionality during Armed Conflict

In case no civilian damage or civilian casualties are expected, the question remains whether the IHRL proportionality rule is still relevant vis-a-vis the opposing combatants or civilians who participate directly in the hostilities. As was explained above, the answer to this question depends on the context, and cannot always be determined in a general sense. Even though the situation is concerned with the protection of the life of the individual, or the right to life, the general assumption may be justified that if the situation at hand concerns a situation of intense hostilities, the lex specialis rule may dictate that the IHL rule takes precedence, excluding the applicability of the more restrictive IHRL rule. In cases of low intensity armed conflicts, including occupation, the situation is more problematic.\[107\]

It must first be noted that the geographical situation in which the use of armed force is planned, makes a difference. The IHL rule on proportionality applies both in situations of an international armed conflict and in a situation of a non-international armed conflict. However, as far as the applicability of IHRL is concerned, the type of conflict matters in which the rule on proportionality is applicable.

The interplay between the proportionality rule under IHRL and IHL may become relevant when the targeted killing of so-called ‘terrorists’ is analysed. It is clear that there are some States that see counter-terrorist operations as operations within the realm of an armed

\[107\] See also the ICRC Report of the Expert Meeting on the Use of Force in Armed Conflicts – Interplay between the Conduct of Hostilities and Law Enforcement Paradigms.
conflict, usually if the attacking State has been the victim of terrorist attacks. The use of the armed conflict paradigm could entail that the IHL proportionality test is employed, and when executed extraterritorially, displacing the IHRL-based restraints. In terms of recent practice of the United States (US), however, it is submitted that this approach is flawed because the extraterritorial execution of ‘terrorists’ takes place outside an armed conflict to which the US is a party. However, if an attack does occur during an international armed conflict, where a State uses armed force outside its own territory, the extraterritorial applicability of IHRL possibly becomes an issue. Without entering into the details of this debate, it is fair to say that the concurrent application of IHL and IHRL proportionality may arise in (1) an international armed conflict in situations where a State operates on its own territory; (2) in a situation of a non-international armed conflict in which a State is assisting another State in its strife against one or more non-state armed groups on the territory of the latter State; (3) in a situation where State armed forces are conducting a peace operation abroad and the troops become a party to an armed conflict in the host-State and (4) in situations of occupation. Assuming however that both the rules of IHL and IHRL are applicable, the question is whether in a tactical situation it might be said that, “whenever the State has enough control over a particular situation to enable it to attempt to detain individuals, then such an attempt must be made before force can be used and non-lethal force must be favoured if possible. This argument seems to allow for retention of the standard law enforcement and human rights approach without creating impractical situations.” These impractical situations to which Lubell refers seem to exist by definition in situations of intense fighting, whether during an international or a non-international armed conflict, during which the IHRL standard is “widely perceived as battlefield-inadequate, risky to implement and therefore unrealistic” and as a result, “States are unlikely to accept that they must attempt to detain opposing combatants before using lethal force.” It is submitted that the applicability of the IHRL standard of proportionality during this type of combat situations must be dismissed in its totality because it would neglect the long standing basic notion of IHL that “combatants lawfully may kill their enemies and are at constant risk of being killed by them.” But that is not the end of the story, because the situation may be different in situations where there

109 Although the application of IHRL instruments is in principle dependent on the existence of jurisdiction, it is submitted that for the purpose of the present analysis, the exact scope of the extraterritorial application of the rules of IHRL is not necessarily dependent on the question whether a Human Rights Body has jurisdiction over a case that is brought before it, but rather on the question whether the respective human right can be applied in practice by an individual who belongs as a fighter to one of the parties to the conflict. For a critique of the extraterritorial applicability of IHRL: see Dennis. For the extraterritorial application of the ECHR, see the cases of Bankovic, Al-Skeini, Hassan, and Jaloud. See also Lawson, and Besson 2012.
110 See for example Vandenhole.
111 See for example Doswald-Beck 2006, pp. 892-894.
112 Lubell 2005, p. 750, referring to a situation of non-international armed conflict.
113 Geiss 2010, p. 125.
114 Lubell 2005, p. 750.
115 Parks 2010, p. 830.
exists no reason why the rules applicable to combat operations would not be complemented by the rules of IHRL, and thus the IHRL proportionality rule would come into play.

In the context of the ICRC Interpretative Guidance on the notion of direct participation of hostilities, the issue whether IHL itself places additional restraints on targeting that are similar to the proportionally rule under IHRL, received ample attention. More in particular, Section IX of the ICRC Interpretive Guidance on the notion of direct participation in hostilities asserts:

“[I]n addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.”

Furthermore, Section IX states that “even direct attacks against legitimate military targets are subject to legal constraints, whether based on specific provisions of IHL, on the principles underlying IHL as a whole, or on other applicable branches of international law.”

Also, the Interpretative Guidance states that “[c]learly, the fact that a particular category of persons is not protected against offensive or defensive acts of violence is not equivalent to a legal entitlement to kill such persons without further considerations. At the same time, the absence of an unfettered “right” to kill does not necessarily imply a legal obligation to capture rather than kill regardless of the circumstances.”

The claim that there is a rule under international law to apply a least harmful means restriction on the use of armed force against persons who may be lawfully attacked under IHL is based on doctrine and some case law. The arguments in Section IX of the ICRC Interpretative Guidance on the notion of direct participation of hostilities are only derived from the rules and principles of IHL. Although the legal frameworks from which the arguments are derived for a least harmful means restriction on the use of armed force against persons who may be lawfully attacked under IHL are derived from doctrine and some case law, the practical importance of their restraining function will increase with the ability of a party to the conflict to control the circumstances and area in which its military operations are conducted, and may become decisive where armed forces operate against selected individuals in situations comparable to peacetime policing.”

116 Melzer 2009, p. 77. According to Fenrick, the consulted experts nor the ICRC addressed only IHL with regard to DPiH. See Fenrick 2009, p. 297.

117 Melzer 2009, p. 77. See also p. 80: “In classic large-scale confrontations between well-equipped and organized armed forces or groups, the principles of military necessity and of humanity are unlikely to restrict the use of force against legitimate military targets beyond what is already required by specific provisions of IHL. The practical importance of their restraining function will increase with the ability of a party to the conflict to control the circumstances and area in which its military operations are conducted, and may become decisive where armed forces operate against selected individuals in situations comparable to peacetime policing.”

118 Melzer 2009, p. 78.

119 See Melzer 2010c, pp. 904-913. See also Doswald-Beck 2006, p. 891.

attacked under IHL, are distinct from those under IHRL, the practical outcome of both lines of argumentation is not.\textsuperscript{121}

The critiques on the IHL-based least harmful means restriction have been fierce. In particular Parks claims that Section IX “offers arguments not based on treaty law, State practice or domestic or international case law”\textsuperscript{122} and “selective research to support an argument rather than a thorough and objective analysis.”\textsuperscript{123} These claims are however based on the legal framework of IHL, not IHRL. In a surprisingly short statement on arguments based on IHRL that may support the point of view of the ICRC in its Interpretative Guidance, Parks simply states that “the law of war is \textit{lex specialis}”\textsuperscript{124} when it comes to the conduct of hostilities. It is submitted that this statement is not at odds with the possibility that IHRL may provide additional constraints in a situation during which IHL is applicable, but during which there is no situation of active combat. In addition, as Melzer notes in his reply to Parks’ critique on the Interpretative Guidance, it must be emphasized that “questions pertaining to the interrelation between the various applicable bodies of law with regard to regulating the use of force in a particular situation are beyond the scope of the Interpretive Guidance.”\textsuperscript{125}

In his reply to Parks’ critique on Section IX of the ICRC Guidance, Melzer notes that the Guidance “recognizes that, in a situation of armed conflict, the international lawfulness of a particular operation involving the use of force may not always depend exclusively on IHL but, depending on the circumstances, may potentially be influenced by other applicable legal frameworks, such as human rights law (…)”\textsuperscript{126} As a result, Melzer states that the Guidance “cannot possibly be interpreted as giving preference to a general norm of human rights law over a more specific norm of IHL.”\textsuperscript{127}

Lubell agrees with Parks that the legal basis under IHL for the least harmful means restriction is “unclear.”\textsuperscript{128} Similarly, Kleffner concludes that “[c]onsiderations of humanity and military necessity do not provide such a legal basis [for the least harmful means restriction under IHL]. Furthermore, the prohibition of methods of a nature to cause superfluous injury and unnecessary suffering could only supply a basis if one could derive from the practice of States an agreement that the prohibition should be interpreted in such a way. That agreement is presently absent.”\textsuperscript{129} With regard to IHRL, however, Kleffner notes that:

\begin{footnotesize}
\begin{enumerate}
\item According to Kleffner: "(…) human rights law clearly establishes a least harmful means requirement that bears considerable resemblance to that suggested in Section IX of the ICRC Guidance." See Kleffner 2012, p. 47.
\item Parks 2010, p. 829.
\item Parks 2010, note 98 on page 805.
\item Parks 2010, p. 797.
\item Melzer 2010c, p. 898.
\item Melzer 2010c, p. 898.
\item Melzer 2010c, p. 899.
\item Lubell 2005, p. 750.
\item Kleffner 2012, p. 52.
\end{enumerate}
\end{footnotesize}
“It may very well be argued that the rule that the law of armed conflict functions in the aforementioned way as *lex specialis* to human rights law in times of armed conflict is not absolute. In certain areas, human rights law may supply the more specific standards even in such times. This is notably the case in situations that, while occurring during an armed conflict, closely resemble those for which human rights standards have been developed with a higher degree of specificity. Operations during an armed conflict that for all sense and purposes are law enforcement operations provide a pertinent example. Accordingly, it has been argued that the use of force in relatively calm situations of occupation for the purpose of maintaining public order and safety, or in areas under the firm control of state authorities in times of non-international armed conflict, should be governed by the legal parameters that human rights law (as the *lex specialis*) provides for the use of force.”

Schmitt also critiques the statement on the least harmful means restriction embodied in of Section IX of the ICRC Interpretative Guidance, on the basis of IHL, particularly referencing the general principles of humanity and military necessity. With regard to IHRL, Schmitt states that although it is without debate that IHRL applies during armed conflict, “its application is conditioned by IHL.” Schmitt subsequently points to the rule on *lex specialis* that would invoke the applicability of IHL rules as “the law applicable in armed conflict which is designed to regulate the conduct of hostilities.” Schmitt’s statement that the attempt to “squeeze a plainly human rights norm into a restraint on attacks against direct participants under the guise of IHL” seems however not to address the use of force in the situation where IHL applies, but active combat is absent. Instead, Schmitt states that restrictive rules of engagement in counter-insurgency operations are “grounded in policy and operational concerns and not in international humanitarian law.” Pouw reaches a similar conclusion for counter-insurgency operations but contrary to Schmitt, Pouw acknowledges the possible applicability of restrictions on the use of force grounded in IHRL. Similarly, Sassoli and Olson state that “[i]f human rights are to provide an answer as to when a fighter may be killed, it would thus be imperative to know when military authorities, in a situation of armed conflict, are or should be exercising police powers.” Sassoli and Olsen conclude that case law “gives no conclusive answer as to what human rights law requires of government authorities using force against fighters.” They submit that it “is impossible and unnecessary to provide a ‘one size fits all’ answer; (…) the *lex specialis* principle does not determine priorities between two rules in the abstract, but offers a solution to a concrete case in which competing rules

130 Kleffner 2012, p. 48-49 (footnotes omitted).
131 Schmitt 2010, p. 42.
132 Schmitt 2010, p. 43.
133 Schmitt 2010, p. 43.
134 Pouw, p. 468-470.
135 Sassoli and Olsen, p. 611.
136 Sassoli and Olsen, p. 612, referring to the Tobald Case and the Guerrero Case.
lead to different results." They recognise furthermore that "such a flexible solution, in which the actual behaviour required depends upon the situation, is dangerous – especially in our context, where it has to be applied by every soldier and leads to irreversible results. It is therefore indispensable to determine factors which give precedence either to the rule derived from the humanitarian law of international armed conflicts or to human rights."

It is submitted, that there is no one-size-fits-all answer as to the issue of whether the rules on the use of force of IHRL provide an extra layer of restraint to the concurrently applicable (but less restrictive) rules on targeting based in IHL. As Sassoli and Olsen argue: "[t]he question is rather one of degree. If a government could effect an arrest (of individuals or groups) without being overly concerned about interference by other rebels in that operation, then it has sufficient control over the place to make human rights prevail as lex specialis." The determination whether circumstances are such that there is not sufficient control over the place then includes the following factors: "the impossibility of arresting the fighter, the danger inherent in an attempt to do so, the danger the fighter represents for government forces and civilians and the immediacy of this danger." In case-law, this conclusion is supported by the Israeli Supreme Court ruling. Kleffner notes that "[t]he Israeli High Court of Justice reached its conclusion on the basis of the principle of proportionality under domestic law and human rights law" Melzer however states that the Israeli High Court derives its conclusion from a wider proportionality requirement, which would constitute a general principle of international law.

In this ‘flexible solution’, the IHRL proportionality principle continues to apply during armed conflict, albeit not in a situation of active combat, but in situations where there is government control over the place. However, IHL “remains present in the background and relaxes the human rights requirements of proportionality and warning once an attempt to arrest has been made unsuccessfully or is not feasible.” This entails that the applicability of the IHRL proportionality rule is affected by the concurrent applicability of the rules of IHL. Pouw notes in this regard that IHL remains applicable, and if the situation would change such that hostilities emerge, the IHL-based rules are reactivated. As Droege puts it: “[o] ne therefore has to decide whether in a situation of armed conflict, humanitarian law or human rights law applies, because certain killings that are justified under humanitarian law are not justified under human rights law. In other words, even in armed conflict, a killing can be governed by human rights law if the concrete situation is one of law enforcement.

137 Sassòli and Olsen, p. 613.
138 Sassòli and Olsen, p. 613.
139 Sassòli and Olsen, p. 614.
140 Sassòli and Olsen, p. 614 (footnotes omitted).
141 Kleffner 2012, p. 45.
142 See below, Chapter 9.
143 Sassòli and Olsen, p. 614.
144 Sassòli and Olsen, p. 615.
145 Pouw, p. 469-470.
The difficulty to decide which body of law applies is a factual one, not a legal one. While the applicable principles of either humanitarian law or human rights law are clear, it can be a matter of dispute whether a situation was in fact one of law enforcement or conduct of hostilities.\textsuperscript{146} It must be concluded that this entails by no means an unified rule on the use of armed force, but instead allows for both separate legal frameworks to play their own part in the context for which they were designed to operate.\textsuperscript{147} In the words of Doswald-Beck, the restrictions imposed by IHRL “are not at all incompatible with the original fundamental spirit of IHL, namely the desire to prevent unnecessary deaths.”\textsuperscript{148}

As has become clear already in Chapter 5 and also above in this chapter, the applicability of the rules of IHRL on the use of armed force during an armed conflict is not without restrictions in more general terms. Kleffner notes that “to derive restraints on the use of force contemplated in Section IX of the Interpretative Guidance from human rights law is open to a number of considerable objections.”\textsuperscript{149} The first of these is the legal equality of belligerent parties under IHL, because the applicability of restraints based on IHRL to non-state armed groups is debatable.\textsuperscript{150} This is indeed problematic on a conceptual level, because “the reciprocal expectation of compliance by parties to an armed conflict remains one of the central motivating factors for compliance.”\textsuperscript{151} Although it is indeed an important feature of the implementation system of IHL, the principle plays no role in IHRL because the vertical relation is a basic characteristic of IHRL. It is submitted therefore that the restraints based on IHRL cannot be neglected because it would tilt the balance of the equal application of IHL to the benefit of non-State armed groups. Furthermore, it seems that in practice, the impact of this inequality under the law is limited. For example, it must be reminded that IHL itself contains similar rules that lead to an unequal position,\textsuperscript{152} such as the effect resulting from States criminalizing the participation to hostilities by members of non-state armed groups under their national laws.\textsuperscript{153} This similarly distorts the balance of the equal application of IHL between a State and a non-State armed group. Furthermore, regardless of the equality of the application of IHL to the belligerent parties, IHL contains a number of other rules that lead to an unequal position before the law, such as the absence of an explicit authority for non-State armed groups to detain armed government officials who participate in a non-international armed conflict. Secondly, as Kleffner notes, the disputed extraterritorial applicability of IHRL leads to problems. This, it is submitted, is also correct on a conceptual level, but provides insufficient counterweight to support the conclusion that for that reason alone restraints based on IHRL, including the IHRL proportionality rule, must be ignored. After all, since

\begin{itemize}
\item \textsuperscript{146} Droege 2007, p. 346.
\item \textsuperscript{147} For a creative, but flawed, attempt to merging the rules on the use of armed force under IHL and IHRL, see Martin.
\item \textsuperscript{148} Doswald-Beck 2006, p. 904.
\item \textsuperscript{149} Kleffner 2012, p. 52.
\item \textsuperscript{150} See generally Fortin 2017.
\item \textsuperscript{151} Kleffner 2012, p. 52.
\item \textsuperscript{152} See also Doswald-Beck 2006, p. 890.
\item \textsuperscript{153} See also Sassóli and Olsen, p. 615-616.
\end{itemize}
the application of the IHRL proportionality rule is dependent on the existence of a situation of control that allows for applying law-enforcement rules in the first place, there is usually also a situation in which a State may be able to exercise jurisdiction, as required by most Human Rights mechanisms. Thirdly, Kleffner states that the “holistic understanding of the applicability of human rights law” may perhaps not “allow for a graded approach to the use of lethal force along the lines suggested in Section IX of the ICRC Guidance”. This refers to the view that human rights obligations cannot be ‘divided and tailored’ to each situation, but apply as a total system, as was expressed by the European Court of Human Rights (ECHR) in its Bankovic Judgement. The ECHR however has explicitly reversed its view on this particular topic, holding that those rights must be secured which are particularly relevant to a certain situation. Logically, this has different consequences in different situations. As the ECHR has acknowledged in Al-Skeini, where there is effective control over a certain territorial area, such as in a situation of occupation, the occupying power is in a position to secure the complete range of human rights, whereas that will not be the case when the jurisdiction is more incidental with regard to its temporal and geographical extraterritorial scope. A further issue is obviously that the case law of the ECHR does in a general sense not apply to States that are not a party to the European Convention of Human Rights. The regional division of the different IHRL treaties further complicates providing a coherent interpretation of the rights and obligations under IHRL with regard to the use of armed force.

8.3.3.2 Concurrent Applicability of IHRL and IHL Proportionality

As was identified in the previous section, it seems possible that the IHRL-proportionality remains applicable in situations where IHL is also applicable, even if the IHL-proportionality rule plays no part because there are no civilians likely to be affected by a planned attack. This section is concerned with such situations during which civilians are expected to be affected by a planned attack outside active combat, and where a situation of sufficient control exists for the attacking side. To recall, in this situation, it cannot be said that the legal framework of IHL, as lex specialis, always supersedes or sets aside the IHRL rules with regard to the use of armed force that may also apply in armed conflict. The proportionality rules of both legal frameworks may be concurrently applied when an attack is planned on a military objective,
be it a person or an object, and civilians may be expected to be affected by the planned attack, and thus the IHL proportionality rule must be applied. The question is therefore whether the IHRL rule on proportionality places additional restrictions on the attacker in this situation. It thus needs to be analysed whether in that situation, the IHRL proportionality rule would provide an additional restraint on the use of force against persons who are a legitimate target under IHL and on civilians when it is expected that they may be affected by a planned attack.

In the situation where the principles of proportionality under IHL and IHRL apply concurrently, the difference is that the IHRL proportionality principle provides restraints to the use of force against both the civilians present at the scene, and the combatants or civilians who participate directly to the hostilities. The IHL proportionality rule does not provide further protection to persons who constitute a legitimate military target. There is thus a relation possible between the two proportionality principles only with regard to the civilians who are present at the scene. However, when the situation is concerned with the direct attack of a civilian, IHL contains a clear-cut prohibition to directly attack civilians, provided the civilians are not directly participating in hostilities. Melzer notes in this regard that “particularly in small-scale operations, human rights law is not necessarily more protective than IHL [because] human rights law allows the use of lethal force against anyone where this is ‘absolutely necessary’ for a legitimate purpose. IHL, on the other hand, prohibits direct attacks against certain categories of persons in absolute terms, that is to say, even in case of ‘absolute necessity’ for a legitimate purpose.”

Planners and executors of the attack will have to decide what type of operation they will pursue. In cases like this, Melzer’s theory on the paradigm of law enforcement and the paradigm of hostilities makes sense. If the planned operation is directed against civilians, it is prohibited under IHL, provided the civilians are not directly participating in hostilities and as far as IHRL is concerned, it can only be planned as an operation to kill the civilian if the stringent restraints of necessity, proportionality and immediacy are satisfied. Given the fact that in this scenario the applicability of IHRL is assumed, the operation cannot be planned with the a priori purpose to kill the civilians.

An example is the situation when it becomes known to the regional military commander during a non-international armed conflict, that the commander of the non-state armed group is present during a certain limited period of time in the house of his brother. The house is located in a town the government has under its control and where there is a functioning law-enforcement apparatus of the local police. It is assumed that the rebel commander is a military objective who has lost his protection under IHL as a civilian, because his position in the armed group presupposes that he is continuously participating in the hostilities due to his (continuous combat) function, being in charge of the armed operations against the government forces. It is also known that the brother of the commander is present, and his son. Both the brother and his son are civilians, being a baker and a shop-owner. According

\[159\] See for example Melzer’s discussion in Melzer 2010a, pp. 33-49.
to the legal framework of IHL, the military commander may be directly attacked, because he has lost his protection as a civilian. The two civilians present in the house, as well as the house itself, would count as collateral damage in case the house would be directly attacked as a whole, for example using a bomb dropped from the air, or a small team of Special Forces. Whether the expected collateral damage is excessive in this situation compared to the military advantage of killing the rebel commander arguably depends on more aspects of the proportionality calculation than the scenario provides. It is however presumed that the attack may be deemed to be proportionate in this scenario, on the basis of IHL. However, since the government has control over the area, it has been submitted in the previous Section, that the rules of IHRL also apply in this law-enforcement situation. The rules on the use of armed force under IHRL proscribe that the stringent restraints of necessity, proportionality and immediacy must be applied to this situation, with regard to any plan to capture or, if the commander proves to pose a threat to the government forces during the attempt to arrest him, possibly kill the commander. In addition, IHRL also protects the civilians present in the house. It may be argued therefore with regard to the rebel commander in this scenario that the IHRL proportionality rule provides an additional layer of protection to him, as explained in the previous section. With regard to his brother and nephew, the applicability of IHRL implies that they are not only protected by the IHL proportionality rule, but also by the IHRL proportionality rule. The question in this situation where concurrent applicability of the IHL and IHRL proportionality rules exists, is which rule prevails, or whether they must both be applied, providing further restrictions on the military commander planning an operation against the rebel commander. If the protection provided by the IHL proportionality rule is analysed in this scenario, it appears that whether his brother and nephew are successfully protected by the IHL proportionality rule, depends mainly on the question of how military advantageous it is to kill the rebel commander. In particular, the customary IHL rules with regard to precautions in attack apply here in the sense that it may prevent the attack to be carried out in accordance with IHL using an air-delivered bomb that would destroy the house and kill the persons in it. But with regard to the IHRL protection of the brother and the nephew of the commander, it is clear that their protection under IHL is not particularly dependent on themselves, notwithstanding their civilian status and protection, but on other factors, particularly the military value of the rebel commander. It must be noted in this regard that the military advantage under IHL is presumably larger when he is arrested instead of killed, based on the presumption that he may be able to provide the military commander with valuable information about the rebels' operations. The protection for the two civilians in this scenario on the basis of IHRL proportionality, on the other hand, is based on the question of whether a situation of ‘absolute necessity’ exists to using armed force that would affect them. That means that the magnitude of the force that may be used in order to arrest the rebel commander is additionally restrained by the protection on the basis of the IHRL proportionality rule for the two civilians who are present.
To summarize, the military commander planning an operation against the rebel commander in the scenario described above, has an obligation to attempt to capture him, rather than to kill him, as long as the situation remains under his control and remains within the realm of a law enforcement situation. This obligation is based:

1. on the IHRL proportionality rule that protects the rebel commander;
2. on the IHRL proportionality rule that protects the two civilians;
3. on the IHL proportionality rule that protects the two civilians who are present;
4. and on the basis of the underlying policies of IHL and IHRL, which dictate that the most protective regime (for the civilian population) must be applied, and the use of force would thus become dependent on the (imminent) threat.

With regard to the third factor, it must be noted that the IHL-based proportionality rule certainly provides no conclusive prohibition to attack the house in this scenario. However, as an additionally restraining factor, the IHL proportionality rule must be taken into account by the commander when he plans his operation. This is also important because if the attempt to arrest the commander would factually shift from a law-enforcement situation into a conduct-of-hostilities situation, the concurrent application of the IHRL proportionality rule would lose most of its relevance. Thus, for example if the rebel commander resists his arrest, causing danger to the safety of the members of the attacking forces, the lex specialis rule would in that case give prevalence to the IHL proportionality rule, ending effectively the protection of the rebel commander on the basis of the IHRL proportionality rule, and reducing the protection of the two civilians to only the protection on the basis of the IHL proportionality rule.

One case in which the concurrent application of the IHL and IHRL proportionality restraints arguably played a role is the ECHR case of Özkan v Turkey. The case regards an operation launched by Turkish security forces on a village in order to “carry out a planned search operation for members of the PKK reportedly staying in or near to Ormaniçi, as well as for a wanted person who was believed to be in Ormaniçi” When two men were spotted running towards the village during the approach of the security forces, “two warning shots were fired by the 2nd Commando Team, which were met by some shots fired from the village.” The Turkish security forces responded by “intensive firing, including the use of RPG-7 missiles and various grenades that were fired at perceived points of fire in the village.” In addition, “further intermittent exchanges of fire occurred” during the subsequent approach of the village by the security forces. During the firing by the Turkish security forces, one civilian was severely wounded. The ECHR decided, after concluding that at the time a situation of

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161 Özkan v Turkey, paragraph 298.
162 Özkan v Turkey, paragraph 298.
163 Özkan v Turkey, paragraph 298.
164 Özkan v Turkey, paragraph 299.
armed conflict existed, “taking due account of all (...) circumstances, that the security forces’ tactical reaction to the initial shots fired at them from the village on 20 February 1993 cannot be regarded as entailing a disproportionate degree of force.” It must be assumed that the ECHR is pointing to the IHRL-based proportionality rule in this scenario. However, according to Melzer, “[t]he judgment also shows that, during the conduct of hostilities, the interpretation of the requirement of proportionality shifts from evaluating the injury inflicted on the targeted person (law enforcement paradigm) to that incidentally inflicted on peaceful civilians (paradigm of hostilities) and that, therefore, Article 2 ECHR tolerates ‘collateral damage’ in the conduct of hostilities. Nevertheless, in a situation where collateral damage is likely, the quality and quantity of force used must be absolutely necessary ‘for the purpose of protecting life’.”

Melzer concludes that “the direct application of human rights law to the conduct of hostilities does not import the rules and principles of law enforcement into the conduct of hostilities but that, instead, the factual occurrence of hostilities requires an interpretation of human rights law in accordance with the paradigm of hostilities.” However, it is submitted that if Melzer is suggesting that in the two situations above, a merger occurs of the two applicable legal regimes, this approach may only be useful for the purpose of adjudicating a case before a human rights court. A paradigm-shift does not affect the concurrent and complementary applicability of the two legal frameworks, including the two different proportionality rules. The facts of a situation will dictate for the planners and executors of an operation during which both proportionality rules are applicable, which protections apply to which persons. The result of a paradigm shift is that the IHL-based proportionality rule, which is much less restrictive for security forces than the IHRL rules, becomes dominant as a result of the lex specialis rule when the situation develops from a law-enforcement situation into a situation of hostilities. Assuming that the two frameworks have merged and merely using the rules from one legal framework to interpret the applicable rules from the other legal framework is incorrect, because it denies the concurrent applicability of the rules of the entire legal framework.

8.3.3.3 Sub-Conclusion

To conclude, a complete merger in all situations of the application of the principle of proportionality in IHRL and IHL is an illusion. The only solution to this would be if the restrictive application of the principle of military necessity would be accepted to be equal

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165 Özkan v Turkey, paragraph 305: “there were serious disturbances in south-east Turkey involving armed conflict between the security forces and members of the PKK.”
166 Özkan v Turkey, paragraph 305.
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to the application during armed conflict of the principle of proportionality in human rights law. Therefore, it still seems obvious that the doctrine of the *lex-specialis* must be applied in order to solve the matter.\(^\text{169}\) Military personnel thus will have to be able to shift between the rules of these two legal frameworks, although in practice these rules will have been clarified in their rules of engagement.

From the above sections, it follows that the principle of proportionality as it manifests itself in IHL and IHRL are clearly separate in content and application. Nonetheless, there are factual situations possible in which both proportionality rules must be applied. Particularly because the applicability of the IHRL proportionality rule is subject to a large number of conditions, these situations may perhaps not occur in every military operation. The relationship between the two rules seems however not to be one of a merging rule, but of the application of the two separate rules cumulatively.

### 8.4 Conclusion

In this chapter, it has been concluded in Section 8.2.5 that the proportionality requirements under IHL and the *ius ad bellum* need to be satisfied within their own frameworks, and thus that there is no integrating relationship between the two rules on proportionality in these legal frameworks. Rather, their relationship is that they work in parallel to the same situation. Parties to an armed conflict thus need to realise that it is their responsibility to sometimes prevent their armed forces from executing certain attacks even though these would be perfectly legal under IHL, because the *ius ad bellum* proportionality rule provides an extra layer of protection to the civilian population.

With regard to the proportionality rules under IHL and IHRL, it was concluded in Section 8.3.3.3 that they are clearly separate in content and application. Nonetheless, there are factual situations possible in which both proportionality rules must be applied cumulatively. However, particularly because the applicability of the IHRL proportionality rule is subject to a large number of conditions, these situations do not occur in every military operation during armed conflict. The next chapter explores whether the application of proportionality rules cumulatively is possibly the result of the application of a general principle of proportionality in general international law applicable to armed conflict. In addition, it is analysed in the next chapter whether the other manifestations of proportionality are useful, as an inspiration or otherwise, to increase the understanding of the IHL proportionality rule.

\(^{169}\) See Nuclear Weapons Advisory Opinion, paragraph 25.
Chapter 9
Chapter 9: Conclusion of Part III

“Centuries of discussions by philosophers and jurists about the meanings of necessity and proportionality in human affairs do not seem to have produced general definitions capable of answering concrete issues”

9.1 Introduction

In the previous chapters of Part III, the origins and functions of the notion of proportionality in international law are analysed, as well as its different manifestations in a number of branches of international law relating to the use of armed force and that apply during armed conflict. The central research question of Part III is the question of what the content of the principle, or legal notion, of proportionality is in international law and in its different branches. The objective of this is ultimately to assess the extent to which these different understandings of the principle of proportionality may be useful for clarifying the IHL proportionality rule. To that end, this chapter contrasts and compares the manifestations of proportionality that have been encountered in the previous chapters on the basis of the roles of principles of international law as set out in Part II of this study. This chapter suggests that on the basis of analyses of the manifestations of proportionality across the board of international law, a general proportionality principle of international law applicable during armed conflict may be derived (Section 9.2). This principle may, as an inspiration or otherwise, help to interpret the IHL proportionality rule (Section 9.3).

9.2 Proportionality as a General Principle in International Law Applicable during Armed Conflict

It was concluded in Chapter 4 that proportionality is a concept that is inherent in any legal framework and is used (1) as a tool or legal technique to interpret vague legal rules, related to equity and reasonableness; (2) to balance competing interests in order to provide reasonable and equitable outcomes and (3) to protect the rights of smaller entities from excessive interference from the larger entity. The conclusion is thus that a general proportionality principle in international law is applicable in peacetime. When compared to the roles principles of international law perform, it may be concluded that the general principle of proportionality in international law serves to fill gaps and to interpret other rules of international law. Proportionality also operates as the basis for specific proportionality rules in different branches of international law applicable in peacetime, used to balance diverging interests, without superseding these rules. The analysis in the chapters relating to the *ius ad

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bellum, IHL and IHRL reveals that proportionality also plays an important role in situations where armed force is used, including during armed conflict.

The principle of proportionality in the *ius ad bellum* manifests itself in different situations. These situations usually present themselves as exceptions to the general prohibition of the unilateral use of armed force by States, as codified in the UN Charter. In general, in any *ius ad bellum* proportionality calculation, the size, duration and effect are relevant factors for determining whether an armed attack in response was proportionate. Here, proportionality plays a similar role as it does in international law in relation to countermeasures. Proportionality therefore clearly performs the function of balancing competing interests between equal entities in different legal frameworks applicable in both peacetime and during armed conflict. With regard to IHRL, it was established that there are various manifestations of proportionality in IHRL, mostly performing the function to protect the rights of citizens against interference by their authorities. Both in peacetime and during armed conflict, however, proportionality is also used to put considerable constraints on the legitimate use of lethal force under IHL. Here, proportionality is used for balancing the right to life of a person against the arbitrary use of armed force by State agents in situations where that is absolutely necessary, and additionally, proportionality also performs a second function, requiring no more force to be used than necessary to achieve the intended result.

The most prominent manifestation of proportionality that was identified in Chapter 6 within the legal framework of IHL is defined as follows: an attack is indiscriminate if it “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” Balancing the notions of military advantage and collateral damage to the civilian population, the IHL proportionality rule is used to provide reasonable and equitable outcomes. It is thus submitted that ‘the IHL proportionality principle’, is primarily a specific rule of IHL, based on other, underlying policies of IHL. Chapter 7 has moreover provided a number of examples of other notions, including, but not limited to, specific rules of IHL that also moderate the use of force during armed conflict in addition to the IHL proportionality rule that is aimed to mitigate collateral damage to civilians and civilian objects. As such, it seems that there is an important mitigating notion present in the entire branch of IHL that serves to achieve the dual objectives of IHL, and observe the balance between these notions. This mitigating notion, that seeks to provide reasonable and equitable outcomes, is based on the policies of humanity and military necessity. In turn, a

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2 A.M. Gross conducted an analysis of the convergence of the concepts of proportionality in IHRL and IHL in the situation of occupation. After surveying the practice of the Israeli High Court of Justice, Gross concludes that the Court uses the parameters of the *ius in bello* proportionality to assess the limitations that have been put on the exercise of human rights of Palestine civilians. In his view, the result of the convergence of both types of proportionality for people living in occupied territories is that “their rights can now be limited both for ‘public interest’ or the rights of others and for military necessity.” This illustrates that there is a danger to connect proportionality standards that apply as rules in different places of the law applicable in a certain situation of armed conflict, because a cumulative applications of these frameworks results in a virtually total denial of the rights of these civilians. A.M. Gross 2007, p. 9, italics in the original.

3 See article 51 (5) (b), article 57 (2) (a) (iii) and article 85 (3) (b) API.
general principle of proportionality in IHL (which is not the rule on collateral damage) is the basis for a number of specific rules in IHL, among which are the rules on collateral damage, precautionary measures and the specific rules that were identified in Chapter 7.4 These latter rules include the rules regarding the destruction of enemy property, and the restraints on the use of methods and means of warfare against the enemy. Taken together, it appears that the character of proportionality in IHL is diverse. It serves as the basis for a variety of rules throughout the different parts of IHL, some of which are recognised as particularly important. Furthermore, it may be recalled that proportionality was identified in Chapter 3 as one of the substantive principles of IHL.

From the preceding chapters in this Part III, it follows that proportionality applies as a limitation to the use of force in all branches of international law that regulate armed force, in diverging situations or levels.5

This cumulative application of proportionality in the *ius ad bellum*, IHL and IHRL, as well as its application in peacetime, may be understood as the result of an underlying general principle of proportionality in international law applicable to armed conflict. When the character of this general proportionality principle under IHL is compared to the proportionality principles applicable in the other legal frameworks during armed conflict, it is striking to note that there is a strong resemblance between these rules, because the ultimate purpose of all these rules is to mitigate human suffering on the one hand, and to provide leeway to authorities to achieve their legitimate objectives on the other hand. In the words of Cannizzaro, "proportionality serves to establish a limit, mainly of a humanitarian character, to the enforcement activities that States undertake to protect their interests."6

Nonetheless, in the previous chapter, it is concluded in Section 8.2.5 that the proportionality requirements under the *ius in bello* and the *ius ad bellum* need to be satisfied within their own frameworks. It follows that there is not necessarily a relationship between the two rules on proportionality in these legal frameworks. An exception is that the *ius ad bellum* proportionality rule may provide an additional layer of protection to the civilian population during armed conflict, which the IHL proportionality also aims to protect. With regard to the proportionality rules under IHL and IHRL, it was concluded in Section 8.3.3.3 that they are clearly separate in content and application. However, there are factual situations possible in which both proportionality rules must be applied cumulatively, but particularly because the applicability of the IHRL proportionality rule is subject to a large number of conditions when they apply simultaneously, these situations do certainly not occur in every military operation during armed conflict. The next section describes how a general principle of proportionality in IHL must be understood.

4 Krüger-Sprengel, p. 195: “elle constitue dans des cas particuliers une partie intégrante des norms de protection établies par le droit international”


6 Cannizzaro 2000, p. 466.
9.3 Proportionality as a General Principle in IHL

Based on the above, a general proportionality principle of international law applicable during armed conflict may be derived. This is a general principle that serves as the basis of the different manifestations of proportionality mitigating the use of armed force in international law, applicable during armed conflict. This general principle of proportionality applies as a matter of law as a substantive principle that may fill gaps in the law, but is unable to set aside other rules or principles of the different legal frameworks, such as specific rules of IHL. Neither would these manifestations of proportionality in the other legal frameworks that apply during armed conflict place an additional layer of legal obligations on top of the existing rules of IHL (including the IHL proportionality rule). On the contrary, instead of amounting to an integrated proportionality principle, it was established in Chapter 8 that the standards of proportionality restricting the use of armed force in armed conflict apply in parallel. Nonetheless, the multitude of manifestations of applicable proportionality standards demonstrates that proportionality is a general principle of international law. It thus performs the important function of interpreting the rules and principles of international law, including those of IHL in their application in practice. Furthermore, it may be recalled that proportionality was also identified in Chapter 3 as one of the substantive principles of IHL and may thus perform the crucial function as a gap-filler, through the Martens Clause, in factual situations where no specific rule of customary or treaty law is available. Within IHL, proportionality thus serves as the basis for a variety of rules throughout the different parts of IHL, some of which are recognised as particularly important. This IHL principle of proportionality is of a more general nature than the specific rule of proportionality in IHL that is based on the principle. The objective of this principle is to mitigate suffering of both civilians as the opposing forces and is more specific than the foundational policies (also generally known as the principles of humanity and military necessity).

The existence of such a proportionality principle in IHL is recognised by some authors, courts and States. For example, Phillippe argues that proportionality is a ‘central’ principle of IHL.7 Gardam wrote in 1993 that the ‘theory of proportionality’ is a “central element of the modern law of armed conflict.”8 Also, Melzer states with regard to an obligation to ‘capture rather than kill’, that the argument that this applies could be based, except on the military necessity principle in IHL and on IHRL-proportionality, also on “a wider proportionality requirement, which would constitute a general principle of international law”.9 The ICRC Interpretative Guidance (primarily also written by Melzer) states that “[i]n conjunction, the principles of military necessity and of humanity reduce the sum total of permissible military

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7 Philippe, p. 1187: “Le principe de proportionnalité occupe donc un place enviable en droit international humanitaire et sous-tend l’ensemble du droit des conflits armés.” Philippe proposes to integrate an explicit proportionality criterion in any decision making process during armed conflict, to prevent the principle to be only an ideal, but a reality instead. See Philippe, p. 1192.
8 Gardam 1993, p. 11.
action from that which IHL does not expressly prohibit to that which is actually necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances”.

Another ICRC legal adviser, Cordula Droege, wrote that “[t]here is a growing position that even under humanitarian law the ability to use lethal force is limited not only by a principle of proportionality protecting incidental loss of civilian life or damage to civilian objects, but also by other limitations inherent to humanitarian law, in particular the principle of military necessity and the principle of humanity.” The Israeli Beit Sourik case of 2004 states that “[p]roportionality is recognized today as a general principle of international law’. With regard to this case, Pertile states that “the view that the principle of proportionality, although never finding explicit recognition, operates in the application of [IHL] can be safely shared. The principle is the normative tool that reconciles the opposing values of humanity and military necessity. However, contrary to what the reasoning of the Court seems to imply, it is submitted that the reasons of military necessity are not recognised by every norm applicable to the case at hand and that the balancing operated through the principle of proportionality is possible only when reference to military necessity is explicitly admitted in a derogatory clause.”

When proportionality is interpreted as a broad concept that is present in many different branches of international law, it can be regarded as a general principle of the entirety of international law. When applied to the law pertaining to situations of armed conflict, it could be interpreted as “une doctrine générale limitative de la violence dans les conflits armés.”

Some of the practice that has been collected by the ICRC in the customary law database with regard to the IHL rule on collateral damage also relates to a more general statement of moderation in the use of force during armed conflict. In addition, the UK is on the record stating that “[a]ll our military planning is conducted in full accordance with our obligations under international law to employ the minimum necessary use of force to achieve military effect and to avoid injury to non-combatants or civilian infrastructure.” This seems to indicate that the UK views its proportionality obligations under IHL to be broader than the IHL proportionality rule. The 2015 US Manual on Law of Armed Conflict (LOAC), updated in 2016, also refers to a general principle of proportionality. It states on the subject that IHL “requires that even when actions may be justified by military necessity, such actions not be

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10 See Melzer 2009, p. 79.
12 Pertile, p. 679-680.
14 See for example the Military Manual of the Philippines: “The use of force to accomplish authorized missions should be reasonable in intensity, duration and magnitude.” See also Kenya’s LOAC Manual, which states that “one of the main principles which places constraints on the conduct of hostilities is “the principle of proportionality which calls for the avoidance of unnecessary suffering and damage and therefore prohibits all forms of violence not indispensable for the overpowering of the enemy.” See https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule14.
15 Mr. Adam Ingram, Minister of State for the Armed Forces, see House of Commons, Official Report, 2 April 2003, column 738W (emphasis added), as quoted in the Chilcot Report, available on www.iraqinquiry.org.uk, para 51 on p. 180.
unreasonable or excessive.” This definition of proportionality is clearly a different, more
general, notion than the proportionality rule on collateral civilian damage, since it refers to
proportionality as a means to balance the more general principle of military necessity on
the one hand and unreasonableness and excessiveness on the other hand. It is not entirely
clear whether the US understands this proportionality principle as a more general notion
that entails legal obligations for US soldiers. In the further elaboration of proportionality,
the principle is explained by referencing to the military concept of the economy of force,
the IHL “standard applicable to persons conducting attacks” (i.e. the collateral damage
rule, JvdB), the rule on precautions against the effects of attacks and with reference to
the prohibition on the use of weapons that are calculated to cause superfluous injury and
unnecessary suffering. It thus seems that the US Manual on LOAC adequately acknowledges
that manifestations of proportionality apply in different rules of IHL. However, it seems that
in the reference to the principle of proportionality requiring that even actions justified
by military necessity must not be disproportionate, proportionality works as a general principle
that serves to connect the separate rules of IHL into a coherent system.

Although it is submitted in this study that a general principle of proportionality does
exist, there are also writers who maintain that no normative guidance may be derived from
the principles of IHL. A general proportionality principle would in Kleffner’s view not have
an independent normative value that would apply directly to the battlefield. He states: “To
approach the law on the conduct of hostilities from the opposite permissive starting point –
that parties to an armed conflict are allowed to use those methods and means which are not
expressly prohibited – is more in tune with the nature of the law of armed conflict as a law
that governs a state of exception rather than normality. Hence, there are good reasons for
maintaining that, in the area of the law governing the conduct of hostilities, any restriction
on what parties to an armed conflict may do when using force against military objectives
in their quest to overcome the adversary must derive from an express restriction stipulated
in a rule or principle of positive international law.” Dinstein similarly states that “[i]t is
sometimes maintained (for instance, by the Supreme Court of Israel, in the Beit Sourik case of
2004) that ‘[p]roportionality is recognized today as a general principle of international law’.

17 Military necessity is defined as the ‘principle’ that “justifies certain actions necessary to defeat the enemy as quickly and
19 The accompanying footnote however refers to Vattel and Grotius; and also to the Caroline Case, where proportionality is
explained to mean that even actions taken in self-defence should not be “unreasonable or excessive” since such actions
“justified by the necessity of self-defense, must be limited by that necessity and kept clearly within it”. If this phrase is
meant to introduce a military necessity justification to use armed force based on the ius ad bellum, even when that would
not be in accordance with the rules of IHL, it must be rejected. If this notion of proportionality is however meant to refer
to a legally binding principle of IHL that is legally restricting the use of armed force during armed conflict, the references in
the footnotes make no sense. US DoD Manual, note 67 on page 60.
This is a completely untenable proposition. Indeed, proportionality is not even a general principle of IHL: it is patently excluded insofar as combat operations are concerned."21

As may however be concluded from the analysis in this part of the study, proportionality is both a rule and a principle in IHL. The different standards of moderation in IHL moreover prevent excessive effects from the use of armed force during armed conflict. These standards are the result of the general principle of proportionality in international law that also applies in IHL. This general principle of proportionality in IHL influences the rules of IHL (including the IHL proportionality rule) to a certain extent in terms of interpreting them and to fill gaps. It is suggested that based on the potential for principles as a source of international law, that this general proportionality principle may apply either as a principle or as a rule of international customary law.22

The question that remains is what the identification of a general principle of proportionality in IHL means for the application of the IHL proportionality rule. This question can only be answered after an in-depth analysis of the IHL proportionality rule and how it must be applied in practice. This is the subject of Part IV.

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21 Dinstein 2013, p. 74.
22 Cottier et al., p. 671: “[a]s a “fundamental rule of international law”, the principle of proportionality is “able to apply in its own right.” ... The normative difference between customary international law and a legal principle of law is important as the latter does not operate on its own but informs and supports the process of application and interpretation of specific rules.”
Part IV: Proportionality in Practice

In the previous Parts, the focus has been on international law in general, identifying the role and functions of principles in Part II. The focus shifted in Part III to an analysis of the notion of proportionality in various legal frameworks, particularly as applied in international law applicable during armed conflict. This final Part IV assesses the proportionality rule exclusively in the context of IHL.

First, Chapter 10 assesses the context in which the IHL proportionality rule is applied. This concerns the operational context of attacking the opponent, which is often done using a targeting process. In legal terms, the IHL proportionality rule is place within the prohibition of indiscriminate attacks and among the precautions in attack. Chapter 11 provides an in-depth analysis of the different components of which the IHL proportionality rule is composed. This includes in particular an analysis of the categories of persons and objects included as incidental damage in the IHL proportionality rule as well as the concept of military advantage.

A number of factual situations on different levels of authority in which the IHL proportionality was applied in practice is discussed in Chapter 12. The findings in Chapters 10, 11 and 12 are subsequently used in Chapter 13 and 14 to assess the notion of ‘excessive’ which is ultimately the test that determines whether a planned attack complies with the IHL proportionality rule. In Chapter 14, a number of suggestions are presented which may affect the interpretation of the IHL proportionality rule, including the broader principle of proportionality in IHL.

The general conclusions of this study are presented in Chapter 15.
Chapter 10
Chapter 10: Proportionality in Context

10.1 Introduction

The focus in this chapter is on providing more insight on the practical and legal context in which the proportionality rule must be applied. For that reason, first, the place of the proportionality analysis is explored in the process that is in the heart of IHL: attacking the enemy. Therefore, a short descriptive analysis of the targeting process is provided in Section 10.2, as an introduction to the way the IHL proportionality rule must be applied in practice. Subsequently, as the prohibition of disproportionate attacks under IHL is categorised as a subset of the category of indiscriminate attacks, the notion of indiscriminate attacks is briefly explored in Section 10.3. In Section 10.4, it is explored how the IHL proportionality rule, as a precautionary measure in itself, fits in the system of obligations under IHL with regard to precautionary measures protecting civilians during attacks and military operations.

10.2 Targeting and Proportionality

The IHL proportionality rule applies when an attack is planned and when that attack is subsequently executed during an armed conflict. The activity of planning the use of armed force, even when used in defence, together with the actual launch of an attack, may be labelled as ‘targeting’. Targeting is “the sine qua non of warfare”. It is therefore relevant to analyse the concept of targeting, in order to enhance the understanding of the circumstances under which the IHL proportionality rule must be applied.

Boothby aptly defines targeting as “a broad process encompassing planning and execution, including the consideration of prospective targets of attack, the accumulation of information to determine whether the attack of a particular object, person, or group of persons will meet military, legal and other requirements, the determination of which weapon and method should be used to prosecute the target, the carrying out of attacks, including those decided upon at short notice and with minimal opportunity for planning, and other associated activities.” Defined as such, targeting covers a wide range of issues, criteria and considerations that play a role in the application of the IHL proportionality rule.

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1 The term “attack” is defined under international humanitarian law as an act of “violence against the adversary, whether in offence or in defence.” See article 49 (1) API.
2 Schmitt 2012.
3 Boothby, p. 4.
Although “important discrepancies” do exist between the rules applicable to targeting in international armed conflicts as opposed to targeting in non-international armed conflicts, for the purpose of the application of the proportionality rule, this division has mostly become irrelevant. As was established in Chapter 6, the IHL proportionality rule applies equally in both types of armed conflicts.

Targeting rules applicable in land warfare also apply to attacking targets on land from the air or from the sea. Although the “fundamental principles of the laws of armed conflict apply equally in naval warfare,” additional and specific rules apply to targeting in naval warfare (thus between or among ships at sea and planes in the skies above sea) as well as in particular types of operations such as peace operations. For the purpose of this chapter, it is important to note that the rules on the protection of the civilian population apply as soon as naval, space or cyberspace warfare affects the civilian population on land.

10.2.1 Introduction

Targeting comes in a variety of forms. It may be conducted through a carefully pre-planned procedure involving specialised personnel, or ad-hoc, as a small unit or even an individual soldier under attack needs to decide how to respond to a given situation. For the purpose of this chapter, it is assumed that there is a military commander present who is responsible for the decision to launch an attack. This is normally the person who needs to conduct the proportionality assessment before and during the use of mostly kinetic means of striking an opponent. The law has trusted the military commander with the responsibility to conduct the proportionality analysis and make decisions with regard to the excessiveness of civilian casualties and damage to civilian objects. This military commander is present on different levels, ranging from a high-ranking military commander at a headquarters far away from the location where the attack will impact, to an on-scene commander whose personal safety may be on the line. In fact, most of the actual fighting in warfare takes place at the tactical, small unit level and even “an infantry private deciding to engage an enemy belligerent is implementing [IHL] principles in a real-time targeting process.” These privates have no military lawyers following them in their footsteps to provide them with legal advice.

4 Boothby, p. 5.
5 Article 49 (3) API: “The provisions of this Section apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.”
6 Heintschel von Heinegg 2013 in Fleck, p. 478
7 For naval warfare, see generally Heintschel von Heinegg, 2013, pp 463-547, in particular p. 479 and Boothby, p. 309. See also Schmitt 2016, p. 269: “The general rules governing targeting apply equally in land, air, sea, space and cyberspace. Specialized rules may apply in particular types of operations, such as peace operations or naval warfare.”
8 This chapter understands targeting as a kinetic activity involving the use of armed force. For non-kinetic targeting, see Duchêne 2016, pp. 201-230.
9 Corn and Corn, p. 344.
However, IHL requires all types of military commanders to assess whether the launch of an attack is lawful. The proportionality analysis is part of this assessment, or targeting process.

While conducting the thinking exercise of the targeting process, the military commander is dependent on many factors. For example, the means and methods available to the military commander may differ to a large extent. A commander of an artillery battery will normally have only one or very few types of artillery shells at his disposal. An aircraft-pilot is dependent on the bombs attached to the airplane and those cannot be changed while the plane is in the air. Therefore, although the commanders may be able to adjust the fuses that detonate the bombs and grenades, the options to adjust the choice of a weapon system in order to limit collateral damage are limited in these two situations. The same goes for smaller units, using only their rifles, (rocket-propelled) grenades or, at the most, smaller types of mortars. These latter commanders may however, be able to call in airstrikes or close air support. Higher level commanders, on the other hand, may be able to task the attack of a certain military objective to the artillery commander, the pilot, or a ground unit. To these types of commanders therefore, more options may be available when conducting a targeting process.

In addition to the availability of weapons systems, the capability to collect, interpret and compare information is also crucial to conducting a targeting process. However, the access to information may be very much dependent on the level of sophistication of the military forces of a party to an armed conflict. For example, the joint headquarters of a coalition of western States may be able to conduct air strikes through a sophisticated planning process using software systems that provide input to the decision making process on the expected damage to civilian structures and using real-time footage from unmanned drones. The situation is different for a non-state armed group that wishes to attack a town or dwelling, or that is defending a certain part of a larger city and that may only be able to rely on the information that is visible to the naked eye, or perhaps some historical information as to where military objectives and concentrations of civilians may be found. Circumstances that influence the targeting process include time-pressure and there may be ongoing hostilities that result in a lack of information and a high level of stress.

A number of common features are found in any type of targeting process, whether by a non-state armed group (NSAG) or by regular armed forces of a State, even though “there are variables that differentiate how a specific operation’s targeting process is carried out - namely, the goal itself, the time allotted for planning, the means or capabilities, and the tools available to assess.” This applies to any level at which a commander may be situated.
and to all types of weapon systems. A useful targeting process, to take as the basis for further analysis of the role of the proportionality rule, is the six step targeting process proposed by Henderson. It is comprised of the following steps:

Planning phase:
1. Locate and observe the potential target and its surrounding area;
2. Assess whether the target is a valid military objective and that it is otherwise unprotected from attack by IHL;
3. Take all feasible precautions to minimise collateral damage;
4. Assess whether any expected collateral damage is proportional (...) to the anticipated military advantage to be gained from the attack;

Execution phase:
5. Take such care as is appropriate in the tactical situation to release or fire the weapon to achieve the best possible chance of hitting the selected aim point;
6. Cancel or suspend the attack should it become apparent that any one of the assessments made under steps 2 or 4 is no longer valid.14

An additional step may be to assess the result of the attack, which may in turn lead to a next phase in an ongoing operation.

10.2.2 Specifics of Targeting by Less Sophisticated Armed Forces

Targeting is as such not different during non-international armed conflicts compared to international armed conflicts: the objective to affect the military capability of the enemy through attacks is identical. As mentioned above, the rules applicable to the two types of armed conflict are mostly identical for the purpose of the IHL proportionality rule.15 The character of the parties to the conflict however varies during the different types of armed conflicts. By its nature, one of the parties to a non-international armed conflict is a non-State armed group (NSAG). A major difference that exists between these different parties to the conflict in the context of targeting, is often the level of sophistication of those parties, in the sense of the weapons and other capabilities the fighters of these groups possess. This is particularly relevant for the purpose of an analysis of the application of the IHL proportionality rule.

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13 Pratzner, p. 80.
14 Henderson, p. 237 (footnotes omitted).
15 See for example the customary rules as cited by the ICRC Customary Law Study with regard to targeting, such as rules 5-22. See Henckaerts and Doswald-Beck 2005a, pp. 17-71.
Chapter 10: Proportionality in Context

Many different situations may occur during which on-scene commanders or individual soldiers need to decide whether the course of action they want to pursue, or that they are ordered to execute, is proportionate. It may be that the forces that are about to launch an attack, and that are thus obliged to conduct a proportionality analysis, are part of NSAG that is technologically inferior to its opponent. This could mean that the NSAG has only a very limited capability to focus on preventing civilian casualties, compared to the more sophisticated party to the conflict they face. This may be the case as a result of the air dominancy of the opposing party, including the presence of reconnaissance drones, or the types of weapons the NSAG has at its disposal, usually predominantly light and improvised weapons.\(^\text{16}\) The targeting process is therefore not in all situations as sophisticated and well-structured as this chapter may at times suggest. There are however no special IHL targeting rules for less sophisticated armed forces. It has to be noted that not only NSAGs use less advanced weaponry during non-international armed conflicts. For example, the use of ‘barrel-bombs’ by the armed forces of some States indicates that not all States use strictly Precision Guided Munitions (PGM) during their operations.\(^\text{17}\) If the target of those types of bombs is a large military objective, the use of barrel bombs is not prohibited \textit{per se}, however the use of these types of bombs in populated areas may violate the IHL proportionality rule.

Yet, it may be imagined quite easily that NSAG encounter situations in which collateral civilian damage is possible, and thus the proportionality rule must be applied. For example, if a squad of NSAG-fighters is approaching a certain military objective of the opponent, such as a defending firing position of State forces, that they may want to attack through a RPG, it is very possible that civilian objects are located in the near vicinity of the enemy position. Also, it could be that a civilian shelter is located at such a position for the simple reason the civilians feel better protected against the violence of a NSAG if they hide from the hostilities near a defending position. Therefore, in this scenario, the NSAG has to take the possible collateral damage into account when they launch their attack (assuming it is feasible that they are aware of the presence of civilians). Furthermore, a NSAG may have acquired powerful weaponry during their operations, that they wish to use against their opponent even though the NSAG has no capabilities to reasonably be aware of the whereabouts of the civilian population. In that case, the commander of the NSAG forces needs to reconsider the initial plan of attack once the presence of the civilian population on the scene becomes apparent.

\(^{16}\) The use of lighter types of weapons are also less likely to result in collateral damage than more sophisticated, often heavier weapons systems such as artillery and air strikes.

\(^{17}\) See for example for the use of barrel bombs in the context of the armed conflict in Syria: https://www.hrw.org/news/2015/08/05/barrel-bombs-not-isis-are-greatest-threat-syrians. Barrel bombs are described by Human Rights Watch as improvised weapons consisting of “oil drums or similar canisters filled with explosives and metal fragments. They are dropped without guidance from helicopters hovering just above antiaircraft range, typically hitting the ground with huge explosions and the widespread diffusion of deadly shrapnel.” Other governments would drop bombs from the air in primitive ways: “Weapons experts told the organizations that the munitions used are unguided and are often rolled out manually from Antonov cargo planes or launched from other aircraft in a manner that does not allow for accurate delivery.” See https://www.hrw.org/news/2011/08/30/sudan-southern-kordofan-civilians-tell-air-strike-horror.
As mentioned above, a less sophisticated force may not be capable of an exact analysis of the presence of civilians and civilian objects at the location of attack. This may be because of a lack of assets such as surveillance drones and satellite images, although this is true for most armed forces in the world. In addition, the lack of advanced communications systems may pose an additional challenge to the commander of a NSAG unit to acquire information about the presence of civilians. This does not mean that the commander is relieved from the obligation to verify that the target is a military objective. The rule is furthermore that the commander must do everything feasible to assess whether the planned attack will comply with the IHL proportionality rule. However, although the threshold of the necessary effort is equal to a commander with less sophisticated means at his disposal compared to a commander that does have these capabilities available, the actual options may be very limited. The result of this is that the level of uncertainty of the presence of civilians on the scene must be accepted to be higher compared to a commander with more feasible options to ascertain the absence of civilians.

### 10.2.3 Specifics of Targeting by Sophisticated Armed Forces

The targeting process is well-defined by Western States and alliances of States, such as NATO. The United States has defined the targeting process as “the process of selecting and prioritizing targets and matching the appropriate response to them, considering operational requirements and capabilities.” Another definition describes targeting as “the deliberate application of capabilities against targets to generate effects in order to achieve specific objectives. It is about the application of means (weapons) of warfare to affect addressees (people or objects) using a variety of methods (tactics) that create effects contributing to designated goals. Targeting, accordingly, represents the bridge between the ends and means of warfare.”

For sophisticated armed forces, there are two different types of targeting processes. First, deliberate targeting focuses on known future targets, which may be attacked either on call or on a moment previously scheduled. The defining factor of deliberate targeting is thus that there is usually sufficient time to assess whether a certain target is a military objective and what the possible military value of the target is, as well as to gain information about possible collateral damage when it would be attacked. Secondly, dynamic targeting

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18 See for example the US Joint Chiefs of Staff, Joint Publication 1-02 2010, which is available online: www.dtic.mil/doctrine/new_pubs/jp1_02.pdf. NATO’s targeting doctrine is the 2008 Allied Joint Publication AJP 3.9. This publication is however not generally available. Therefore, references in this research to AJP 3.9 are of a general descriptive nature.
19 US Joint Chiefs of Staff, Joint Pub 1-02 2010, p. 236.
20 Ducheine et al., p. 2.
21 Pratzner, p. 81, see also Jachec-Neale, pp. 200-204.
22 Scheduled deliberate targeting may be described as attacking targets that must be attacked at a specific moment in time, whereas in the case of on-call targeting, the actions are not necessarily to be addressed at a specific moment. See AJP 3-9, p. 1-2.
involves the process that needs to be followed before targets may be attacked which have
been identified too late to be included in a deliberate targeting process. The targets that
are processed through the dynamic targeting process may be previously identified military
objectives (for example, a missile launch installation) or persons, the location of which was
previously unknown, but that becomes known to the attacker at a given moment. Dynamic
targets may also be previously unknown military objectives that suddenly present themselves.
A particular type of dynamic targeting is targeting against time-sensitive targets. Whether
these targets can be attacked needs to be addressed as soon as possible in case they endanger
friendly operations, or because the military advantage of attacking them is particularly high
and the window of opportunity in which the targets can be attacked is limited. For these
types of targets, NATO has developed a quicker targeting process.

On a tactical level, ground targets can be attacked through two distinct types of air
operations, namely air interdiction operations and close air support. The latter type of
operations consists of airborne assets attacking military objectives in support of ground
troops, and can be done by fixed-wing or helicopter assets. Normally, close air support
operations are planned and executed through the dynamic targeting process, since the exact
support that is needed in a ground operation usually only presents itself when the ground
forces are already underway. Nonetheless, it is imaginable that a ground operation has been
planned in advance including the deliverance of close air support of air assets, in which case
the situation allows for following the process for deliberate targeting.

In a sophisticated targeting process, it is not only the use of explosives or other kinetic
means that are considered to achieve a certain objective. Indeed, the targeting process also
aims to coordinate the efforts and apply non-military assets such as information operations
to achieve a similar result. As such, the targeting process “enables targeteers to plan and
execute operations and activities comprehensively, efficiently, and effectively. At the same
time, it enables commanders to use force (or assets and resources) more economically by
providing additional options to them with which to accomplish their mission.”

A wide variety of assets and sensors enable sophisticated forces to conduct an extensive
analysis of the situation surrounding a military objective. The identification of possible
military objectives that may be targeted during an armed conflict may have taken place
already in peacetime. As a result, a target ‘folder’ or ‘package’ may be available already upon
the outbreak of actual hostilities. Sophisticated armed forces may thus have a pre-approved
list of military objectives that may be attacked to pursue the objectives of the leadership
on the political and strategic level. Once an armed conflict is ongoing, the analysis of

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23 AJP-3.9, pp. 1-2: the dividing line is the question whether the attack is to take place within a three day period, or later.
24 AJP 3.9, p. 1-3.
25 Ducheine et al., p. 3
26 Pratzner, p. 82.
27 Henderson, p. 239.
28 See for example the list drawn up by Reynolds, p. 100.
the ‘pattern of life’ at the location of the military objective provides the opportunity to determine exactly which type of weapon may be used to reach an optimal effect, while minimizing the risk to civilians, and the optimal time window in which the objective may be best attacked to avoid or at least minimise collateral damage, as well as maximising the military advantage of the attack. Targeteers\textsuperscript{29} will also have a software system available that enables them to predict how the use of a certain weapon system or type of bomb will affect the target as well as its immediate surroundings. These software systems are capable of producing Collateral Damage Estimates, which offers contemporary military commanders unprecedented possibilities to match the optimal type of weapon with a view of minimising collateral damage. Especially if there is sufficient time to conduct extensive surveillance, or even a reconnaissance mission on the ground, the deliberate planning process, augmented with good quality intelligence, may present an optimal profile of the target and enable the planners to take all other feasible precautionary measures to limit collateral civilian damage. At the same time, the deliberate planning process provides targeteers the opportunity to verify thoroughly whether a certain object is a military objective, as well as whether it may be expected to be sufficiently military advantageous indeed at that moment in time to destroy the object. The quality of this process is not only dependent on the factors that were already mentioned: time and available information and intelligence, but in addition, “competency in the targeting tradecraft; and (...) the mental agility to change the plan as the environment evolves”\textsuperscript{30} is required to maximise the effects of the deliberate planning process.

For time-sensitive targeting, the situation is slightly different, because the time factor does usually not allow for an extensive effort as there is in the situation of deliberate planning. The importance of this factor cannot be overstated: “[a]lthough information and communications technology (ICT) has enabled many lower end functions to be automated, there are necessary steps - command direction and course checks, legal reviews, proper vetting of individual targets, etc. - that demand time to properly complete.”\textsuperscript{31} Sophisticated armed forces or alliances will normally already have a list available of possible military objectives that may be targeted through time-sensitive targeting. These lists of time-sensitive military objectives enable targeteers to address certain sub-questions in advance. This may shorten the decision process to assess whether the target can be attacked, as soon as a time-sensitive target has actually ‘popped up’. Nonetheless, although the time-sensitive targeting process aims to take much less time than the deliberate planning process, that does not mean that it is subject to less stringent legal obligations. To name just two examples, the positive identification of the target as a military objective as well as the obligation to take feasible precautionary measures, remains applicable. The information that is needed to take decisions with regard to the identification of a target as a military objective, or the

\begin{footnotesize}
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\item [29] Targeteers are persons with a special qualification to predict the effect of certain types of weapons or on the way targets may most effectively be attacked.
\item [30] Pratzner, p. 82.
\item [31] Pratzner, p. 82.
\end{itemize}
\end{footnotesize}
presence of civilians and civilian objects in the vicinity of the target, may be supplied by others than the attacking force. This may sometimes present a problem as far as time-sensitive targeting is concerned, because there may be no time to verify this information. As far as taking precautionary measures is concerned, Henderson provides a useful example how this may play out in practice when conducted under time pressure:

> “an infantry soldier who is under fire from enemy combatants cannot be expected to take the same steps to improve the accuracy of his or her shot as would be expected of a sniper in a camouflaged position whose presence is unknown to the enemy.”

### 10.2.4 Targeting and Collateral Damage Estimate Methodology

Any targeting process involves a number of steps, both in the planning and execution stage of an attack. The proportionality rule applies both during the planning as well as during the execution phase of an attack. Some armed forces or coalitions of armed forces possess procedures and assets that assist in making well-informed proportionality assessments prior to launching attacks. These attacks are primarily conducted by air-to-surface weapons and artillery. Collateral Damage Estimate (CDE) methodology used by the US as well as NATO, allows planners, targeteers and commanders to make rather precise predictions on the impact area of certain types of bombs. CDE methodology thus enables assessing the number of civilians that may be expected to be affected by the planned attack. This concerns the casualties expected to be done by the bomb, consisting of the result of pressure wave, fragmentation, blast and the crater that will be caused. In other words: “the commander and his subordinates place a point on a map representing the target, draw an effects radius around that target, and assess what known collateral concerns exist within that radius.”

Foremost, obviously, the CDE methodology assists in determining the impact of the used weapons, particularly whether damage to civilian objects and civilian casualties may be expected. It therefore also requires a determination whether the military objective has an additional civilian function, and how close civilian objects are to the intended point of

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32 Henderson, p. 235.
33 Henderson p. 236.
34 Osinga and Roorda, p. 62: “The United States introduced a computer program, nicknamed "BugSplat", to calculate the risk that bomb blast and fragments might affect civilian objects near a pre-planned target. Each potential target could be examined for proximity to civilians or civilian property. Officially named the Fast Assessment Strike Tool—Collateral Damage (FAST-CD), it generated blob-like images resembling squashed insects that precisely modelled the potential damage produced by a particular type and size of bomb, dropped by a particular aircraft flying at a particular altitude. FAST-CD took account of the characteristics of terrain and the objects being struck in order to forecast an often irregular pattern of damage. If the predicted risk of collateral damage was deemed too high, targeting specialists could attempt substituting either a smaller weapon or one with a delayed fuse—which lets a bomb penetrate first and then detonate—or try changing the type of aircraft or its angle of attack.”
35 Werres, p. 47-50.
impact of a certain type of weapon. It is therefore the primary function of the computer program integrated in the CDE methodology, to assist in assessing the expected collateral damage of a planned attack.\(^{37}\) Despite the name of the CDE methodology, however, the use of this computerised model also makes it possible to predict the extent to which the military objective will be destroyed, killed or disabled. This may assist in assessing the expected military advantage of a certain attack, although the actual expected military advantage may also be dependent on other factors. The computer model is not the only tool that commanders must use when assessing the military advantage: they also need to use their common sense and assess other factors such as, in the case of a co-ordinated attack, the progress reached in other strikes.

According to the planning tool that the CDE methodology is, there are levels one to five of expected collateral damage.\(^{38}\) These five levels determine who must take the ultimate decision on the execution of the attack. In case the CDE methodology calculates that collateral damage may be expected from a planned attack, the CDE methodology can subsequently assist in the commander’s duty to do everything feasible to avoid, or at least minimizing collateral civilian damage.\(^{39}\) The methodology furthermore takes into account possible risk to causing environmental damage, as well as whether risk exists for causing a plume of a chemical, biological or radiological nature. Also, when it is clear in the planning stage that an object is a dual-use object, it is always placed in the highest category.\(^{40}\) Whenever according to the CDE methodology civilian casualties cannot be excluded, the authority to approve the attack moves up the chain of command, at least to the level of a general.\(^{41}\) The five levels dictate in which cases a further analysis may need to be executed into the effects of using alternative weapons systems to attack the target under scrutiny. That means that in the first CDE level, it is determined whether any collateral damage is expected. If this is not the case, the CDE process is finished, and the attack may proceed. If there some collateral damage is expected, the process moves to the second level, where it is assessed whether weaponeering options can mitigate the expected collateral damage. This process repeats itself, while during each CDE level an analysis is conducted whether a particular attack may be launched, or based on

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37 One tool that is used by US CDE methodology is the Population Density Reference Table. This table “lists data from the intelligence community and other sources and methods and allows for estimates of the population density per 1,000 square feet per day, night, and special events for any given collateral structure based on its functionality (...)” See McNeal, pp. 26-27.

38 See for example Wright, p. 832.

39 As required by the obligations concerning precautionary measures, see article 57 (2)(a)(ii) API.

40 Werres, p. 49.

41 In the US practice for pre-planned strikes conducted in the context of operation ISAF in Afghanistan, “the President of the United States or the Secretary of Defense must approve any pre-planned ISAF strike where 1 civilian casualty or greater is expected.” See McNeal, p. 2. When this is the case depends to large extent on the so-called ‘Non–Combatant Casualty Cut-Off Value’ (NCV), which has been proclaimed at the outset of the operation. In case, the NCV is one, for example, the decision to launch the attack moves up the chain of command as soon as one single civilian casualty is expected from a planned attack. It may however also be the case that the NCV is determined to be ten, in which case lower commanders may decide to launch the attack without seeking approval from higher authorities as long as they expect nine or fewer civilian casualties to occur. See McNeal, p. 26. As an example, McNeal notes that during the major combat operation Iraqi Freedom in 2003, the NCV was thirty non-combatant casualties. See McNeal, p. 27.
failing the parameters for that level, the planned target must be assessed in a higher level in the CDE process before it may be launched.

The software system that is used to make the CDE assessments is “grounded in scientific evidence derived from research, experiments, history, and battlefield intelligence, and (...) designed to adapt to time-critical events.” Furthermore, it is constantly updated with the effects of existing bombs in different conditions, or by new types of weapons. This implies that the accuracy of the predictions of the software is improving constantly, especially when the methodology is used during a longer period within the context of a particular operation, since more accurate information becomes available of the effects of the different types of weapons on the surface and buildings specific for that particular area. Eventually, according to McNeal, the US practice of collateral damage estimation and mitigation “is intended to ensure that there will be a less than 10 percent probability of serious or lethal wounds to non-combatants.”

In order to maximise the probability of the calculated and deemed acceptable effects to ultimately occur, the ‘worst case’ scenario of a certain attack is often taken as the basis of the calculations. That means that normally, the actual collateral effects of an attack are less severe than expected based on the calculation of the CDE methodology. Of course, there may also be factors that impact the proportionality assessment negatively and that cannot be calculated through computer programs. An example is what happens when a target is hit that functions as a weapons storage. If precise information on the quantity of explosive material present at the location is lacking, it seems hardly possible to predict the impact of even a small explosive on the target, because of the secondary detonation of the stored explosives that will follow. In addition, in case a military objective is located next to a busy street, the presence of civilians on that street is also difficult to predict through a computer program. Of course, the program may be able to calculate based on general assumptions that there are less people on the streets at night than there would be during the day. But the actual circumstances at the time of the attack may be very different than the situation the computer is programmed to assume. It is therefore important for planners, targeteers and commanders to be mindful that collateral damage estimates must always be interpreted through sound human judgement, in order to prevent inherent flaws of computerised systems from nullifying the obligations posed by the proportionality rule.

42 McNeal, p. 5.
43 McNeal, p. 15.
44 McNeal, p. 1.
45 McNeal, p. 20.
10.2.5 Sub-Conclusion

It may be concluded from the discussion above that the IHL proportionality rule must be integrated in any decision making progress in the context of the planning and execution of armed force. The legal obligation applies equally to a private firing his weapon as to an attack that is planned in a high joint military headquarters, through an institutionalised procedure conducted by highly trained and skilled targeteers and military commanders. It starts by armed forces to consider whether any incidental collateral damage may be expected from any planned attack. If that is the case, first the distinction rule needs to be applied, and subsequently a proportionality assessment needs to be conducted.

10.3 Indiscriminate Attacks and Proportionality

Having explored the targeting process of which the proportionality assessment is part in practical terms, the next step is to assess the place of the IHL proportionality rule in legal terms. According to the definition of a disproportionate attack, it is a subset of the wider category of indiscriminate attacks. Therefore, it is to this category that the analysis now turns.

The starting point for a discussion of the notion of indiscriminate attacks is its definition in treaty law. Article 51(4) API prohibits as indiscriminate attacks:

a. Those which are not directed at a specific military objective;
b. Those which employ a method or means of combat which cannot be directed at a specific military objective; or
c. Those which employ a method or means of combat the effects of which cannot be limited as required by API.

And consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

Article 51(5) API adds as examples of the attacks mentioned in section 4 of the same article:

(a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects, and (b) disproportionate attacks.

In addition to the definition in API, customary IHL also contains the prohibition on indiscriminate attacks. The ICRC Customary Law Study states that indiscriminate attacks are prohibited under customary IHL in both international and non-international armed conflicts (Rule 11). Rule 12 repeats the definition of indiscriminate attacks found in article 51(4) sub a, b and c API, with the exception that the scope of sub c (methods and means of combat the effects of which cannot be limited as required by API) is extended under customary IHL to include
the entire corpus of IHL, not only API. This latter extension makes sense given the fact that
API is not the only treaty that deals with weapons that may be regulated by this prohibition,
as well as the fact that international customary law may also contain prohibitions on certain
means and methods of warfare.

The temporal scope of the prohibition of indiscriminate attacks is obvious. It applies
throughout the targeting process, so the assessment must be made in advance to planned
attacks, as well as during the execution phase of the attack. As is the case for the evaluation
of the expected collateral damage and military gain from an attack, the circumstances
ruling at the time and the information that was reasonably available to the persons
planning and executing the attack dictate, whether they could foresee the planned attack
to be indiscriminate. As a preventive framework, IHL dictates that commanders take due
regard before launching an attack, but IHL certainly does not rule out the possibility that an
attack that had devastating results for the civilian population was bona fide expected to be
a discriminate attack when it was planned and ordered to be launched. Therefore, attacks
that seem indiscriminate in hindsight may not always have appeared as such when they were
planned. This fact makes it very difficult for anybody else than the people who planned and
executed the attack to have sufficient information to make a well-founded claim that any
attack was indeed indiscriminate. It is therefore very difficult to prove that the prohibition
of indiscriminate attacks was violated. Criminal tribunals or fact-finding commissions
can only look into what actually happened in hindsight, thus on the basis of the result of
the attack. Their main problem therefore is that a violation of this prohibition can only
be proven if sufficient information is available about the way the attack was planned in
advance and whether it was executed in accordance with a plan that would not violate the
prohibition. The ICRC commentary states in this regard that “in relation to criminal law the
Protocol requires intent and, moreover, with regard to indiscriminate attacks, the element
of prior knowledge of the predictable result.”

The purpose of the prohibition on indiscriminate attacks is summarised by the ICRC
Commentary: “it confirms the unlawful character of certain regrettable practices during the
Second World War and subsequent armed conflicts. Far too often the purpose of attacks was
to destroy all life in a particular area or to raze a town to the ground without this resulting, in
most cases, in any substantial military advantages.” The indiscriminate attacks prohibited
in article 51(4)(a) and (b) seem to be primarily attacks carried out by attackers who ‘just
don’t care’. These attacks are planned and carried out by persons who seem not primarily
interested in trying to hit the military forces of their opponent, but just anything they can
hit regardless of its status or protection. This implies that these prohibited indiscriminate
attacks violate the distinction obligations as well as the military necessity principle because

46 See for example Ponti, and Moneta, for a discussion of prosecuting individuals criminally for indiscriminate attacks in the
context of the ICTY.
47 See Sandoz et al., para 1934 on p. 617.
no military advantage can be attained (unless it happens by accident) by attacks that are not directed at military objectives as prohibited in article 51(4) a and b. The attacks prohibited by article 51(4) sub c and the examples mentioned in article 51(5) a and b, on the other hand, are directed at a military objective, but are indiscriminate nonetheless.

The prohibition of indiscriminate attacks covers (i) attacks that fail to take into account whether the target may have a protected status under IHL; (2) attacks using means and methods that are indiscriminate; (3) attacks using means and methods whose effects cannot be contained (such as water, fire, poisonous wells); (4) attacks that fail to treat singular military objectives as separate targets but instead attack an area that also contains civilians and objects and (5) disproportionate attacks. The question remains whether there are more examples other than the five mentioned above. Not covered by the prohibition are attacks that have indiscriminate effects, but where not planned or executed in advance with the reasonable expectation that they would have these effects that seem indiscriminate in hindsight. This is an inherent characteristic of the way IHL works to prevent destructive effects of warfare on the civilian population. The fact that an attack may sometimes seem to have been indiscriminate in hindsight, judged by the destruction of civilian objects and injury to civilians it caused, can not be taken as the only basis to evaluate the legality of an attack because IHL does not prohibit the launching of an attack that was not reasonably expected to have these effects when it was planned. Rather, it could be the result of an honest mistake or weapons systems malfunction. In practice, it may be difficult to prove whether the attacker indeed had no reason to expect indiscriminate effects to result from the attack, but it would be impossible for military commanders to conduct attacks if they would be held responsible for the effects of an attack on the civilian population when at the time they were planning that attack, they had no reason to believe these effects would occur.

It has been noted that the way the prohibition of indiscriminate attacks has been drafted is “unsatisfactory” because it “confuses the distinction and proportionality principles.”49 This is because a disproportionate attack is explicitly mentioned as an example of an indiscriminate attacks. Since the latter category of attacks is referred to as attacks which “consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction”, this seems to intermingle distinction and proportionality. In the sequence of the planning and execution of an attack, it is indeed illogical to conclude that disproportionate attacks violate the distinction principle. It would have been clearer if the article would have recognised that once the attacker has distinguished between military objectives and civilian objects and the civilian population, and the attack has been directed strictly to a military objective, the principle of distinction has been complied with. The issue of the proportionality of the attack would subsequently be assessed without giving rise to the possibility that the distinction rule may be violated.

It seems in a broader sense, that the prohibition on indiscriminate attacks basically requires attackers to use the weapons they were entrusted wisely, and think before they act. The prohibition serves to remind any attacker that military necessity allows the use of means and methods in armed conflict, but that with the availability of weaponry, there is also a duty to only launch discriminate attacks. In general, military commanders can prevent their attacks from being indiscriminate by taking appropriate precautions in attack. Since the proportionality rule is also a precaution in itself, the following section discusses the place of the proportionality rule in the obligations with regard to precautions in attack.

**10.4 Precautions in Attack and Proportionality**

The proportionality rule is not only included in IHL as a prohibition in the context of indiscriminate attacks, but also as an obligation commanders need to take into account in the planning and execution of attacks. The obligations with regard to precautions in attack are wider however than only the proportionality rule. This section discusses the place of the IHL proportionality rule in the obligations with regard to precautionary measures. Section 10.4.1 introduces the issue, explaining the relation between the IHL proportionality rule and precautionary measures. In addition, the difference between active and passive precautionary measures is explained. Section 10.4.2 addresses the ‘feasibility’ standard that is included in a number of precautionary obligations. Section 10.4.3 discusses the personal scope of the obligation to take precautionary measures. and to what extent information needs to be collected by the persons who have the obligation to take precautionary measures. In addition, it is useful to reflect on the evaluation of precautionary measures. These general issues are examined in the following sections.

**10.4.1 Introduction**

The rule of proportionality in IHL is codified in the 1977 Additional Protocol I, as is discussed in Chapter 6. After it was formulated in the context of precautionary measures, it was subsequently copied to the article containing the prohibition of indiscriminate attacks. The proportionality rule is a precautionary measure in itself, in the sense that it is aimed at limiting collateral civilian damage during attacks. The precautions in attack are an important part of the targeting process described above. The precautionary measures fit in different phases of the targeting process and they guide the sequence of steps of which the targeting process is comprised. As Corn observes: “the precautions obligation will often involve more

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50 See generally: Corn 2014, Sassoli and Quintin, Queguiner 2006, Henderson pp. 155-196 and Van den Boogaard and Vermeer, which is partly based on this chapter as well as other chapters in Part IV. Furthermore, Section 10.4.6 of this chapter served as the basis of Van Den Boogaard 2018a.

objective considerations than application of the proportionality obligation: precautions involve a series of concrete steps in a coherent targeting process that can be applied in a systematic manner.” Therefore, the approach of precautionary measures is much more process-driven, resulting in an effective implementation of substantive rules of IHL. The suggestion that proportionality only needs to be assessed in either the precautions phase or at the time an attack is actually launched, must be rejected. Proportionality analysis must be done throughout the targeting process, from planning to the actually pushing of the button, and even beyond, during the execution of the attack.

The rules with regard to precautions in attack are codified in article 57 of API. Article 57 API is placed in Part IV of API, which has as its topic the “Civilian population” and the stated objective of Section I of this part of API is the “General Protection against the Effect of Hostilities”. Thus, without losing sight of considerations of military necessity, the provisions of this part of API must be read with that objective in the back of our heads. In addition, the ICRC has identified the precautionary measures as rules of customary IHL applicable in both international armed conflicts as in non-international armed conflicts. The precautions in attack obligations may be generally divided into two parts: a general obligation to take ‘constant care’ to spare the civilian population in military operations during armed conflict (Article 57 (1) API) and a list of specific obligations that operate to implement the general obligation during the specific situation of attacks (Article 57 (2) and (3) API). It must be noted in addition that precautionary obligations can also be derived from other rules, such as the specific regulations that apply for attacking works and installations containing dangerous forces “if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.” Corn suggests that the obligations to take precautionary

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54. Shamash, p. 112-113.
56. Article 57 (2) API reads: “With respect to attacks, the following precautions shall be taken:
   (a) those who plan or decide upon an attack shall:
      (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;
      (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;
      (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
   (b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
   (c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.”

   Article 57 (3) API reads: “When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.”

57. See article 56 API and Henckaerts & Doswald-Beck 2005a, Rule 42.
measures “should be understood to include a broad range of measures”\textsuperscript{58} that also includes measures such as training military lawyers in IHL and the targeting process.\textsuperscript{59}

Armed conflict is a situation during which all parties to it take turns in launching attacks, conducting a defensive move, and executing a counter attack. For an analysis of the context of the IHL proportionality rule, the focus is on the precautionary measures attackers are obliged to take in the conduct of their military operations. That does not take away the fact that parties to the conflict have a similar obligation when they are on the defending side. That obligation, codified in article 58 API, refers to the precautions against the effects of attacks, or ‘passive precautions’.\textsuperscript{60} It states that the parties to an armed conflict shall, to the maximum extent feasible:

a. Without prejudice to the prohibition of deportation of civilians, endeavour to remove the civilian population, individual civilians and civilian objects under their control from military objectives;

b. avoid locating military objectives within or near densely populated areas; and

c. take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.

Article 58 API is complemented by the prohibition of human shields as codified in article 51 (7) API.\textsuperscript{61} It has to be noted that although the obligations on precautionary measures against the effects in attack are worded quite clearly, they are also restricted by a specific reference to military necessity and the specific circumstances of the situation. Obligations of the passive precautions of the defender are thus restricted to doing that what is “to the maximum extent feasible”. Similar wordings appear in the obligations to take precautions in attack, as will be further elaborated below. Subsequently, the analysis turns to the obligation to take constant care for the protection of civilians in all military operations.

The precautions discussed below refer to the precautions to the dangers to the civilians on land. This follows from article 49 (3) API. However, article 57 (4) states that “[i]n the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.”

\textsuperscript{58} Corn 2014, p. 465.

\textsuperscript{59} Corn 2014, p. 465.

\textsuperscript{60} See Jensen.

\textsuperscript{61} Article 51(7) API reads: “[t]he presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not directly the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military objectives from attacks or to shield military operations.” This is also a rule of customary international humanitarian law applicable both in international armed conflicts as in non-international armed conflicts. See also Quéguiner 2006, p. 811-812 and Henckaerts and Doswald-Beck 2005a, Rule 22.
This provision serves to underscore that for operations between aircrafts, between war ships or among aircrafts and war ships, where collateral civilian damage is normally absent, the effects on the civilian population and civilian objects must nonetheless be taken into account.\textsuperscript{62}

\subsection*{10.4.2 ‘Feasible’ Precautions}

Some of the precautionary obligations of Article 57 AP I are contingent on an element of feasibility. This concerns the specific precautionary measures of article 57 (2) (a) (i) and article 57 (2) (a) (ii). According to the treaty text, the other precautionary obligations are not limited by a feasibility requirement, and thus at least in theory, these measures would have to be taken whether or not it is feasible to do so. The rules on precautions in attack in customary IHL as identified by the ICRC, however, seem to be inserting the element of feasibility equally in the latter group of obligations.\textsuperscript{63}

How the word ‘feasible’ must be understood is dependent on the respective specific precautionary measure it applies to. In general, however, it may be said that the word feasible must be understood as a reality check: it simply means that the obligation applies to the extent possible under the relevant circumstances. There is no absolute obligation for military commanders to do everything that is imaginable from the point of view of a larger planning staff that has all the information that may be found of the specific circumstances available and plenty of time to deliberate on all imaginable measures that could be taken to minimise civilian casualties. Rather, it depends on the circumstances: whether there is time-pressure, the availability of personnel to examine different options, the importance of the target, the tempo and moment of the ongoing operation, what the opponent is doing and so forth. There is a specific reference here to a military necessity exception and thus the obligation to take precautionary measures in order to avoid civilian collateral damage “is not absolute.”\textsuperscript{64}

But a genuine effort has to be made.\textsuperscript{65}

The ICRC proposed two alternatives in their draft-article on precautions in 1972: to use the words “ensure” and “all reasonable steps” in the text regarding the verification and proportionality obligations. With regard to the obligation on the choice of weapons and methods, the ICRC included the term “all necessary precautions”. Ultimately, however, the word ‘feasible’ was accepted by the majority of States and preferred over other words. The feasibility of the precautionary measures was consequently used consistently throughout.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{62} Sandoz et.al., para 2230, pp. 687-688.
\item \textsuperscript{63} Rule 15 reads: “In the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. \textit{All feasible precautions} must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.” (emphasis added) But arguably, that does not apply to the State parties to API for those precautionary measures that contain no specific reference to feasibility.
\item \textsuperscript{64} Fenrick 2001, p. 501.
\item \textsuperscript{65} Quéguiner 2006, p. 809-810.
\end{itemize}
\end{footnotesize}
the obligations for taking precautionary measures of those who plan or decide upon an attack. In particular it was felt that ‘feasible’ was preferred over ‘reasonable’, as it imposed “a higher positive obligation to take such measures.” On the other hand, it was decided that the word ‘ensure’ imposed a standard that was too strict. Therefore, the result is that the highest standard with regard to the protection of the civilian population that proved to be possible was that of feasibility. Of course, the protective standard of feasibility satisfies the general goal of IHL to protect civilians. Simultaneously, the word takes the principle of military necessity into account, because that principle inherently implies that damage to civilians and civilian objects has to be avoided in case it is not necessary to “weaken the military forces of the enemy”.67 The general obligation to take precautionary measures to spare the civilian population is thus an expression of restrictive military necessity.68 In addition, the use of the word ‘feasible’ recognizes that if military considerations do not allow to take precautionary measures, the attacker cannot be obliged to do so. The United Kingdom (UK) issued a declaration of understanding of the word feasible in this regard, which states that the word ‘feasible’ should be understood to mean “that which is practicable or practically possible, taking into account all the circumstances ruling at the time, including humanitarian and military considerations.”69 This explanation of the word feasible is subsequently used consistently by States.70 Moreover, the UK declaration has been inserted verbatim in Article 3(4) of the 1996 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended (Protocol II to the 1980 CCW Convention).71 Examples of which circumstances must be taken into account according to the UK may be found in the UK Military Manual and that same article of Protocol II to the 1980 CCW Convention. These circumstances include the importance of the target and the accuracy and radius of effect of the available weapons.72

It is clear that the rules on precautionary measures oblige the parties to the conflict to prefer the absolute avoidance of civilian losses over the acceptance that some civilian damage will occur and merely strive to minimise its magnitude. The feasibility requirement of the precautionary measures implies that such avoidance is dependent on the available resources during the conduct of the military operation. This may concern, in the case of air

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66 Sassòli and Quintin, p. 82. See also the commentary to Rule 15, noting that a standard of reasonableness is “a little less far-reaching” than that of feasibility.
67 St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (1868), para. 3.
68 Sassòli and Quintin note that “[t]he principle of military necessity as a prohibitive rule implies that civilian losses must be avoided whenever possible.” See Sassòli and Quintin, p. 75.
69 The United Kingdom’s declaration of understanding reprinted in Roberts and Guelff, n47, 511. See also Art 2 of the 1995 Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Conventional Weapons Convention) stipulating that feasible precautions include “practical measures”.
71 Article 3(4) Protocol II to CCW reads: “All feasible precautions shall be taken to protect civilians from the effects of weapons to which this Article applies. Feasible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.”
72 United Kingdom, Ministry of Defence, pp. 83-84.
warfare, the use of precision weapons, such as laser-guided missiles and drones. Indeed, in some situations the obligations of precaution “cannot be fulfilled without using precision guided weapons.”

Similarly, certain methods of warfare may be unfit to obtain destroy certain military objectives, and obtain the military advantage associated with that military objectives. For example, it may be impossible to attack a certain person in an urban area because the proportionality obligations preclude the use of a large artillery projectile in that area, and the only other option may be to send a squad of special forces. If such forces are unavailable to the military commander on the scene, the military objective is simply out of reach for the commander to attack, even if the military objective remains in the same place for an extended period of time.

10.4.3 Personal Scope

The next relevant general issue with regard to taking precautionary measures is the personal scope of the obligation, or, in other words: to who does the obligation apply? Whereas the general assumption is often that the obligations are placed in the hands of the military commander, the character of the precautionary measures is such that they would need to apply to a broader group of persons in order to meaningfully play their role. Boothby notes in this regard that “it may not always be realistic to expect subordinate level commanders to balance factors some of which are unknown to them.”

A number of States expressed their reluctance regarding an overly broad application of the precautionary obligations. For example, the Swiss government made a reservation upon ratification of API to the effect that “this provision only creates obligations for commanding officers at the level of battalion or group or above.” Furthermore, the Government of the UK made a statement upon ratification of API that the obligation to cancel or suspend the attack when it is not proportionate, only applies to “those who have the authority and practical possibility.”

However, it is equally true that subordinate level commanders may be faced with a situation which was not foreseen by higher level commanders, such as human shields, as may not be uncommon in the dynamics of today’s urban warfare. It may thus be that the commanders present on the scene are presented with a different picture than the one assumed by their superiors. In such cases, the subordinate level commanders are not absolved from their own responsibility to comply with the obligation to take feasible precautionary measures, if only to report the situation and to check whether their orders need to be adapted given the new information.

73 HPCR Manual on air and missile warfare, rule 8. See also Boothby, p. 124-125 and O. Gross, p. 1.
74 Boothby, p. 120.
75 Sandoz et al., para 2197, on p. 681. The declaration is now withdrawn.
76 The UK Declaration is available on the website of the ICRC, see https://www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=oA9E09F0aEE757CC2c56f402003f86D2
Henderson notes that “the obligations in article 57 API apply to all personnel who have the authority and practical possibility to affect the course of an attack.” Indeed, it is submitted that “the obligation to take precautions in attack applies to all forms of attack and “apply where they can be met” and they are not dependent on “the authority under rules, regulations and instructions.” Therefore, taking precautionary measures is required in all military operations and at every level of the military hierarchy and they must be taken by anyone who has the authority and practical possibility to do so.

10.4.4 Collecting Information

The civilian population is endangered as much by bad information as it is by bad decisions. An attack that complies with all precautionary measures may result in devastating effects for the civilian population if it is based on incorrect information with regard to the presence of civilians. Therefore, the basic obligations to take constant care and feasible precautions create a continuing duty “to assign a high priority to the collection, collation, evaluation and dissemination of timely target intelligence” with a view to making a decision pertaining to the planning or execution of further military operations. The intelligence that is gathered in advance of a military operation should therefore not only be focussed on information regarding the identification of military objectives and the military advantage of attacking them. Information on the context of the military objective must also be gathered, including particularly information on the likelihood of damage to civilian objects and civilian casualties.

It is obvious that responsible military commanders prefer to base their decisions on a complete picture of the situation in the area where they are conducting their operations. It is however unrealistic to expect that picture to be complete and a further blurring occurs by the chaos that is inherent to armed conflict. It is therefore submitted that the available information and decisions following from it must be assessed in accordance with a standard of reasonableness. Commanders must take decisions during their operations and they are not always in the luxurious position that they can rely on information collected, analysed and combined in real-time by a variety of sophisticated sensors. For most NSAGs, advanced systems gathering information on the activities of the adversary on the battlefield may be

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77  Henderson, p. 157.
78  Henderson, p. 159.
79  Henderson, p. 160.
80  Sassoli and Quintin, p. 111.
82  See also Section 11.2 below.
83  Bothe et al., p. 405.
absent in its entirety. Nonetheless, those deciding are obliged to “make a reasonable effort to discover pertinent information.”\textsuperscript{84} Hence, the ‘reasonable military commander’ approach can be equally applied to the obligation to take precautionary measures.\textsuperscript{85}

According to the ICRC Study on Customary IHL, decisions with regard to precautions in attack must be based on “the information from all sources which is available [...] at the relevant time.”\textsuperscript{86} The ICRC has taken the position that the endeavours of acquiring information on which decisions are based “must be made in good faith and in view of all information that can be said to be reasonably available in the specific situation.”\textsuperscript{87}

Ultimately, the collection of information is extremely situational dependent. Even military forces equipped with the most modern weapons and surveillance systems do not always have these assets available to reach absolute certainty on whether an object constitutes a military objective. It must be realised that the law does not require absolute certainty for those planning and deciding on attacks. But that does not give commanders a free pass to merely rely on speculations or assumptions when planning military operations, but rather an increased duty to verify information as it becomes available in the course of an operation. The information on which a decision is based must therefore be up to date, which means that it must be as current as can reasonably be expected given the circumstances, which also means that the capacity and capability to verify play an important role. The collection of the information must in particular be aimed at verifying the nature and location of the military objective, the presence of civilians, and the likelihood of a meaningful change in these circumstances. This also implies that it is not at all times required to update the information continuously, although drones and other technological developments may be able to provide real time information in today’s conflicts which enhance “considerably the possibility of gleaning accurate information about the battlefield.”\textsuperscript{88} However, military forces equipped with more limited operational capabilities as far as the available reconnaissance and observation systems are concerned, cannot always be expected to be able to implement their precautionary obligations to the same level of parties to the conflict equipped with more advanced weapons systems.

\textsuperscript{84} P. Barber, p. 689, adding that “[i]t is not possible to determine exactly what ‘everything feasible’ incorporates, but if normal intelligence gathering methods that had proven reliable in the past had been used on this occasion, it is probable that this would meet the required standard. If normal intelligence methods were ignored or not used when available, then it is likely that liability could ensue.” In support of this position, see Schmitt 2007, p. 163, and Henderson, p. 165. In support of the application of the feasible standard to the commander in case of lack of information, see Sassòli and Quintin, p. 82-83.

\textsuperscript{85} See Chapter 11.

\textsuperscript{86} Rule 15, Henckaerts and Doswald-Beck 2005a, p. 55.

\textsuperscript{87} Melzer 2009, p. 75.

\textsuperscript{88} Dinstein 2010, p. 140.
10.4.5 The Obligation of Constant Care

The objective of Section I of Part IV of API is repeated in the body of the text of article 57, in the first paragraph, stating that “in the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.” Furthermore, with regard to non-international armed conflict, note should be taken of Article 13(i) APII, which reads: “The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations.”

The obligation to take constant care is not intended to lead to the conclusion that civilians may not be affected by military operations at all. As Dinstein observed: “[c]ivilians almost always suffer in wartime. [...] In wartime, there are inevitable scarcities of foodstuffs (indeed food, clothing, petrol and other essentials may be actually be rationed); buses and trains may not run on time, curfews and blackouts may impinge on the quality of life, etc.”

In addition, the malfunction of a weapons system, human errors and faulty intelligence may cause much suffering among the civilian population, but is not necessarily caused by a lack of taking precautionary measures.

The general obligation of taking constant care has a broader scope than the remaining specific precautionary measures. According to the text of the article, as well as rule 15 identified by the ICRC Customary IHL Study, the obligation of constant care applies to the broader concept of ‘military operations’, whereas the application of the other specific precautionary measures is restricted to the special military operation of ‘attacks’. Attacks are specifically defined in article 49 API, whereas the term military operations is not defined in API. In general, however, other military operations than attacks could include sweeping mines or other explosives; detention operations and logistic operations. Some types of military operations, such as simply moving a unit from one location to another, may sometimes be merely a logistical affair, whereas sometimes it is used as a manoeuvre in an offensive operation. In the first situation, it may be no problem that a road through a populated area is used, whereas in the latter situation, it may be better to use a route that avoids populated areas. In the latter situation, the ‘active’ precautionary measures of article 57 coincide with the obligations of ‘passive’ precautionary measures of article 58 API.

Quéguiner makes the point that the obligation constitutes an independent legal obligation and cannot be seen as “merely inspirational” to the other more concrete precautionary measures. Thus, despite its general wording, the obligation to take constant care of the civilian population expresses the obligation for commanders to reconsider, even when an operation would lead to proportionate civilian damage. And as such the rule is

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89  Dinstein 2010, p. 135.
90  Dinstein 2010, p. 135.
91  The ICRC Commentary states that: “The term "military operations" should be understood to mean any movements, manoeuvres and other activities whatsoever carried out by the armed forces with a view to combat”. see Sandoz et al., para. 2191 on p. 680.
92  Quéguiner 2006, pp. 796-797.
meant to provide an additional layer of protection for the civilian population during military operations.

10.4.6 Specific Precautionary Obligations

The first, and crucial specific precautionary measure is codified in article 57(2)(a)(i) AP I. It deals with the obligation to verify whether a planned target is indeed a military objective. It states that with respect to attacks, those who plan or decide upon an attack shall "do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them". The rule is also identified as a rule of customary IHL. This precautionary measure works to reinforce more specifically the general obligation to take constant care to spare the civilian obligation. Therefore, it dictates that attacks must be aimed at military objectives. This obligation is therefore closely associated with the principle of distinction. Furthermore, special protections that apply to persons and objects also need to be taken into account. This concerns in particular medical units (Article 12 AP I), cultural objects and places of worship (Article 53 AP I) and works and installations containing dangerous forces (Article 56 AP I).

The second specific precaution provides that all feasible precautions need to be taken with a view to avoiding, and in any event to minimise collateral damage, emphasizing the overall goal of precautions in attack. It underlines that in the course of planning or deciding on an attack, it must be contemplated whether it is possible to avoid affecting the civilian population in achieving the military objective of an attack. The ICRC Customary Law Study states that "[t]his rule must be applied independently of the simultaneous application of the principle of proportionality" as included in rule 14 of the Study. This means that it is not sufficient to stay within the parameters that the proportionality principle prescribes, but that also a good-faith effort needs to be carried out to avoid collateral damage in the first place. When the military advantage that is sought cannot be achieved without injuring civilians and causing damage to civilian objects, the rule dictates that the choice of means and methods of attack must be adapted, if feasible, in order to minimise the collateral damage. One may question the scope of this obligation. Obviously, as was mentioned above, the required standard is that the precautions must be ‘feasible’. This means that the feasibility depends on the availability of options with regard to the weapons that can be used (bigger or smaller explosive, detonation before or upon impact or delayed-fuse etc.), or the

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93 See Henckaerts and Doswald-Beck 2005a, Rule 16.
94 See Article 57(2)(a)(ii) AP I and Rule 17 (ii), in Henckaerts and Doswald-Beck: “those who plan or decide upon shall - take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects”
95 Henckaerts and Doswald-Beck 2005a, p. 57.
The third specific precautionary obligation states in Subparagraph (2)(b) of Article 57 AP I that an attack shall be cancelled or suspended if it becomes apparent that:

1. the objective is not a military one, or
2. is subject to special protection, or
3. the effect is expected to be disproportionate

This obligation imposes a continued obligation to monitor the objective under attack and it tells the military commander that the responsibility to minimise damage to the civilian population does not end once the attack has been initiated. Instead, the commander must, also when the attack has long been underway, continue to consider its effects on (1) the civilian population and (2) objects and persons under special protection. These persons could also include wounded adversaries. In addition, the military commander needs to continuously monitor that the expected further damage that will be done to civilian infrastructure and the civilian casualties the further execution of the attack may be expected to cause, is still not excessive compared to the military advantage of the attack.

In a military headquarters where a large attack is being commanded, there may be a massive amount of information coming in that cannot always be expected to be processed, analysed and re-distributed timely to realistically change the existing plan of attack. The new information may however lead to the conclusion that the target of the attack is not a military objective, or subject to special protection. This may result in a new obligation for the commander to suspend or cancel the attack, if that is possible, or to the obligation to abort the attack when it is already (partly) under way. This may be very difficult for certain types of weapons systems, such as loitering ‘fire and forget’ systems.

A second factor, apart from the availability of new information, that may invoke the application of subparagraph b, is the factual development of an attack. When viewed on the operational level, the success, or lack of success, of other parts of the attack may lead to the conclusion that the proportionality equation has changed so considerably, that it may become illegal to further pursue the planned attack. This may be the result of the fact that the military advantage that was expected from the attack has either already been attained, or because it became evident that it has become impossible to attain that military advantage at all. When the proportionality equation has shifted sufficiently significant in that situation, the attack must be discontinued.

A fourth specific precautionary obligation is found in Article 57 (2) (c) AP I, which provides that “effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.” This rule is also of a customary nature in
both international and non-international armed conflicts according to the ICRC Customary
Law Study.\textsuperscript{96}

The objective of warning the civilian population is “to give civilians the chance to protect
themselves”\textsuperscript{97} in situations where an impeding attack may put them into danger. Therefore,
the obligation extends to situations where it is uncertain whether civilians will be affected
by the attack and that the attack is expected to result in more than only inconveniences.
To achieve that objective, it is essential that the duty to give warning is taken into account
throughout the different stages of the targeting process, and deliberated continuously as an
inherent part of the process of choosing between the available options of attack. Warnings
are potentially most effective during operations against targets that are situated in populated
areas. This however does not relieve attackers from their duty to warn before attacking a
military objective where a small number of civilians is expected to be present. An important
element of the duty to warn is that the warning must be ‘effective’. Whether a warning may be
considered effective depends on the circumstances of the planned attack. The has been stated
in this context that: “effectiveness must be judged from the perspective of the concerned
civilians, namely whether the warning enables them to actually take measures enhancing
their protection against the danger arising from military operations.”\textsuperscript{98} These warnings may
be general or, unless circumstances do not permit, specific. The warning must preferably be
clear, timely and not consist of misleading or unclear instructions to the civilian population
how they may escape from being affected by an impeding attack.

An example of circumstances that ‘do not permit’ the attacker to warn the civilian
population is a situation in which the accomplishment of the mission depends on the
element of surprise. Of course, although warning the civilian population of an upcoming
bombardment allows them to escape from the effects of the attack, the same goes for
soldiers of opposing forces. Therefore, the element of surprising the enemy may often be
applicable in situations aiming to kill members of enemy forces. Therefore, the duty to warn
is more likely to arise in situations where military objectives are targeted that are not easily
relocated. In addition, a warning is not required if issuing the warning would jeopardise
the safety of the attacking forces if the situation leaves no time for the attacker to issue a
warning. However, also in situations of a time-sensitive attack, the military advantage of
attacking the military objective concerned must be sufficient in order to justify refraining
from issuing a warning. Here, the more general rule of Article 57(1) AP I to take constant
care to spare the civilian population comes into play, as well as Article 57(2)(a)(ii) AP I. A final
exception to the obligation to issue an effective warning is the situation in which giving
a warning is simply impossible. After all, in some situations there are simply no realistic
options to convey a warning to the civilian population.

\textsuperscript{96} Henckaerts and Doswald-Beck 2005a, Rule 20. This section served as the basis of Van Den Boogaard 2018a.
\textsuperscript{97} Sandoz et al., para 2225, on p. 687.
\textsuperscript{98} Presentation of an expert during a meeting of the ILA Expert Group “The conduct of hostilities under international
humanitarian law - challenges of 21st century warfare” in November 2013, on file with the author.
Warnings give the civilian population the possibility to leave an area where hostilities are planned to take place. Putting measures in place to warn the civilian population is thus an important component of the process of planning military operations, particularly in urban areas. However, even in a pre-planned operation, the exact location of intense fighting may not always be predictable since it is dependent also on the conduct of the opposing forces. Still, the obligation to warn can only be meaningfully fulfilled if several options to warn the civilian population are taken into account before an operation is launched. It seems therefore mandatory for military commanders or planners to include methods that would enable the civilian population to be warned in the planning process of any future operations.99

There is a clear relation between the duty to warn and the proportionality rule. First, like the other obligations to take precautions in attack in order to minimise civilian casualties or damage, the obligation to warn the civilian is a practical measure that enables military commanders to implement the principles of distinction and proportionality and it thus increases the protection of the civilian population. There is however an additional relationship between the obligation to issue an effective warning and the proportionality rule under IHL. It may be that it follows from the proportionality assessment that the civilian collateral damage of a certain attack is excessive compared to the expected military gain. If however, after a specific warning the civilian population has largely left the area, the residual collateral damage may be deemed no longer to be excessive. This effective warning may thus have made an attack legally possible that would otherwise have been illegal because of excessive collateral damage. An ironic fact is that those civilian casualties that do result from this attack, would not have occurred when no warning would have been given, because then it may have been assumed that the military commander would have cancelled the attack. As such, however, that is certainly within the boundaries of IHL. In fact, assuming that an effective warning has led to the evacuation of the civilian population from an area where subsequently hostilities take place is beneficial from an operational point of view. This is because the fact that the number of civilians present in the area has decreased also increased the attackers’ possibilities to conduct attacks on the adversary, since there are fewer civilians present. The obligation to warn is thus also a “useful tool in the hands of commanders for gaining more freedom of action.”100

The last specific precautionary measure contained in article 57 API refers implicitly to the proportionality rule. Article 57(3) and Rule 21 of the ICRC’s Customary IHL Study reads: “[w]hen a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.” The rule is formulated identical in its conventional and customary IHL version. This rule therefore deals with ‘target selection’, and is in many ways challenging to apply.

99 As Corn notes: “The feasibility for issuing warnings prior to attack, to include when, how, and to whom, should be factored into all courses of action, and not just raised as a consideration after they have been developed.” See Corn 2014, p. 439.
100 Baruch and Neumann, p. 373.
First of all, for this rule to be applicable, military commanders would need to identify lawful military objectives that have a similar military advantage. This may seem easy if identical military objectives are planned to be attacked, such as two tanks. But even in this simple example, there may be a larger military advantage in attacking the tank in the front of a column, because the military advantage that follows from the attack is both the destruction of the tank, and the blockade of the road by that tank. In this context, the focus must be not only on the military advantage of destroying the target, but on the expected effect of attacking the planned targets. In the example of the tank, the effect of destroying the first tank while a column of military vehicles is crossing a bridge or a dam is much more than only the destruction of the tank, since it may result in halting the column for a considerable time, perhaps even pinning it down, which would make it easy to destroy the other tanks.

10.4.7 Sub-Conclusion

The precautions in attack consist of a number of coherent legal obligations, which form an extensive framework of checks the commander needs to take into account in order to shield civilians and civilian objects from the effects of hostilities.\footnote{See for example Rogers’ checklist, Rogers 2004, pp. 113-117.} The proportionality rule is only one of these measures. Even in the event all precautionary requirements are complied with, “there is an additional obligation not to undertake the attack if it is apparent that the civilian losses and damage to civilian objects are likely to be excessive in light of the anticipated military advantage.”\footnote{Gardam 2004, p. 98.} Conversely, in case an attacker has refrained from taking the practicable possible precautions, a proportionate attack may still lead to a violation of the precautions rule, if civilian casualties and damage could have been avoided or minimised by taking precautionary measures.\footnote{Margalit, p. 158.} One could say that in this regard that the proportionality rule is a secondary rule that only enters the scene when it is impossible to take precautionary measures which are expected to avoid collateral damage.

10.5 Proportionality in Context

The rules concerning targeting, indiscriminate attacks and the duty to take precautions in attack are obviously also rules of common sense for professional soldiers. Minimising civilian casualties and damage to civilian objects is consistent with professional military values simply because it does not bring about any military advantage, or, as some argue, consistent with a principle of chivalry.\footnote{Gill 2013, p. 43.} Given the sequence of steps in targeting procedures
as explained above, the proportionality assessment must be made several times during the
process of planning and executing an attack. If it is clear at the outset of a targeting process
that a planned attack is expected to cause excessive collateral damage, it would be pointless
to continue planning the attack. This concerns the precautionary proportionality rule of
article 57 (2) (a) (iii) API. Furthermore, proportionality is the final check before the attack
is carried out, as contained in the prohibition of article 51 (5) (b) API. Lastly, even after it
has been decided that the attack is launched, the proportionality rule remains applicable.
If it becomes clear during the execution phase of an attack that excessive civilian damage is
expected, article 57 (2) (b) API dictates that the attack must be cancelled or suspended.

Seen from the viewpoint of a military commander who is engaged in armed conflict,
there are a number of courses of action he (or she) could take. Even during armed conflict,
commanders may be passive and wait until an attack occurs on their unit and fight back when
that happens or they could be active and plan and subsequently launch an attack themselves.
Which course of action is taken, obviously also depends on the actions of the opposing
force and the orders handed down from the chain of command. These are all operational
considerations, but the IHL proportionality rule must be considered in all these situations.
However the question remains how the proportionality rule may be applied in practice. To
shed more light on that question, the next step is to analyse the different components that
play a role in the proportionality assessment. Heated debates in literature concerning the
interpretation of these components show that the application of the IHL proportionality
rule in practice is no simple task.
Chapter 11
Chapter 11: Components of the Equation

“Somebody thinking in terms of collateral damage must be a bad guy, a cold technocrat being ready to sacrifice innocent lives on the altar of military efficiency.”

“the law of proportionality, deciding what attacks are permissible, is far too vague to be useful, and leads to experts on different sides talking past each other.”

11.1 Introduction

The proportionality rule in IHL requires a balancing act between the anticipated military advantage and the expected incidental damage. As a result, the answer to the question of whether an attack complies with the IHL rule of proportionality is dependent on the interpretation of these two components. For example, there is discussion about civilians who, be it voluntary or involuntary, by their presence are shielding a legitimate military objective from attack. On which side of the proportionality equation should they be included? Also, there is disagreement about the issue of whether opponents who are hors de combat should be taken into account in the proportionality equation as incidental damage.

But the discussion is broader than just that, because also other parts of the definition of the IHL proportionality rule may be discussed. The disagreement on the components of the IHL proportionality rule is exemplified by the large amount of literature that deals with the subject and the converging opinions therein. Before it is possible to determine how the IHL proportionality rule may be applied in practice, which is during military operations in armed conflicts, a thorough understanding of all components of the equation is required. Even if it turns out that it is impossible to provide a simple flowchart for applying the IHL

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1 Oeter 2010, p. 167-194.
3 See for example the discussion in Schmitt 2009, p. 330-332.
4 See for example Henderson, p. 206.
5 The issue was also mentioned by the ICTY Prosecutor in the ICTY OTP Kosovo report. It stated that there are four unresolved issues that must be addressed for the purpose of the application of the IHL proportionality rule: “(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 totalling 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?” See Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (ICTY OTP Kosovo report), available online: http://www.icty.org/x/file/Press/nato061300.pdf. See also Fenrick 2000, p. 75.
proportionality rule, commanders need to know which factors need to be taken into account and how these should be valued.\(^6\)

The aim of this chapter is to assess the different factors which comprise the IHL proportionality rule. Recalling the definition as provided for in API, an attack is considered to violate the IHL proportionality rule if it “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” Therefore, Section 11.2 looks into the personal scope of the rule: who is bound to apply the IHL proportionality rule? Since the IHL proportionality rule applies to attacks, Section 11.3 assesses how the notion of an attack is defined. Section 11.4 analyses what it means that the civilian casualties and damage included in the equation are labelled as ‘incidental’. Section 11.5 looks into the temporal scope of the IHL proportionality rule, assessing whether only immediate damage may be counted as increasing the military advantage or collateral damage of a planned attack, or more distant consequences of an attack must also be taken into account. The civilian side, the first of the two major parts of the IHL proportionality equation, is assessed in Section 11.6 (persons) and 11.7 (objects). It is assessed in Section 11.8 whether there are other objects and persons than the strict civilian ones that must be included on the civilian side of the proportionality equation. Section 11.9 looks into the question of how a ‘combination’ of the respective civilian factors must be evaluated. Section 11.10 analyses the other major component of the IHL proportionality rule: the military advantage.

11.2 The Personal Scope

The first question to be answered is the question of who exactly is “planning”, “deciding on” or “executing” an attack, because according to the rule, that person is also the one obliged to conducting the proportionality equation. In this context, a distinction can be drawn between the question of who is making the assessment and the question of what this person needs to take into account. The answer to these questions is very dependent on the type of attack and the level of command on which this person is situated. Section 13.2.1 assesses who must conduct a proportionality assessment. Section 13.2.2 subsequently assesses whether a concerted string of attacks that may result in civilian casualties or damage to civilian objects in different phases and on different locations, must be assessed only on an attack-to-attack basis, or that a more comprehensive proportionality analysis is required. Section 13.2.3 provides a short analysis of proportionality calculations on a strategic level.

\[^6\] In the words of Geiss, the proportionality calculation “requires fixed points of reference. Otherwise it would be impossible to carry out the balancing judgment that the proportionality principle requires.” Geiss 2012, p. 86.
11.2.1 Who Conducts the Proportionality Equation?

States are the primary objects of international law. As such they conclude treaties and are bound by the rules of the treaties they ratified, including the IHL proportionality rule. Furthermore, States are bound by the rules that follow from the other sources of international law, including the customary rule on proportionality in IHL. In reality, of course, the IHL proportionality rule is implemented by State agents, or by members of a non-State party to the conflict. According to article 57 (2) (a) API, the persons who are responsible to conduct the proportionality equation are “those who plan or decide upon an attack”. At first sight, this seems to exclude the person who actually executes the attack, in situations where this is a different person. However, article 57 (2) (b) API states that the “attack shall be cancelled or suspended if it becomes apparent that (...) the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” This implies that from the moment the attack is actually under way, the responsibility no longer rests with the planner of the attack. Instead, the responsibility to monitor whether the attack continues to comply with the IHL proportionality rule shifts to the executor of the attack in those situations where this is a different individual. This executor may be situated at a lower level than the planner or commander who has ordered the attack.

If an attack is a single airstrike on a pre-planned military objective, military planners assess the components of the IHL proportionality equation before submission of the target to the commander for approval. This can take place long before an attack is actually launched, although information needs to be updated before it is decided it can go ahead. But if the target is a civilian house from which an infantry platoon has unexpectedly come under fire during a foot patrol, the platoon commander, or even a lower commander who is present on the spot, will be responsible for the proportionality calculation, if the decision is made to return fire and attack the house. It must thus not be ruled out that in the execution of an attack, the responsibility may rest on one individual soldier, a pilot or a forward air controller.\(^7\)\(^8\)

The obligation to conduct the proportionality calculation, preceding the decision to attack, may sometimes for reasons of policy be placed higher in the chain of command: not only up to the level of generals, but some decisions are referred to the Minister of Defence, or a Head of State. As a quite extreme example, it was claimed that some targeting decisions

\(\text{7 As an example: picture a situation in which a squad of soldiers tries to attack a man with a gun in his house. After the man returns fire, the room is attacked by two fragmentation hand grenades, killing the man, five children and wounding four women and children. In this situation, which is derived from an actual event involving Australian soldiers and an Afghan man in 2010, the soldiers tossing the grenades are required to conduct a proportionality assessment themselves. See: http://www.smh.com.au/national/lost-in-the-fog-of-war-20120211-1s5br.html.}\)

\(\text{8 The forward air controller (FAC) is also known as a ‘JTAC’, which stands for a Joint Terminal Attack Controller. Both terms mean a member of the armed forces who is trained to direct aerial attacks from the air from a forward position for example to enable close air support to a ground unit.}\)
during Operation Allied Force in 1999 “finally ended up on President Clinton’s desk for his approval”.9

The ICRC Commentary is helpful to interpret this provision of API. It states that:

“Some considered that the introductory words (“those who plan or decide upon an attack”) could lay a heavy burden of responsibility on subordinate officers who are not always capable of taking such decisions, which should really fall upon higher ranking officers. This view is not without grounds, but it is clear that a very large majority of delegations at the Diplomatic Conference wished to cover all situations with a single provision, including those which may arise during close combat where commanding officers, even those of subordinate rank, may have to take very serious decisions regarding the fate of the civilian population and civilian objects. It clearly follows that the high command of an army has the duty to instruct personnel adequately so that the latter, even if of low rank, can act correctly in the situations envisaged”10

The observation in the ICRC Commentary seems valid. Even though subordinate officers may not always have the authority to execute some types of attacks, the other side of the coin is that there is not always time to ‘phone home’ for any targeting decision that could lead to collateral damage, especially not for those on-scene commanders who are in the midst of a battle. Although Switzerland made a reservation to article 57 (2) API, according to which this provision only creates obligations for commanding officers at the level of battalion or group or above,11 this reservation was revoked in June 2005.12

It seems logical to assume that one can only make decisions with regard to the degree to which a certain attack is proportionate if the person involved has sufficient access to information to make an informed decision. It is therefore also logical that an individual soldier does not have the oversight to be able to identify the role of the attack that he is ordered to execute in a larger framework, as, for example, the battalion commander has. On the other hand, the individual soldier on the scene may be better placed to anticipate the number of civilians that may be affected by an attack than a battalion commander who is situated in his command post. If the information of the individual soldier is different than the information that was briefed to him by his superiors, it is his responsibility to act upon that information. Tension may exist in that situation between the orders the soldiers received and their IHL-based legal obligations. Time is also a crucial factor. Time-sensitive targets, or when a unit is under attack itself, would arguably justify a less elaborate proportionality calculation, because the reasonable options to obtain conclusive information on expected

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9 See Clark, pp. 203.
10 Sandoz et al., paragraph 2197.
11 Sandoz et al., paragraph 2197, note 5. A similar statement appears in Switzerland’s Basic Military Manual (1987), which states: “During every attack, commanding officers at the battalion or group level, and those of higher ranks, shall see to it that the civilian population … does not suffer any damage.” See http://www.icrc.org/customary-ihl/eng/docs/v2_rul_ ruler15.
military advantage and potential collateral damage are limited. Nonetheless, it is particularly in the midst of combat, that IHL obligations, including the IHL proportionality rule, need to be applied and complied with.

Furthermore, the level of decision making is very much dependent on the type of military operation, and the level of sophistication of the available weaponry. After all, the weaponry of an infantry unit is very different from that of an artillery unit or an attack helicopter. The proximity to the battlefield is not always relevant: if an attack is executed by an operator who is flying an armed drone, it could be that the person who is executing the attack is physically dislocated from the place of the attack. For the purpose of the IHL obligations, there is however no difference between the position of the drone-operator and a jet-pilot.\(^{13}\) The level of communication and control that is possible, also implies that if the communication is sufficiently sophisticated to enable having actual ‘eyes on target’ from a distance of thousands of kilometres, it could in theory also be possible that decisions to attack are made at a higher level, possibly even up to the political level. A possibly more problematic scenario is that where an autonomous weapons system is capable of attacking without human intervention. In that situation, the case could be made that the person responsible for the proportionality equation is the person who decided that the system would be deployed, or even the person who wrote the software code on which the decisions of the system are based. Technological developments seem to point in the direction that in the future, autonomous weapons systems deployed with artificial intelligence software will be capable of independently conducting a proportionality assessment and deciding to launch an attack. In a complex environment where civilians and military objectives are intermingled and circumstances change quickly, the person who deployed the system is unable to conduct the proportionality assessment. Whether future autonomous weapons systems will be able to conduct a proportionality assessment in accordance with the restraints dictated by IHL under these circumstances is still unclear.\(^{14}\)

### 11.2.2 Levels of Authority

A general division of the tiers of command or authority in a military organisation is the distinction between the strategic, operational and tactical level. The strategic command is the higher command, overseeing the big picture, where the tactical level relates to the lower level of command.\(^{15}\) The operational level is the intermediate level. In simple terms:

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\(^{13}\) In practice, there may be many differences. The drone operator is not in danger himself, being located elsewhere than the drone. The fighter pilot however is sometimes able to get his own eyes on target and look at the bigger picture. But in legal terms, their obligations under the IHL proportionality rule are equal.

\(^{14}\) See generally Van Den Boogaard 2015.

\(^{15}\) NATO defines the levels as follows: The strategic level: The level at which a nation or group of nations determines national or multinational security objectives and deploys national, including military, resources to achieve them. The operational level: The level at which campaigns and major operations are planned, conducted and sustained to accomplish strategic objectives within theatres or areas of operations. The tactical level: The level at which activities, battles and engagements
at the tactical level, a commander needs to take decisions incident-by-incident. At the operational level, the commander plans and decides on an attack-by-attack basis, involving different types of units operating in a concerted manner. At the strategic level, decisions regard the overall military campaign. In addition, a ‘grand strategic’ or political level could be defined to which may be referred in questions regarding the *ius ad bellum*, which is thus outside the scope of IHL. Decisions on the political level are motivated not only by military considerations, but also, if not predominantly, by political motives, such as conducting an attack to strengthen the position of a political leader.

Depending on the level on which a proportionality analysis is undertaken, that person also needs to assess the expected military advantage and collateral damage corresponding to that level of authority, which corresponds to “whatever level the regulated functions are being performed.” The type of military advantage and collateral damage to be taken into account may thus differ on the corresponding levels. However, some States interpret the military advantage expected from a tactical attack rather broadly. According to the 2002 United States Joint Doctrine for Targeting, for example, the military advantage of an attack “is not restricted to tactical gains, but is linked to the full context of a war strategy.”

Already during the diplomatic conference leading to the adoption of API, there was controversy on the level on which the components of the proportionality equation need to be assessed. This controversy lead to a number of declarations and reservations made by States ratifying API, such as the declaration of Canada, that it “is the understanding of the Government of Canada in relation to subparagraph 5(b) of Article 51, paragraph 2 of Article 52, and clause 2(a) (iii) of article 57 that the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not from isolated or particular parts of the attack.”

The text of the Canadian declaration seems to imply that the decisions with regard to the proportionality of an attack are reserved to the higher levels of command, corresponding to the operational level. This seems to be based on the premise that a group-commander or platoon-commander on the tactical level may not have the necessary knowledge to assess whether a particular attack would be (dis-)proportionate given the importance of the military advantage that is sought by the operation as a whole. The declarations are inspired by the

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17 Sloane, p. 315.
18 See for example the discussion in Else, pp. 200-206.
19 United States Joint Targeting Doctrine, Joint Publication 3-60, published 17 January 2002, page A2 of Appendix A, available online: http://www.bits.de/NRANEU/others/jp-doctrine/jp3_60(02).pdf. See also “For the US military, the expected incidental civilian damage and the anticipated military advantage must be analysed in light of the strategic needs of the relevant armed conflict” Olasolo, p. 182-183, quoting Hays Parks 1982 and Carnahan, p. 866. However, Olasolo identifies a trend that also the US is conducting proportionality analysis at an operational level. Olasolo 186-188.
20 Similar declarations were made by Australia, Belgium, Germany, Italy, Ireland, the Netherlands, New Zealand, Spain, and the United Kingdom. See Roberts and Guelff, p. 501. The declarations are also available on www.icrc.org.
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historical example of the attacks on the Calais area in June 1944. Nowadays, many of these attacks would probably be labelled as disproportionate, but they were meant as a diversion and as such they were part of the overall invasion plan in Normandy. This seems to imply that a disproportionate attack on a tactical level would be legal as long as the operational or even strategic operation, of which the tactical attack is a part, is not expected to cause excessive collateral civilian damage. It must be noted that the reservations are directed not to the entire proportionality equation, but to the estimation of the expected military advantage, which is only one of the components of the proportionality equation. The declarations and reservations to API, as mentioned above, seem to be based on the preference that targeting decisions involving collateral damage (of a certain level) should be made by higher-ranking officers with a certain degree of oversight, for example on the operational level. The declarations make sense from the perspective of a State that wishes to retain the flexibility to conduct a minor disproportionate attack that is linked to a subsequent larger attack with lower collateral damage, thus leaving the attack as a whole (consisting of different phases) proportionate. There is some support for this in doctrine.

However, it is submitted that conducting a proportionality assessment on the operational level alone is insufficient to meet the requirements of the IHL rule on proportionality. Instead, it is submitted that the IHL proportionality rule must be applied on all levels of command and the calculation must be therefore be conducted separately on each of those levels. This is true because restricting the proportionality equation to the operational level is at odds with the conclusion in the previous section that the obligation to conduct a proportionality assessment may rest on very different persons, situated at very different levels of command. Individual soldiers and on-scene commanders may be unable to conduct a proportionality analysis on the strategic or operational level, because there is insufficient information for them on their level. But the same is true vice versa: the tactical situation may look very different than anticipated at the operational level. The obligation to conduct a proportionality calculation, even a very basic one, must therefore be placed on anyone who approves, or takes the ultimate decision to execute the attack. As a result, in terms of responsibility and accountability, it depends on the exact circumstances of the attack to determine who required to conducting a proportionality assessment of a planned attack.

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22 However, it seems unlikely that the final estimation of the expected military advantage of a certain attack is decided upon by a different person than the proportionality equation as a whole. See also below, Section 11.10.

23 Olasolo suggests that proportionality assessments must be carried out in a broader context than a single attack. He points out that military personnel that can carefully conduct the targeting decision making process is not usually allocated to the platoon- or company-level. He concludes that “the fact that the position favouring the proportionality analysis at the tactical level has gained support in recent years does not mean that IHL currently requires application of the proportionality rule at this level.” See Olasolo, p. 179.

24 Presumably, this is the person who in the words of Henderson has “effective control over the attack.” See Henderson, p. 235.
The ICRC Commentary to API regarding the precautionary measures confirms the validity of the critique against the approach to focus exclusively on the overall military advantage in a proportionality assessment. The Commentary states that “[t]his article [i.e. article 57, (2)(a) (iii)], like Article 51 (Protection of the civilian population), is not concerned with strategic objectives but with the means to be used in a specific tactical operation.” 25 The text of the reservations and declarations on the level to decide on the proportionality of an attack, it is submitted, contradicts the IHL obligations for some types of attack, such as operations of Special Forces, operations of infantry units in close combat in an urban area, and of pilots of attack-helicopters. Also, many situations may be envisaged in non-international armed conflicts with small units of a non-state armed group conducting attacks. It must be clear that the IHL proportionality rule applies throughout all stages of an attack in all types of armed conflicts, from the planning to the execution phases, and that there is a continuous need to remain conducting the calculation. 26

It is therefore submitted that as a minimum, proportionality assessments must also be conducted on the tactical level. It may be argued that this assessment is redundant when the on-scene commander is certain that the tactical situation corresponds with what was expected on the operational level. It is submitted that amidst situations of hostilities, that is an extremely exceptional situation. Furthermore, especially if the connection between the separate parts of the attack is unclear, it may be expected that the (in itself disproportionate) collateral damage of the tactical attack will be retaliated, leading to counterattacks with ever increasing levels of collateral damage, spiralling into total disregard for civilian lives.

Therefore, it is submitted, the responsibility for a single attack must instead be on the corresponding level, even when it is part of a concerted attack. Thus, the on-scene commander retains a personal obligation to conduct a proportionality analysis and it is incorrect to dismiss the responsibility of combatants deciding on single attacks to conduct a proportionality equation. Bohrer and Osiel note that denying the tactical level of the obligation to conduct proportionality assessments could lead to “horrific results”. 27 However, “the law of tactical proportionality can demand no more in efforts to safeguard civilians than consistent with the measure of discretion that soldiers of lower rank, in those circumstances, actually possess.” 28

Furthermore, it is submitted that an additional proportionality assessment must be made on the operational level because it is possible that an attack may seem proportionate on a tactical level, but proves excessive based on a lack of military advantage to be attained on the operational level, due to earlier successful results of other parts of the same concerted attack. 29

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25 Sandoz et al., para 2207.
26 Commentary to the Manual on Air and Missile Warfare, paragraph 15 of rule 14, p. 94.
27 Bohrer and Osiel, p. 790.
28 Bohrer and Osiel, p. 792.
29 An example would be a concerted land operation aimed at killing or detaining a certain commander who is expected in a certain area. An attack on a building in that area from which even minor collateral damage is expected becomes excessive
Watkin is of the opinion that since military operations are planned on a strategic level, the military advantage that is sought to be achieved should also be viewed on the corresponding strategic level. This seems in line with the commentary to Additional Protocol I, which says that it is obvious that “an attack carried out in a concerted manner in numerous places can only be judged in its entirety.” This approach suggests that even though one particular attack may be expected to cause excessive collateral damage, this attack may nonetheless proceed, provided the attack is part of a larger, concerted military operation, and the overall military advantage of that larger operation is not expected to be disproportionate. A justification that has been put forward for this is the execution of attacks with the object to mislead the enemy. The historic example typically provided to support this interpretation of military advantage is the heavy bombardment on the French shores near Calais, right before the Allied landing in Normandy during the Second World War. The State practice of the United States is also reported to be focusing on the strategic level for the proportionality equation. Also, the Prosecutor of the ICTY has claimed that when discussing integrated attacks, that “[t]he proportionality or otherwise of an attack should not necessarily focus exclusively on a specific incident.”

The question may be valid whether the scope of the overall armed conflict plays a role. As Carnahan notes: “[i]n weighing military advantages against civilian casualties, a more restrictive standard might be appropriate for operations in a “limited” conflict, such as Vietnam, than for operations in a “general” war, such as World War II. Such a distinction, however, finds no basis in [API]. (...) If different legal standards are to be applied to the conduct of limited and general wars, then the Vietnamese combatants would have been permitted to conduct themselves and their operations in ways prohibited to their American allies and opponents. Such a double standard for the conduct of “limited” wars would be militarily impracticable.” This seems to be a fair conclusion. Of course, when an armed conflict has only reached the level of small border-incidents, the question may be asked whether there is any ‘overall’ military advantage of an attack in the first place. However, the law does not exclude larger operations to be launched.

When the commander has already been apprehended by another unit. Therefore, the proportionality assessment on the operational level in this example decisively influences the proportionality assessment of the tactical level. See also Neuman, p. 98, providing the example of a single strike against a power station which cannot be attacked based on a cumulative approach if the enemy would be able to use another power station.

30 Watkin 2007, p. 43-47.
31 Sandoz et al., paragraph 2218.
32 See for example Geiss 2012, p. 77. See also Bothe et al, p. 324.
33 See the discussion in Olasolo, p. 182-183, . quoting Hays Parks 1982 and Carnahan, p. 866. However, Olasolo identifies a trend that also the US is conducting proportionality analysis at an operational level. Olasolo 186-188.
34 OTP Final Report, para 78.
35 Carnahan, p. 867.
The strategic approach could be criticized because it does not seem to be conformity with the words ‘concrete and direct’. Also, an inherent threat of the strategic approach seems to be that the “ultimate advantage - the end of the war - appears to have too remote a connection with any tactical operation. The alternative would be to deprive proportionality of all meaning, as it would appear to sanction a strategic nuclear strike, provided the strike was thought likely to bring the conflict to an end.” It has also been argued, that it is not justified to conduct only one calculation of the total expected casualties and the anticipated intensity of the campaign for a series of attacks. This would amount to dismissing the significance – or even legality – of single attacks for the reason that these attacks should be seen in the framework of the effect of the total operation.

Watkin states that “the use of a strategic approach in considering proportionality need not be viewed as a means by which conflict will get out of control as along as the analytical framework incorporates an assessment of the effects of the attacks at tactical, operational and strategic levels.” In his view, the military advantage of a certain strategic campaign logically also incorporates the calculations of military advantage on the operational and tactical levels. Indeed, the ‘overall’ military advantage seems to refer not to the war as a whole, but to a finite event. The conclusion may thus be drawn that the ‘overall’ military objective is meant to refer to the operational level, or the lower strategic level.

The tactical approach does seem less logical when the concept of the targeting of ‘systems’ is considered. These could be very simple systems: destroying one bridge gives little military advantage if there is another one right next to it. For large networks, such as the communications-systems of the armed forces of the opponent, the destruction of a single component leads to no military advantage whatsoever, leading to the conclusion that certain dual-use military objectives may only be attacked as part of a large and comprehensive system-attack, because they form a part of that system that is a military objective when viewed as a whole.

It is submitted that in many cases, especially when a more or less concerted attack is being planned, it is most adequate to include the ‘overall’ military advantage in the proportionality equation. However, when there is an attack taking place in a situation where a target has suddenly ‘popped up’, or when an attack is conducted in response to a sudden enemy attack, there can be no ‘overall’ military advantage to that attack, and the military advantage of the attack must be viewed on the tactical level. Also, for pre-planned targets, the emphasis on the ‘overall’ military advantage should not lead to situations in which a total disregard would emerge for the well-being of civilians. Therefore, it is submitted that in addition to a

36 Hampson 1992, p. 47.
37 Watkin 2007, p. 47.
38 Dinstein 2004, p. 87, see also Dörmann 2003a, p. 164.
proportionality calculation on the higher levels of command, there should always also be an
evaluation of the military objective to be attained on the tactical level.

In the end, both the strategic and the tactical approach of the military advantage seem at
odds with the IHL proportionality rule if they would be the only level on which the military
advantage of planned military action is analysed. The fact that the individual deciding on
the launch of a planned attack is situated at the tactical, operational or strategic level should
not make a difference for the question of whether a proportionality assessment needs to be
conducted, including the assessment of the expected military advantage.\textsuperscript{40} In addition, the
situation in which a certain specific attack that is expected to cause disproportionate results
may be justified because it is part of a larger plan, could potentially be used for lower ranking
commanders to disregard their obligation to try to minimise the negative effects of their
operation to the civilian population. If the tactical commander is supposed to assume that
the specific attack he is to conduct is part of a larger plan, he may also assume that he has
no duty to conduct a proportionality calculation. This would not do justice to the protective
scope of the IHL proportionality rule and could lead to catastrophic results.

Thus, it is submitted that the ground rule is that proportionality assessments must be
done on both the operational and the tactical level. The exception to this may be a situation
in which three conditions are fulfilled: when the tactical operations are (i) part of an pre-
existing plan on the operational level and (2) the tactical commander is aware of the fact
that he will encounter a certain degree of \textit{prima facie} excessive collateral damage and (3) the
situation as it becomes apparent to the tactical commander in the course of the execution of
the operation is as expected in the planning phase.

\subsection*{11.2.3 Proportionality on a Strategic Level}

A preference for the application of the IHL proportionality rule on a strategic level seems to
emerge from some case-law, as is demonstrated below in Chapter 12. The military advantage
sought from operations on a strategic level may be expected to correspond with higher
permissible levels of collateral damage. There are diverging opinions in doctrine on this
subject. Some writers seem to confuse the IHL proportionality rule on a strategic level with
a general comparison ex post facto between the amount of civilian casualties resulting from
the operation and the objectives that were achieved.\textsuperscript{41} Other authors maintain that to only
focus on a strategic level for the calculation of the proportionality of an attack is incorrect.\textsuperscript{42}
However, simply adding the military advantages on the operational and strategic levels

\textsuperscript{40} See also Stone, p. 537.
\textsuperscript{41} See for example the faulty conclusion by Barnidge on page 181, and the accompanying notes. He, as well as the statements
of others he refers to, all refer to the alleged lack of proportionality of Operation Cast Lead as a whole. See also generally
Parks description of the Rolling Thunder and Linebacker operations: See Parks 1982 and Parks 1983, and Fenrick with
regard to Allied Force, see Fenrick 2001.
\textsuperscript{42} See also Dörmann 2003a, p. 171.
onto the military advantage expected on a tactical level, as proposed by Neuman, seems overbroad.\footnote{Neuman, p. 100.} Attaching military advantage on other levels to the expected collateral damage of a single tactical attack would allow for extensive collateral damage of that single attack. Since at that level also, if not primarily, political objectives are persecuted, this seems to be at odds with the required concrete and direct military advantage.\footnote{Arai-Takahashi 2015, p. 357.} Although State practice shows that the proportionality assessment is also done on a strategic level,\footnote{For an example, see Chapter 12 below, in Section 12.2.2.} this must however not be understood to indicate that the proportionality of the entire conflict must be assessed as part of a single attack. Such a wide interpretation confuses proportionality as understood in the realm of the \textit{ius ad bellum} rules of self-defence with the IHL rule on proportionality.\footnote{See footnote 73 on p. 19 of the Final Report of the ILA Study Group on the conduct of hostilities and IHL: “The Conduct of the Persian Gulf War: Final Report to Congress, Pursuant to Title V of the Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991 (Public Law 102-25) April 1992, at p. 611 seems to reflect such confusion (“An uncodified but similar provision is the principle of proportionality. It prohibits military action in which the negative effects (such as collateral civilian casualties) clearly outweigh the military gain. This balancing may be done on a target-by-target basis, as frequently was the case during Operation Desert Storm, but also may be weighed in overall terms against campaign objectives.”).”}

There may be some confusion in the language used within the military for labelling some military objectives particularly important for an operation on a strategic level. For example, the surface to air capabilities of the opponent would be characterised as such, because disabling the air defences would render the attacker air-superiority.\footnote{See for example US Doctrine, Joint Publication 3-30, the Command and Control of Joint Air Operations, 10 February 2014, p. I-3: “Highly sensitive strike missions against longrange strategic targets will generally require a higher level of detailed planning and centralized control”} Nonetheless, attacking one ‘strategic’ objective is an operation on a tactical level, but presumably with a high expected military advantage. If the single attack is part of a larger operation aiming to disable the air defence capabilities of the opponent, the same attack is also part of an attack at the operational level. It is submitted that it in such a situation, it is unacceptable to conduct a proportionality equation exclusively on the strategic level, because such a test would be too imprecise to lend any protection at all to the civilian population. Of course, a proportionality assessment on the grand-strategic level may also be necessary to assess the justifiability of the use of force in the \textit{ius ad bellum},\footnote{See Chapter 5, Section 5.3.} but in IHL it would be incorrect to leave it at that.\footnote{One method of how to measure the proportionality of an attack on the strategic level could be the method that is proposed by Hays Parks 1990 in his article Air War and the Law of War: civilian deaths per ton of bombs. See also Table 2 on page 65 of Fenrick 2000. Fenrick calls this a “very crude indicator of regard for collateral casualties.” See Fenrick 2000, p. 79.} Thus, it is submitted that the proportionality of an attack should be assessed as a minimum on both the operational level and the tactical level.\footnote{It may be debated whether this means that the reservations and declarations made by a number of States upon ratification of API, that the ‘overall’ military advantage must be addressed, should be reconsidered.}
In sum: if specific attacks seem to be disproportionate on a tactical level, they should be either cancelled altogether or be checked with the higher headquarters whether the attacks must be seen as part of an operational plan that would result in such a large military advantage. As a result, the rules pertaining to the proportionality equation apply “on all levels of military action and at all stages of the planning and execution of attacks.” This is also important since this approach offers a means by which “military commanders at all levels of the chain of command can be held accountable.” The conclusion is thus that operations consisting of a string of attacks must be assessed not only on an attack-to-attack basis, but a more comprehensive proportionality analysis is required on the respective levels of authority.

11.3 What is an “Attack”?

According to article 51 (5) (b) API, a disproportionate attack is prohibited. Article 57 (2)(a)(iii) and 57 (2)(b) API add that both before and during an attack, precautions must be taken to prevent disproportionate attacks. Therefore, it is relevant to define what according to IHL constitutes an ‘attack’.

The concept of an attack is defined in article 49 (1) API as “acts of violence against the adversary, whether in offence or in defence”. This concept must be interpreted broadly. That means that an attack covers the use of armed force to damage objects or injure or kill persons. According to Kalshoven, this implies the use of weapons, or in other words, the use of armed force through “violent means”. Rogers adds that the threshold of an attack is already passed by the use of his light weapon by a single soldier. This does not imply that any military operation should be regarded as an attack. Military logistic operations or detention operations during armed conflict do not qualify as an attack, because they can generally not be characterised as ‘acts of violence’. Dinstein states that “[t]he term attack (...) means any act of violence, understood in the widest possible sense (including a non-kinetic attack), as long as it entails loss of life, physical or psychological injury, or damage to property. Attacks do not include non-forcible acts, such as non-injurious psychological warfare. The line of division between what is permissible and what is not, is accentuated by computer network
attacks (CNA). These would qualify as attacks within the accepted definition only if they engender – through reverberating effects – human casualties or damage to property (it being understood that a completely disabled computer is also damaged property). Nonetheless, the notion of ‘attack’ is not limited to kinetic force: operations involving chemical, biological or radiological means of warfare are also accepted to qualify as attacks. Decisive are thus the effects of an operation.  

It must furthermore be noted that an attack may also include acts of violence ‘in defence’. This includes shooting back when one is attacked, but also a more concerted counterattack against an adversary that has attacked first. Outside the ambit of armed hostilities, the military would understand this type of use of armed force as ‘self-defence’. The concept of self-defence is however not a useful concept in IHL. The concept of ‘self-defence’ is used in *ius ad bellum* and could also be a lawful breach of a person’s right to life under international human rights law in a law-enforcement paradigm. IHL is however indifferent to the reason why the armed force is used. It simply dictates that during armed conflict, one who defends is, like the attacker, obliged to adhere to the rules of IHL, such as distinction, proportionality and the obligation to take precautionary measures. In addition, the laying of mines is also considered an attack.  

According to the next part of the definition of an attack, the armed violence must be directed ‘against the adversary’. This implies that the intention of the use of the armed violence is relevant. The idea of this part of the definition is first of all to underline that the use of armed violence may not be directed to the civilian population or civilian objects, but must be directed to the opponent. Conversely, the use of armed violence that is not directed against the enemy would then not be considered part of the definition of an attack. Exceptions to this are indiscriminate attacks, because those fail to distinguish between military objectives and civilian objects or the civilian population. That means that although they are generally not as such ‘directed to the adversary’, they should still qualify as attacks in the sense of IHL, even as an explicitly prohibited type of attacks. On the other hand, armed violence used during military exercises, or firing weapons at a shooting range, may obviously not be labelled as armed violence directed against the adversary, and thus does not constitute an attack. This would also apply to other types of the use of weapons, such as celebratory fire.

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59 Dinstein 2008, p. 2. As noted in the Tallinn Manual 2.0, Rule 92: “a cyber attack is a cyber operation, whether offensive or defensive, that is reasonably expected to cause injury or death to persons or damage or destruction to objects.” Tallinn Manual 2.0, p. 415.
60 Tallinn Manual 2.0, p. 415.
61 Kalshoven and Zegveld 2011, p. 176.
62 See Article 51(2) and (3) API.
63 Article 51, (4) API.
It is clear that a direct attack on civilians is prohibited. An interesting issue that may be raised is the connection between the definition of an attack and a warning shot that may be fired. Understood in the classical sense, this is an easy question: by definition, a warning shot is never aimed at the actual target. Therefore, a warning shot is not an attack because it is not directed against the adversary. However, in the context of the conflict in Gaza in 2008-2009, the Israel Defence Forces used the so-called ‘knock on the roof’ method to warn civilians to leave a certain building. These knocks on the roof would include a minor attack on the building that was to be destroyed, in order to make it clear that an attack on the building was imminent and to persuade the civilians that were present to leave it. It has been argued that these smaller attacks should be labelled as direct attacks on civilians. However, it seems that the better definition of these ‘knocks’ were in fact – as warning shots – precautions in attack in the sense of article 57 API, and as such, not violations of IHL, or attacks on the military object as such.

11.4 “Incidental” Damage: Expectation and Anticipation

The definition of the IHL proportionality rule states that the collateral damage that is counted in the equation should be ‘incidental’. This must be understood as damage that is caused willingly, but not in itself as the primary objective of the attack. Furthermore, as a result of the precautionary obligations, it must be minimised as far as that is feasible. Military planners and commanders may be expected to thoroughly assess what may be expected from a certain planned attack, motivated both by operational considerations and by their obligation to apply the IHL proportionality rule, because unexpected results may be contrary to their objectives. Accordingly, military planners, commanders and operators prefer weapons, munitions and methods of warfare that cause predictable effects.

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65 See also Byron, p. 199. See more particularly Van Den Boogaard 2018a.
66 One could wonder whether this means that there could be a difference between different types of collateral damage. Reynolds notes there could be ‘involuntary’ and ‘voluntary’ collateral damage. The former could be described as “any unintended, unanticipated effect of an attack resulting from system malfunction, human error or other errant cause.” The latter would then be “any anticipated incidental damage or other effect of an attack that is justified under the principle of proportionality.” See Reynolds, p. 89. However, this distinction is not useful for clarifying the IHL proportionality rule. Involuntary collateral damage is per definition unexpected. Thus, it cannot be taken into account in the proportionality calculation, simply as a matter of logic. The IHL proportionality rule only requires to take into account what may be expected.
67 See article 57 (1) API: “In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects” and article 57 (2) (a) (i): “take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;”
68 Garraway 2005, p. 3.
The military advantage must be limited to the advantage that is ‘concrete and direct’. With regard to the collateral damage, such a limitation is not applicable. The use of the word ‘incidental’ serves merely to underline that there may not be a deliberate attack on the civilian population and civilian property. The term ‘incidental’ cannot be understood as an additional qualifier of the ’loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof’.

The question then is which factors those who plan, execute or decide upon attacks must take into account when they examine the information available to them. As the ICRC Commentary to API notes: “[t]he danger incurred by the civilian population and civilian objects depends on various factors: their location (possibly within or in the vicinity of a military objective), the terrain (landslides, floods etc.), accuracy of the weapons used (greater or lesser dispersion, depending on the trajectory, the range, the ammunition used etc.), weather conditions (visibility, wind etc.), the specific nature of the military objectives concerned (ammunition depots, fuel reservoirs, main roads of military importance at or in the vicinity of inhabited areas etc.), technical skill of the combatants (random dropping of bombs when unable to hit the intended target).” Additional factors are the availability of reconnaissance assets by the attacking force (reconnaissance drones, real-time surveillance by special forces, helicopters and other aircraft), the availability of effective precautionary measures (both general and specific warnings), time-pressure (the place and role of the specific attack in the general war-effort). This list is certainly not exhaustive, because the circumstances of every single attack are different. It is an important feature of the proportionality calculation, that it concerns not the result of an attack, but what was expected to happen before the attack was launched. A number of States declared specifically upon ratification of API that a decision on proportionality must not be judged with the advantage of hindsight. The ICTY Trial Chamber agreed in its judgement in the Galic Case in 2003. It states that “[i]n determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.” The applicable standard of the commander’s knowledge is thus “that which he reasonably knew under the circumstances.” This is true both for the expected collateral damage, as for the military advantage to be obtained. As Canada stated upon ratification

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69 See Geiss 2012, note 77 on page 89. Geiss argues that “The word ‘incidental’ is certainly broader than the requirements of being ‘concrete and direct’.

70 See Sandoz et al., paragraph 2212 on page 684, see also Reed, p. 25.

71 For example, Germany stated that “the decision taken by the person responsible has to be judged on the basis of all information available to him at the relevant time, and not on the basis of hindsight”. Similar declarations were also made by Switzerland, Italy, Belgium, The Netherlands, New Zealand, Spain, Canada and Australia. See www.icrc.org for the exact texts of the statements.

72 See the Galic Case, paragraph 58.

73 Bill, p. 136. Bill calls this the ‘Rendulic Rule’. Bill states explicitly that the Rendulic Rule is a rule of customary international law and it applies to the IHL proportionality rule. See Bill, p. 151 and 140.
of API: “[i]t is the understanding of the Government of Canada that, in relation to Articles 48, 51 to 60 inclusive, 62 and 67, military commanders and others responsible for planning, deciding upon or executing attacks have to reach decisions on the basis of their assessment of the information reasonably available to them at the relevant time and that such decisions cannot be judged on the basis of information which has subsequently come to light.”

The civilian side of proportionality equation is thus based on a combination of expectations, as assessed by a reasonable military commander. Expectations are subjective by definition, yet an expectation may become more objective when there is sufficient information available on the nature of the target and the amount of civilian objects and civilians that are surrounding the target. The availability of surveillance assets and other information sources are therefore important in order to be able to obtain a clear picture of the target and presence of civilians and civilian objects. Also, other objective factors may play a role, such as a temporal component or the type of weapon that is used. A tragic example of how expectation can be deceiving is the attack on the Al-Firdis bunker in Bagdad on 12 February 1991. The expected collateral damage of the specific attack was zero. The US planners reportedly had no knowledge that the families of the military would hide for safety in the bunker at night. As a result of the attack, a considerable number of civilians died.

The fact that expectation is the decisive factor also means that civilian casualties and damage to civilian structures that have occurred by accident, are outside the equation. It may be cynical for the victims of such attacks, that the executors of such an attack never intended for these casualties to happen in the first place. After all, that does not change the damage done, nor does it provide comfort for the lost lives. There is a limit to these accidents of course. It is a fact of life that weapons will sometimes malfunction, or that civilians are present in places they were not expected to be. But when it is known that the used weapon often malfunctions, this does impact the proportionality equation. The same goes for the presence of civilians: if the planner and executor of an attack has to act upon the knowledge that he may reasonably be expected to possess, he is required to examine whether his assumptions are correct. When he decides to be reckless, the responsibility of the attack must be attributed to him. If he is not reckless, but has reasonably come to the conclusion that the attack he plans to execute is proportionate, the damage resulting from that attack is caused legitimately because IHL allows for these casualties and damage to occur. Of course, also other factors may play a role in the determination of recklessness, such as the question of how much time there is to conduct a planning or an attack, the value of the target and the question of whether the attackers are under fire.

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75 For example, a munitions factory may be expected to contain less civilian workers at night than during the day.
76 See also http://www.hrw.org/reports/1991/gulfwar/INTRO.htm for an appreciation by Human Rights Watch.
As far as the use of weapons is concerned, the expectation of the effect of that weapon plays a role. This means that knowledge is required of the exact effect of the type of weapon that is planned to be used in an attack to be able to calculate the amount of military advantage it may be expected to accomplish, but also the amount of collateral damage that may be expected to result from the attack using that particular weapon. In this regard, the question may be asked whether the expected failure rate of a particular type of weapon must be taken into account. On the one hand, it seems apparent that there is always a chance that a certain weapon will malfunction. This seems part of the reality of warfare and not a factor that a military commander must take into account when he uses a type of weapon or munitions. On the other hand, there also does seems to be a limit to this. Part of this limit is the scale of the planned attack: if the attack is assessed on an operational level, the failure rate and expected percentage of malfunction of a certain type of weapons used in a significant number of single attacks of that operation can be statistically calculated. Resulting collateral civilian damage is thus foreseeable and must therefore be taken into account. The obligation to take this into account may however also present itself on a tactical level. As an example, one could think of some types of cluster munitions. The submunitions of some types are well-known to malfunction for a considerable percentage. When this is known to the commander, he is indeed obliged to take this effect of the weapon into account when he calculates the proportionality of an attack. This means that when using certain types of cluster munitions, the commander will have to take into account that the expected military advantage is decreased because a large number of bomblets will fail to explode upon impact. This will also increase the likelihood of civilian casualties, also on the longer term.  

Greenwood and Boothby however think that only immediate risks caused by weapons known to result in leaving dangerous explosive remnants of war after their use should be taken into account by the military commander who plans an attack, because “there are too many factors which are incapable of assessment at the relevant time.” They argue that these effects are only ‘immediate’ in the first few hours after the attack, and that the commander does not have to include an expectation on the possible return of civilians to the area. Henderson however states that since cluster munitions are well known to possess a high dud rate, it can be expected that there will be civilian casualties when cluster munitions are to be used in civilian areas. It is submitted here, that it has now sufficiently been established, at least for some types of cluster munitions, that remaining submunitions will pose a threat to the (returning) civilian population, thus increasing expected civilian casualties. Even though the casualties resulting from remaining bomblets may only substantiate in the longer term, it cannot be expected that there will be civilian casualties when cluster munitions are to be used in civilian areas.

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See for example McCormick & Mtharu, p. 206: “Israel’s apparent reckless disregard for the rule of proportionality by ignoring the mid to long term civilian damage from unexploded submunitions makes it more difficult for other states to argue that the general rules of international humanitarian law adequately cover the use of cluster munitions and obviate the need for any additional specific prohibition.”

See McCormick & Mtharu, p. 197.


term and they may be labelled as indirect, these consequences of cluster munitions are nevertheless foreseeable and are thus part of the proportionality equation.\footnote{Garraway notes in 2005, in a brief on the issue of cluster munitions that “[i]f it is known that there is a likelihood, or even a certainty, that an attack will leave behind some explosive remnants of war, then that must be factored into the equation.” See Garraway 2005, p. 5.} The nature of cluster munitions is why these weapons were, and still are, the subject of substantial efforts to prohibit them altogether.\footnote{Haines, p. 284.}

Another issue is the situation when only less-precise bombs are available to an attacker. After all, not all parties to armed conflicts around the world have laser-guided weapons that can be directed to an exact location, thus minimising the collateral damage to civilians and civilian objects. Less-precise bombs may be expected to have a larger area where they may impact, thus the expectance increases that they miss the intended military target at which they were aimed. An example may be the sophisticated weapons that were engaged by the Israel Defence Force against ‘katoesja’ and other primitive rockets that were deployed by fighters of Hezbollah and Hamas. The fact that these latter armed groups do not have more sophisticated weapons at their disposal does not mean that they are not bound by the same restraints as the IDF is. In theory, the protective value of the IHL proportionality rule seems to benefit from the development and use of increasingly sophisticated weapons – at least more precise and weapons with more limited effects. However, assuming both parties to a conflict conduct a thorough proportionality calculation before an attack, the party with more sophisticated weapons may end up having more potential legitimate targets available to attack, than the party armed with less-sophisticated weapons, because the former may be presumed to have the better capability to limit the expected collateral damage. However, there is a danger here: assuming more targets can be attacked because the weaponry is more sophisticated and thus more precise, this means that the proportionality analysis must be done on a more detailed scale. These details may not be easily anticipated, however. This may in turn lead to an increase of the collateral damage that is expected.

As an additional problematic issue in the identification of that which may be anticipated from a certain attack, the question of the probability of success of an attack should be addressed. Sometimes there is only a limited likelihood estimated to exist in advance that the military advantage that is sought by an attack, will also be achieved. How must this percentage be factored into the total proportionality equation? Suppose it is possible to identify that a certain high-value target is present in a certain house, and 1 civilian. The military advantage of killing him would be very high, and although it is equally likely that the civilian will also be killed, suppose for the sake of argument that this would be proportionate. However, what if, given the circumstances, there is only a 10% chance that the target would indeed be killed, because you know that the target is wearing a bullet-proof vest, while the civilian is not. Does this alter the proportionality equation? When the expected military advantage of an attack is considered, it is obvious that if a relatively small military advantage is sought, the probability that the operation actually will attain this objective, must be larger than in a case
where there is much more at stake. Thus the probability of failure must also be examined, and that includes the failure rate of the means and method that is employed in the operation. It seems logical to conclude that the success of the operation also needs to be taken into account in such a way that the smaller the likelihood of success, the smaller also the amount of collateral damage may be in order for the attack to remain proportional.

There is another danger in the execution of the proportionality equation. Military commanders may intuitively conduct their proportionality equation is such a way that the different components of the equation are not weighed in a sufficiently objective manner, particularly when one of the parties is military superior. In the words of McPherson:

“Our tendency when we are in a position of considerable advantage will be to identify with the possible benefits to ourselves and others for whom we have special concern and to dissociate from the costs to persons likely to bear the burdens of use of force.”

It seems to be a common feature of mankind to become more or less indifferent to the suffering of the adversary. Yet, this kind of indifference is in direct contrast with the whole reciprocal spirit that lies on the basis of IHL. On the other end of the spectrum, it has also been suggested by the Commentary to the 1956 Red Cross Draft Rules, that in case of doubt how large the collateral damage will be, it should be estimated as large as possible: in dubio pro humanitate.

This statement, however, seems to tip the balance too far to the disadvantage of military personnel. A more helpful suggestion, made by a number of writers, is to include in the equation a ‘reversed assumption’ whether the commander would consider the attack lawful if the expected collateral damage would consist of civilians of his own side. In this rather simple way, the danger may be avoided that the lives of civilians of the adversary are seen as less valuable than the lives of ‘own’ civilians would be.

Another factor that impacts on the expected collateral damage and military advantage are foreseeable secondary explosions. This may for example occur when an object is attacked that contains a large number of explosive material. If secondary explosions are reasonably foreseeable, they also need to be taken into account.

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83 McPherson, p. 94.
84 See also below, Chapter 14, Section 14.2.
85 See for example Fenrick 2000, p. 74 and Rowe 2000, p.160: “It is, for instance, common for those who make targeting decisions to exaggerate (albeit unwittingly) the contribution to military action and the military advantage to be gained from a particular bombing mission and, in addition, to expect the ‘smart’ weapons to produce precision bombing (and thus leave civilians untouched). The reason for this is that Protocol I sets the dividing line between an indiscriminate attack (illegal) and one that is not (legal) on the basis of expectation before the attack is commenced. At this stage of military operations those planning the attack are at their most optimistic and civilians are at most risk. The position has been reached where the well-established principle of distinction between civilian objects and military objectives has been rendered of little practical significance when some military advantage in the destruction of the object is discernible and smart weapons are used.”
86 McPherson, p. 94.
87 International Review of the Red Cross, 1956, p. 702.
It may be concluded that everything that may be expected to occur as a result of a planned attack must be taken into account as incidental civilian damage or casualties. It is important to note in this context that there are no qualifiers attached to the notion of ‘incidental’ civilian damage and casualties to be included in the IHL proportionality assessment, in contrast to the military advantage to be taken into consideration, which must be ‘concrete’ and ‘direct’. The extent to which the expected incidental damage is indeed foreseeable and the related issue of the temporal scope will be further elaborated in the next Section.

11.5 Temporal Scope, Directness and Foreseeability

Linked to the difficult concept of the expectation of a reasonable commander dealt with in the previous paragraph, are the issues of the temporal scope of the proportionality equation and the question of how direct the effects must be in order to be included into it. It is already difficult to predict the direct and short-term effects of an attack, but it is even harder to predict indirect and long-term effects, or as they are sometimes labelled: the reverberating effects. The ‘reverberating effects’ are defined by the ICRC as “the effects that are not directly or immediately caused by the attack, but are nonetheless a consequence of it.”

Direct effects are those effects that are expected to be caused by an attack, such as bullet wounds, but also the effects of an explosion: blast, fragmentation, thermal effects against the human skin and the penetration of those within, which causes damage, often enough to expect the death of the person affected by it. However, also the secondary effects of a blast wave caused by an explosion are included, such as fragments of glass and other material that flies through the air as a result of the explosion, the collapse of buildings, dysfunction of objects (such as damaged vehicles) as well as secondary explosions caused by explosive material located at the aiming point of the attack. There are also effects that are not caused by bullets or explosions, such as laser beams, fire, sound blast and electrical shock, which would also be direct effects of an attack. Reverberating effects may for example be understood to include the effects of flooding caused by the destruction of a bridge, radiation, the unavailability of medical services, outbreak of deceases due to the lack of clean water etc.

89 See below, Section 11.10.
90 See for example the discussion in http://blogs.icrc.org/law-and-policy/2017/03/02/war-in-cities-the-reverberating-effects-of-explosive-weapons/: “the increasing experience of armed forces in urban combat and greater awareness in the public domain about the interconnectedness of essential services arguably makes it objectively foreseeable that damage to or destruction of essential infrastructure will have certain reverberating effects on essential services, such as health care and water distribution”
92 See generally Robinson and Nohle, pp. 107-145.
With regard to the temporal scope of the expected effects of an attack, there is no explicit guidance in the text of the IHL proportionality rule. It is however now well settled, according to Schmitt, that “any consequences, even long-term ones, which are foreseeable and likely in light of the information reasonably available to the attacker, must be factored into the proportionality calculation.”.\(^{93}\) Thus the test does not include any possible effect, but only those effects that are foreseeable, whenever they may be expected to materialise. The temporal aspect thus does not impose a restriction on the temporal scope of the effects of a planned attack that must be taken into account. Recent treaty law confirms this approach.\(^{94}\) for the purpose of the IHL proportionality rule.

With regard to the directness of the effects of the planned attack that must be taken into account for the IHL proportionality assessment, a distinction is made between direct-effects and indirect effects. It must be noted in this regard that the rule contains a distinction between the civilian side of the proportionality equation and the side of the military advantage. Since, according to the text of the rule, the anticipated military advantage must be ‘direct and concrete’, it is necessary to distinguish between those effects that are directly militarily advantageous and those that are indirect, because the latter may not be factored into the proportionality assessment.

For the civilian side, a distinction between direct and indirect effects is irrelevant, because the standard is that of ‘foreseeability’, not directness.\(^{95}\) This is supported, for example, by the commentary to the Red Cross Draft Rules of 1956. With regard to the expected collateral damage, it states that “[i]t is reasonable to require an attacker to take into account his assessment of indirect losses and destruction which he could reasonably foresee to occur in the prevailing circumstances.”.\(^{96}\) This means that no assessment is required of the number of steps that may be identified between the attack and the foreseeable effect to determine whether an effect is direct or indirect.\(^{97}\)

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93 Schmitt 2006a, p. 296. See also the ILA Study Group Report: “[t]here is, however, no basis in IHL to impose a certain (absolute) time limit on those indirect effects that need to be taken into account”, See ILA Report, p. 25 and the accompanying footnotes 90 and 91. Report available on website of the ILA: http://www.ila-hq.org/index.php/study-groups.

94 See for example article 3(10) of the Amended Protocol II to the CCW: “All feasible precautions shall be taken to protect civilians from the effects of weapons to which this Article applies. Feasible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations. These circumstances include, but are not limited to:
(a) the short- and long-term effect of mines upon the local civilian population for the duration of the minefield;
(b) possible measures to protect civilians (for example, fencing, signs, warning and monitoring);
(c) the availability and feasibility of using alternatives; and
(d) the short- and long-term military requirements for a minefield.” (emphasis added)

95 See for example the AMW Commentary, p. 91: “there is no dispute that indirect effects cannot be taken into account if they are too remote or cannot be reasonably foreseen”; the ILA Report in ILS, pp. 23-24: “the prevailing view is that indirect effects of attacks must also be considered alongside direct ones.”


97 See also ILA Report, p. 25.
Thus, ‘directness’, understood in terms of the closeness or remoteness of an effect connected to a planned attack, is only relevant to determine whether an effect of a planned attack contributes directly to the military advantage. For the determination of the incidental effects, however, the directness of the foreseeable effects is irrelevant, as long as the effect is foreseeable. The commentary to the Air and Missile Warfare Manual notes that: “[t]he members of the Group of Experts could not agree as to what extent (if at all) indirect (“reverberating”) effects of attacks have to be factored into the proportionality calculation. In any event, there is no dispute that indirect effects cannot be taken into account if they are too remote or cannot be reasonably foreseen. The Group of Experts could identify no conclusive State practice that settles the issue of indirect effects of attacks.” Similarly, the ICRC Guidance on Direct Participation states that “the relevant threshold determination must be based on “likely” harm, that is to say, harm which may reasonably be expected to result from an act in the prevailing circumstances.” This expectation for the civilian side is thus arguably a ‘but/for test’: all effects are foreseeable that one would reasonably expect to result from a planned attack and that would not occur but for that attack.

Foreseeability is nonetheless a difficult concept to be applied to, for example, power grids that are used both by the military as by civilians. Short term-effects of losing the ability to turn on the light or use computers is clear, but qualify as nuisance rather than damage. However, it may also be foreseen that there are reverberating effects on the civilian population because of the lack of power to water purification plants or hospitals. During the 1990-1991 Gulf war, the number of civilian casualties of the actual attacks on the electrical power grids were outnumbered by the civilian deaths that were the result of the longer term results of the lack of power of hospital and water purification facilities. It is clear that the water purification facilities and the hospitals themselves were not object of the attack. In fact they probably did not suffer any damage of the actual attacks. But that does not seem to imply that the nature of the target (in this case: a dual-use target like the electricity grid) and the effects that may have, can simply be ignored. Even though it may be difficult to quantify the exact effects, they can be foreseen. Provided these effects are reasonably foreseeable, they must be taken into account, especially for dual-use objects. However, it seems that it is an inherent subjective factor in the assessment of whether a certain effect of a planned attack is foreseeable.

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98 Reynolds, p. 90: “A distinction could be made between direct-effects and indirect effects of an attack. Direct collateral damage may be defined as "any immediate physical effect incidental to any type of attack." Indirect collateral damage may be defined as "any delayed, long-term effect, including physical, economic, social, public health, political or other effect incidental to any type of attack." See also See Henderson, p. 207-209.

99 Commentary to the AMW Manual, p. 91.

100 Melzer 2009, p. 47.

101 Shue and Wippmann, p. 568.

102 Byron, p. 208. According to Byron, “the longer-term threat to civilians from attacks, particularly on electricity stations, must be taken into account when making a proportionality assessment.” (emphas in original text).
11.6 The Civilian Side

The civilian side of the proportionality assessment is composed of a material and a human component. This section deals with the human component and therefore discusses what must be understood by the term “incidental loss of civilian life [and] injury to civilians”. A crucial part of the proportionality equation is therefore the question of which individuals qualify as ‘civilians’ in the sense of article 50(1) API. Here the principle of distinction comes into play. Since armed conflict is waged against the armed forces of the enemy, the civilian population is immune from attack. Civilians should therefore refrain from participating in hostilities, and combatants should distinguish themselves as such. It must be clear that in principle only injury and loss of life of civilians is counted in the proportionality equation, and not injury or loss of life to the military forces of the opponent, even if this was unintended.

The definition of a civilian under international law is formulated in a negative sense: a civilian is any person who does not fit into the categories of article 4(A)(1), (2), (3) or (6) of GCIII and article 43 API. Put simply: a civilian is anybody who is not a combatant. A prominent problem for the definition of the notion of civilians in IHL exists in the law applicable to non-international armed conflicts. The cause of this is the fact that in that context, the notion of combatants is non-existent, at least in the applicable treaty law. The alternative term to be used in a non-international armed conflict is that of ‘fighter’. An acceptable definition is proposed by the ICRC, suggesting that “all persons who are not members of state armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, organized armed groups constitute the armed forces of a non-state party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities (“continuous combat function”). These persons retain civilian status for the purpose of protections once they are captured by their opponents, but for the purpose of the protection against direct attack, they have lost this protection continuously for the duration of the armed conflict or until such time the fighters have disassociated from the non-state armed group that is a party to the conflict. Civilians who participate in a more occasional fashion regain their protection against direct attack as soon as they have stopped participating directly in the hostilities and must thus from then on be included on the civilian side of the proportionality assessment.

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103 See also Henderson, p. 206.
105 As phrased in the ICRC Interpretative Guidance on DPIH: “For the purposes of the principle of distinction in international armed conflict, all persons who are neither members of the armed forces of a party to the conflict nor participants in a levée en masse are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.” See Melzer 2009, p. 20.
106 For a discussion of the concepts of civilians in non-international law, see the ICRC Interpretative Guidance on DPIH, Melzer 2009, pp. 27-36.
107 Melzer 2009, p. 36.
Customary law indicates that the prohibition to attack civilians exists both in IHL applicable in international armed conflicts and in non-international armed conflicts. Therefore, for the application of the IHL proportionality rule, it is imperative to distinguish between protected civilians and civilians who participate directly in hostilities. Only the former enjoy the protection awarded to civilians and only the latter may be attacked. The difficulty to make an accurate assessment of which civilians then must, and which must not, be included in the proportionality equation is apparent. The ICRC study into the issue of direct participation of hostilities is a clear manifestation of how the issue of direct participation has divided experts in IHL.

Although an in-depth study of the issue as such will be omitted for the purpose of this chapter, Section 11.6.1 addresses the specificities of civilian immunity, and the relevance of the notion of direct participation for the application of the proportionality calculation. Subsequently, the focus shifts to a number of difficult issues where there could be doubt on the question of whether an individual should be taken into account in the proportionality calculation. This includes the question of whether the civilians that are taking part in a voluntary or involuntary human shield must be taken into account (11.6.2). Another issue is the question whether the allegiance to one or another party to the conflicts plays a role in the proportionality equation (11.6.3). Finally, the question must be addressed whether individuals who work in a military objective lose their status as a civilian (11.6.4). Before these issues are explored, the nature of civilian immunity deserves some further attention.

### 11.6.1 Civilian Immunity

Even though civilians may not be attacked directly, IHL acknowledges the unavoidable reality that they may still be affected by armed violence, without a breach of IHL occurring. It must be noted that not any inconvenience for civilians in armed conflict is included in the term ‘damage’. It is common understanding that armed conflict causes many unwanted side-effects, such as “inevitable scarcities of foodstuffs and other essentials. Indeed, food, clothing, petrol and additional consumer goods may have to be strictly rationed. Moreover, buses and trains may not run on time; curfews and blackouts may impinge on the quality of life; etc.”

Civilians may be affected by an attack because they are relatively close to a military target, because they are inside a military target, because of a misunderstanding of their status or protection, or if a weapons malfunction results in them being hit. Given the definition

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108 See ICRC Customary Law Study, Rule 1, see Henckaerts & Doswald-Beck 2005a, p. 3.
110 Dinstein 2012, p. 270
111 Dinstein 1997, p. 6. See also Byron, p. 195, noting an incident in Iraq, where a large number of civilians was killed, and the US and UK forces claimed that this was caused by an anti-aircraft missile that was fired by the defending Iraqi forces.
of an attack, as mentioned above in Section 11.3, defensive military operations that may be expected to cause collateral damage must also be proportionate.

Civilians who participate directly in hostilities, lose their immunity from attack, which is afforded to them in accordance with their civilian status.\(^{112}\) Therefore, they may be directly attacked. It has been argued that the provision that has codified this concept in API, was "a fairly substantial shift in the balance between military necessity and humanity, with a weighting in favour of protecting civilians."\(^{113}\) This is particularly due to the fact that the civilians are only liable for attack "for such time as" they participate, and the participation must qualify as ‘direct’. For the purpose of the application of the IHL proportionality rule, the question is whether civilians still count in the proportionality equation on the civilian side, or that they have become part of the military advantage that is expected to result from a planned attack. The issue at stake here is the difference between ‘protection’ and ‘status’ of civilians.\(^{114}\) It seems safe to conclude on the basis of the text of API that there are indeed only two categories of status that may be attached to persons: one is either a civilian or a combatant. For the purpose of the conduct of hostilities, it seems self-evident that once the protection against direct attack of a civilian is lifted, due to direct participation in hostilities, the civilian also loses the protection that is awarded by the IHL proportionality rule. That means that although the status remains the same, the civilian does ‘change scales’ for the purpose of the proportionality scale. This is a complicating factor for the attacking party to the conflict, because it complicates the proportionality equation in the sense that not all civilians of whom the commander expects that they will be affected by the imminent strike, have to be factored in as collateral damage. Also, the commander runs the risk that affected individuals with a civilian status (but not protection) may be exploited as propaganda by the opposing party to the conflict, once the attack is conducted. It is thus submitted that for the purposes of the conduct of hostilities, including the application of the IHL proportionality rule, the focus is more on the protection of the civilian, than on the civilian status.

It has been argued that civilians who have been (but are no longer) participating directly in hostilities, or civilians who have supported the active fighting forces in an indirect manner, must be excluded from the civilian side of the proportionality assessment.\(^{115}\) Also, it has been proposed that if civilians are voluntarily participating in a human shield, they can under certain circumstances count less than other civilians.\(^{116}\) It is however submitted that the former proposal is unacceptable and contrary to IHL. Furthermore, it is submitted that accepting the latter proposal would further complicate the (already difficult) proportionality analysis, and finds no basis in the law. If commanders need to take into account not only

\(^{112}\) Article 51 (3) API.

\(^{113}\) Camins, p. 879.

\(^{114}\) See generally: Dörmann 2003b.

\(^{115}\) Blank and Guiora, pp. 66-67. Blank and Guiora suggests that "[p]ersons who participate in hostilities, or assist those who do so, should be counted as legitimate collateral damage, even if they could not be targeted directly at the moment of an attack, and therefore should not factor into the proportionality analysis as civilian casualties."

\(^{116}\) See Dinstein 2010, pp. 152-155. See also below, Section 11.6.2.
the number of civilians, but also add a certain ‘value’ to these civilians, or multiply the number of civilians with a certain factor, it becomes even more complicated. Therefore, it is submitted here that it is undesirable to step upon this slippery slope. Individuals either enjoy civilian protection, and are included on the civilian side of the IHL proportionality assessment, or they are not taken into account because they have lost their protection. As such, civilians must be counted equally in the proportionality equation as long they refrain from participating directly in the hostilities. It could be argued that this is in accordance with the general principle that “[a]ll human beings are born free and equal in dignity and rights.”

While civilians participating in hostilities lose their protection against attack, if they are captured they benefit from all protection of civilians under IHL on the basis of their civilian status. When civilians are known to be sympathetic to the attacked party, or when it is known that they have participated directly in hostilities in the past, they are not eligible for direct attack. Therefore, they must be counted as a civilian on the collateral damage side of the proportionality equation.

It is true that if it becomes impossible for a military commander to determine who is a legitimate target, and who is a protected civilian, “his ability to make the necessary proportionality assessments is severely handicapped [and that these] difficulties will correspondingly undermine his ability to carry out his mission within the bounds of the law.” Nonetheless, it is submitted that creating a category that is less protected than ‘innocent’ civilians finds no basis in the law.

This issue raises the question of whether one’s own civilians should also be taken into account in the proportionality equation, and how the value of these civilians must be equated to the opponent’s civilians. The following situation may be used to illustrate this. If a valuable military target has malfunctioned, such as a combat-helicopter and the enemy is approaching fast, its crew may decide to abandon the helicopter and subsequently call in an airstrike to destroy the helicopter and to prevent it from falling into the hands of the enemy. If however the pilot of the airplane that is tasked to destroy the helicopter notes that the party’s own civilians are in the process of stripping the helicopter of its valuable parts, does he need to take the lives of these ‘friendly’ civilians into account in his proportionality equation? It is submitted that the allegiance of the civilians should not be decisive in the question whether the civilians should be factored into the proportionality equation. After


118 The suggestion of Blank and Guiora seems to amount to a conclusion that in case there is difficulty in determining which civilians still enjoy civilian protection, this protection must therefore be afforded to them in a more limited way. This is however contrary to the well-established rule of the assumption of civilian status as codified in both treaty and customary IHL. See for example article 52 (3) API. There is no similar rule identified in the ICRC Customary International Humanitarian Law Study, but a brief discussion is included in the rule that regards the protection of civilians who take a direct part in the hostilities. It concludes to say that “one cannot automatically attack anyone who might appear dubious.” See also Henckaerts & Doswald-Beck 2005a, pp. 23-24.

119 Blank and Guiora, pp. 66-67. Blank clarified their suggestion to this author in e-mail correspondence to mean that “1) on the battlefield there are more people than just combatants or DPH and then totally innocent civilians and 2) that when there is confusion in determining who is who and what is what, commanders will have greater difficulty making proportionality determinations (and other determinations of course).”

120 See Porat and Bohrer for a view that more value may be attributed to the safety of the own troops than to enemy civilians, as well as a plea to attach more weight to the safety of ‘own’ civilians than on enemy civilians. Porat and Bohrer, pp. 99-158.
all, this would introduce an additional restraint into the definition of a civilian that is not present in the applicable law. It cannot be said that the civilians are participating directly in the hostilities because they are trying to steal scrap metal for reasons of personal gain. Also when the criteria proposed in the ICRC DPlH Interpretative Guidance are applied, it seems safe to assume that the civilians are not participating in the hostilities because a belligerent nexus is lacking. The challenge the pilot is facing is therefore a balancing act between the relative value of the lives of the civilians and the military advantage that consists of the military advantage that the enemy will not come in the possession of the helicopter.\textsuperscript{121}

It is submitted that all civilians should be protected equally by all parties to the conflict.\textsuperscript{122}

After all, the text of the articles of API that govern the protection of the civilian population during the conduct of hostilities, give no evidence that there could be any differentiation between the nationality or ethnicity of the civilians.\textsuperscript{123} The ICRC Commentary to article 50 API supports this conclusion by stating that “[i]n protecting civilians against the dangers of war, the important aspect is not so much their nationality as the inoffensive character of the persons to be spared and the situation in which they find themselves.”\textsuperscript{124} Therefore, it does not seem logical to differentiate between enemy or own civilians.

One other issue that complicates which civilians should be included in the proportionality equation concerns the fact that in modern military forces, an increasing number of traditional military functions is being performed by civilians. This blurs the status of the military target, but also, the question arises whether these individuals should still be included in the proportionality calculation as civilians, or have become part of the military advantage when they are expected to be affected by an attack, even though they are not wearing uniforms.\textsuperscript{125}

11.6.2 Human Shields

Human shields is the practice of deliberately collocating civilians or persons hors de combat with military objectives with the specific intention of preventing the enemy to attack these

\textsuperscript{121} Arguably, the helicopter’s military value is lost once the civilians have removed so many valuable parts from the helicopter, that the enemy will no longer be able to fly it, thus diminishing the military advantage to destroy it. The value of depriving the opponent of the ability to require knowledge about the weapons system may be considered important, however that military advantage is probably only indirect.

\textsuperscript{122} For a different view, see Dinstein 2016, pp. 159-160.

\textsuperscript{123} See articles 48-60 API.

\textsuperscript{124} See Sandoz et al., paragraph 1909, p. 609. It must be noted that there is a clear differentiation between civilians of different nationality in the provisions protecting the civilian population in GIV. The ICTY Appeals Chamber however seemed to water down this distinction. It held that “[...] hinging on substantial relations more than on formal bonds, becomes all the more important in present-day international armed conflicts. While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance. Or, put another way, ethnicity may become determinative of national allegiance. Under these conditions, the requirement of nationality is even less adequate to define protected persons. In such conflicts, not only the text and the drafting history of the Convention but also, and more importantly, the Convention’s object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.” ICTY, Tadic Appeals Chamber Decision, 15 July 1999, para. 166.

\textsuperscript{125} See Parks 1997, p. 109.
military objectives or restrict their options. Unfortunately, the use of human shields has been a frequently recurring tactic in a number of armed conflicts. The use of human shields is a specific violation of IHL as well as a violation of the obligation to take precautions against the effects of attack, more specifically the obligation to refrain from placing military objections in the vicinity of civilians.

Civilians may decide voluntarily to endeavour to shield a military target from attack by their presence, or they may be forced to do so. The question may be asked whether civilians acting as voluntary human shields count differently in the proportionality assessment than those who are forced to do so. The discussion of the protection of civilians participating in a human shield often focuses on the question of whether the participation in a human shield as such constitutes direct participation in hostilities. If the definition of direct participation is followed as it has been formulated in the ICRC Interpretative Guidance on direct participation of hostilities, a human shield does in most cases not qualify as direct participation. This is because there is no direct harm caused to the opponent by the shielding. In those situations, it must be assumed that the civilians do count on the civilian side of the scale.

There is merit in the position that the opposing force must still be reasonably able to wage their war and not be restrained by voluntarily shielding civilians. The 2004 UK Manual on the Law of Armed Conflict states that although the duty of the attacker to take precautionary measures remains in effect, unlawful actions by the opponent “may be taken into account in considering whether the incidental loss or damage was proportionate to the military advantage expected.” This approach seems to suggest that the status and protection of the civilians remain unchanged due to their placement as a human shield. The presence of a human shield does not alter the character of a military objective itself: it remains liable to attack. However, a heavier burden is borne by the attacking side to take precautionary measures. The approach of the 2004 UK Manual seems to suggest that the ultimate assessment of excessiveness is relaxed for the commander as a result of the unlawful act of the side of the conflict that uses human shields, decreasing the value attributed to the shielding.

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127 For an overview, see Schmitt 2008, p. 17-21. See also Geiss and Devaney, pp.11-12, Henderson, p. 211-218, and Bouchié de Belle, pp. 883-885.
128 See for example articles 23 GCIII, 28 GCIV, 12(4), 28(1) and 51(7) API, rule 97 of the ICRC Study on Customary International Humanitarian Law.
129 Article 58 API, see also Rule 22-24 of the ICRC Study on Customary International Humanitarian Law.
130 See for example Schmitt 2008, p. 45 and Bouchié de Belle, pp. 893-896.
131 See DPIH Interpretative Guidance, Melzer 2009, p. 56-57: “The fact that some civilians voluntarily and deliberately abuse their legal entitlement to protection against direct attack in order to shield military objectives does not, without more, entail the loss of their protection and their liability to direct attack independently of the shielded objective. Nevertheless, through their voluntary presence near legitimate military objectives, voluntary human shields are particularly exposed to the dangers of military operations and, therefore, incur an increased risk of suffering incidental death or injury during attacks against those objectives”. See also Sandoz et al., p. 633, para 1943, and Bouchié de Belle, p. 895, who concludes that the human shield’s participation is merely indirect.
132 See the UK Manual of the Law of Armed Conflict, para 5.22.1, p. 68. See also Dinstein 2008, p. 15.
civilians. The updated version of the US DoD Manual has been changed on this point, but still maintains that “[b]ased on the facts and circumstances of a particular case, the commander may determine that persons characterized as voluntary human shields are taking a direct part in hostilities.” These civilians are thus discounted in the proportionality equation and it may be concluded that the US understands civilians voluntarily participating in a human shield as assuming a certain risk and therefore to count differently in the proportionality assessment. The ICRC however maintains that any civilian who is not directly participating in the hostilities and who is voluntarily shielding a military objective, must be taken fully into account in the proportionality assessment.

With regard to involuntary human shields, Dinstein, proposes that civilians who are present involuntarily should be “discounted in value” or that in relation to them at least “the test of excessive injury to civilians must be relaxed”. This is however a minority view. The better view seems to be that civilians involuntarily shielding military objectives retain their full civilian protection and must be fully taken into account in the proportionality assessment as long as their participation does not amount to direct participation in hostilities.

Ultimately, it is submitted that the suggestion of attributing different values to civilians who voluntarily shield military objectives than to civilians who do not, amounts to accepting that there are different categories of civilians. The law in the Geneva Conventions suggests that this is not appropriate. It may be considered the better view to take all civilians who are part of a human shield into account equally for the purpose of the proportionality assessment, assuming they are not participating in the hostilities. First of all for practical reasons: it is very difficult to determine in practice whether a civilian is shielding involuntarily or not. Furthermore, it may be considered prudent to give civilians participating in a human shield the benefit of the doubt, because if there is uncertainty about the status of civilians, they must enjoy the protection of a civilian, which would include the protection of the IHL proportionality rule.

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135 See Melzer 2009, pp. 56-57. See also Pedrazzi, pp. 98-116.

136 Dinstein 2010, p. 131.


138 See for example Schmitt 2009, p. 301: he proposes not “to relax the incidental injury calculation for involuntary shields [because it] would be to enter upon a normative slippery slope.” See also Henderson, p. 215 and Pedrazzi, pp. 98-116.

139 See also Henderson, p. 218.

140 See article 50(1) API.
11.6.3 Physical Injury, Sickness and Mental Harm

It is debatable whether the phrase ‘injury to civilians’ in the IHL proportionality rule refers to injury in a broad sense, consisting of physical injury, sickness and mental harm, or that the two latter categories are excluded. A literal reading of the IHL proportionality rule provides no further guidance, but a further interpretation of the rule paints the picture that it is not only the physical injury that is taken into account.

That physical injury may be inflicted incidentally to civilians in the context of hostilities goes without saying. Civilians may be hit by stray bullets, by blast and shrapnel through the detonation of explosives and other foreseeable effects of the use of kinetic force. These effects include pieces of glass that fly around as a result of blast waves that shatter windows, injuries resulting from collapsing buildings and fires that erupt as a result of explosions.

The collateral infliction of sickness may not be expected when a grenade is launched in the direction of military objectives where a limited civilian presence is deemed acceptable incidental harm. However, in other scenario’s, the infliction of diseases may be highly likely, and therefore foreseeable. The scenarios in which diseases are likely to occur include those carried out with weapons causing severe radiation, such as nuclear weapons; or some chemical weapons causing cancers. In addition, when sewage systems may be expected to get hit incidentally, this may lead to catastrophic diseases, especially when the population is already vulnerable as a result of prolonged hostilities. As explained above, the standard is that of foreseeability.

With regard to the question of mental harm is also included in the assessment of expected incidental harm to civilians, the literature on the subject is limited. One could debate whether the ordinary understanding of physical injury must be understood to also include expected mental harm. If that is the case, foreseeable mental harm must be taken into account.

Treaty law does contain indications that intentionally inflicted mental harm to the civilian population is take into account, particularly through the prohibition of terror attacks. To be included into the IHL proportionality assessment, mental harm must amount to more than merely the inconveniences of war, and the fear and anxiety that the conduct of hostilities in the vicinity would instil on the civilian population. But when studies in the realm of psychiatry would show the foreseeability of the expected occurrence of measurable mental harm such as PTSD, there is no reason why this must be excluded on
the side of expected incidental injury to civilians. Furthermore, it has been argued that exposure to blast may cause certain concussive effects, resulting in injuries that are in fact physically of character. This traumatic brain injury is invisible, but must be taken into account nonetheless when the state of science is sufficiently advanced to calculate the impact of the use of certain weapons that are known to cause these effects.

It is submitted that in practice, it is not foreseeable for a military commander whether the harm that will be caused by a single strike will also include mental harm or diseases. Therefore, it is submitted, that on a tactical level, the statistical possibility that the planned attack will also cause mental harm or diseases is, depending on the factual circumstances, usually too remote, and therefore not foreseeable. However, it is submitted that the statistical likelihood of causing mental harm and diseases by conducting a large scale operation must be taken into account on the higher levels of command. As Lieblich notes: “[t]his harm can be accounted for prior to the attack by relying, for instance, on prediction models concerning the risk among inured persons.” Therefore, from the operational level up, statistics and information about the likelihood of an operation to cause mental harm and diseases must be taken into account as far as that is reasonably possible. This may, for the time being, be a difficult factor to be applied in practice. Nonetheless, it is a foreseeable factor to be taken into account in the practical application of the IHL proportionality rule in larger, concerted attacks, planned on the operational level. As a result, it may be necessary for States to study the foreseeability of collaterally caused diseases and mental harm on the civilian population and include experts in the respective fields into the planning staff for concerted operations.

11.6.4 Civilians inside a Military Objective

A final controversial issue that must be addressed in this section concerning the protection of the civilian population in the IHL proportionality assessment, is that of how civilians who are present inside a military objective must be valued. The often cited example of such a situation is the civilian worker in an arms or ammunition factory. These civilians are by definition more at risk than other civilians, because they are inside an object that in most circumstances qualifies as a military objective. These civilians are by definition more at risk than other civilians, because they are inside an object that in most circumstances qualifies as a military objective. It is also clear that the status of these civilians is not in doubt. They are civilians, simply because they do not qualify as

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145 See also Lieblich 2014, p. 215, arguing that mental harm must be taken into account in the assessment of the IHL proportionality rule.
146 Schmitt and Highfill, pp. 76-81.
147 Schmitt and Highfill, p. 98, noting that to take these effects into account in a proportionality assessment is “[g]iven the current state of science (…) arguably premature”.
148 Lieblich 2014, p. 213.
149 See Dinstein 2016, p. 150. See also Khalfaoui, pp. 251-303.
150 Rogers 2012, p. 12. See also the discussion in Henderson, pp. 218-220.
151 But see the discussion in Camins, p. 869-870. The workers inside the ammunition factory were seen as ‘quasi-combatants’ in the interbellum, for example by Spaight.
combatants. The next question therefore is whether they remain protected, or they lose their protection because they participate directly in the hostilities. Although it must be granted that civilian workers in an ammunition or arms factory, do indeed contribute to the opponents war-fighting and war-sustaining capabilities, it must also be noted that these civilians as such are not participating directly in hostilities. Therefore, “[a]s civilians who take only an indirect part in the hostilities, these workers continue to enjoy protection.”

The question remains whether these civilians must be treated any differently than other civilians who are not working in the factory, but who only happen to be close to the military objective. It seems that the civilians of the former category are taking a calculated risk to be near that military objective, since it could be attacked. Henderson takes a clear position in this issue: he concludes that “the injury or death to any particular civilian is of no lesser weight than the injury or death to any other civilian.” Given the position taken above with regard to the relative weight that must be attributed to civilians in the case of a human shield, which is shared by Henderson, it is submitted that this is the correct position. This does not mean that the munitions factory may not be attacked. Instead, this places a higher burden on the attacker to take more far-reaching precautions before the attack is launched. This additional duty on the part of the attacker is the result of the objective of the section where the IHL proportionality rule is formulated: it is a protective rule for the civilian population. However, if the attack is deemed to be proportionate, it may proceed. Rogers agrees that “[s]uch incidental damage is controlled by the rule of proportionality.” He uses as a similar example, the civilian truck driver who is driving a military ammunition truck. The driver is a civilian, but the truck is a military objective. When the truck is attacked, the driver will subsequently be viewed as proportionate civilian collateral damage.

As Dill notes, the assertion that the IHL proportionality rule would apply differently to civilians who are within a military objective, and thus choose to be subject to a greater danger than those who stay away, is merely an ‘intuition’, not a matter of law. An earlier version of the US DoD Manual position on civilians inside an ammunition factory misrepresented this, but this has now been corrected.

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152 This issue lead to heated debate during the discussions among the experts. See for example N. Melzer 2005, p. 21-23. However, according to Schmitt, virtually all commentators agree that the workers are civilians who are not participating directly in the hostilities. See Schmitt 2008, p. 53. See also Bothe et al., p. 295: “By being within, or in the vicinity of a military objective, these civilians assume the risk of collateral injury from the effects of attack.”
153 Bouchié de Belle, pp. 896-897.
154 Henderson, p. 220.
155 Rogers 2012, p. 12.
156 Rogers 2012, p. 13.
157 See Dill on the Just Security blog, https://www.justsecurity.org/35068/dod-law-war-manual-false-appeal-differentiating-types-civilians/: “It is a powerful intuition that what happens to civilians in war should at least to some extent be a result of their own choices. Crucially, this is an intuition about what the law should be, not about what it is. As an intuition about what the law should be, it is deeply misguided.”
11.7 What are Civilian Objects?

With regard to the scope of the damage included in the IHL proportionality assessment, it may be noted that any ‘damage’ to civilian objects counts for something, including loss of functionality. Civilian objects are defined as any object that is not a military objective, therefore it requires defining what is excluded from the proportionality assessment to determine what is relevant for it. Only objects that are not military objectives may be included on the side of the civilian damage in the proportionality calculation. In short: “Once it is subject to attack, the object itself is not collateral damage.” Therefore, it is useful to quote the definition of a military objective:

“In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.”

11.7.1 Civilian Objects and Military Objectives

Objects that may be identified as a military objective because of its nature are objects that have an undoubtedly military character, such as military vehicles or platforms (armoured vehicles, fighter-jets, attack-helicopters). Static examples would include military airfields, military barracks, bunkers or fortresses. As a result of the definition, it may happen that a prima facie civilian object must be included on the military advantage side of the proportionality equation because of its location, purpose or use. Objects that may be identified as military objectives because of their location could include strategic points, such as bridges, intersections of important roads or rail tracks, hill-tops or mountain passages. These locations could be non-military of character as such but the location of an object in relation to another location could turn a certain object into a military objective nonetheless. Objects that may be identified as military objectives on the basis of their purpose could include objects that are not of military nature, but that could become military objectives because of their intended future use. The intended use of an object is of course difficult to ascertain. Mere potential future use is not sufficient to qualify as a military objective, because there is no concrete military advantage

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160 Article 52 (1) API.
161 Henderson, p. 207.
162 Article 52 (2) and (3) API.
(yet). Only reliable information regarding the future use of an object could be taken into account. A possible example could be a situation where reliable intelligence is available with regard to the intended future use of a civilian airfield, in case the military airfield has been rendered unusable for military airplanes. In this case, its intended future use could lead to the conclusion that the civilian airfield becomes a military objective because of its purpose once the military airfield has actually been attacked.\textsuperscript{163} Examples of objects that may become military objectives because of their use are civilian objects where combatants or military equipment are located. This could include the use of civilian houses by combatants as shelter, weapons storage, hideout or shooting position. Another example could be a school building that is used by military forces as temporary barracks, headquarters or weapons storage.

It is important to stress that there is a fundamental difference between the criteria that render military objectives liable to attack and those that are decisive for persons to be liable for attack, as seen above in Section 11.6. For an object to be a military objective it is not only required to have a military nature, location, purpose or use, but in addition, the planned attack must offer a definite military advantage in the circumstances ruling at the time. The test is thus ‘two-pronged’. This additional requirement does not exist with regard to individuals: their status as a combatant alone makes them a legitimate military target, to be attacked at all times. The requirement of military advantage will be discussed below, in Section 11.10, because the concept of military advantage is also an important component of the proportionality equation.

It must be noted that the logical result of the two-pronged test for military objectives is that even an object that would be military by nature, would count as a civilian object for the purpose of the proportionality assessment in situations where the second prong of the definition of a military objective is not fulfilled. This could lead to the situation in which a military object which is not a military objective, such as a temporarily inoperable tank or empty military barracks, would have to be taken into account as civilian collateral damage when a nearby military objective is attacked. This situation however does not seem to lead to problems in practice because the value that must be attributed to these objects for the protection of the civilian population is arguably zero and these objects therefore do not count for any real significant counterweight against the military advantage of the destruction of the military objective that is planned to be attacked.

According to the Commentary to the Red Cross Draft Rules of 1956, the terms civilian loss and damage must be interpreted broadly.\textsuperscript{164} Therefore, according to this commentary, in case of dual-use objects, (such as a train station, cultural object or a school), more weight needs to be attributed in a proportionality calculation to damage to certain important civilian objects, even when the object has become a military objective. This would imply that there are different values to be attributed to civilian objects in the proportionality equation:

\textsuperscript{163} See HPCR Manual on air and missile warfare, Commentary, pp. 107-108.

\textsuperscript{164} “pertes et destructions infligées à la population civile doivent s’entendre dans un sens très large.” (translation by the author) International Review of the Red Cross, 1956, p. 701.
types of collateral damage apparently count more than other types. This is supported by the particular rules that apply to some types of civilian objects, such as cultural and religious objects (article 53 API), objects indispensable to the survival of the civilian population (article 54 API) and objects that contain dangerous forces (article 56 API), as well as the example above of the inoperable tank and empty military barracks counting marginally as civilian collateral damage.

It is recalled that for the relative value of civilians, it was rejected that there could be a different evaluation of categories of civilian individuals. For civilian objects, apparently, some civilian structures are more important than others.\(^\text{165}\) This may be illustrated by the example of schools. Schools may be attractive to the military because they could be suitable to be used as barracks.\(^\text{166}\) However, the importance of education for children is of high value for the civilian population. Therefore, as compared to shops or a community house, in some cases more value must be attributed to collateral damage to schools. Similarly, a residential building in which two families are living must be counted for less collateral damage compared to one in which seven families have their home, assuming similar family sizes. The existence of civilian objects with different values attached to them, does however further complicate the proportionality equation, because it is easier to balance equal entities, than it is to balance unequal ones, even when they are on the same scale.\(^\text{167}\)

With regard to the scope of the notion of incidental civilian damage, the question must be asked of whether economic losses and expected displacement of the civilian population also count as collateral damage. In this regard, there is a link with the question of whether reverberating incidental effects must be taken into account. It is submitted that since the applicable standard is that of foreseeability, economic losses and expected displacement of the civilian population which is foreseeable must indeed be taken into account as civilian damage. It must be emphasized in this respect that it depends on the situation whether these effects are indeed foreseeable for the commander in a specific situation: it is important that the application of the IHL proportionality rule remains realistic. The next section addresses the question of the extent to which damage to the environment must be taken into account in the application of the IHL proportionality rule.

### 11.7.2 The Natural Environment as Part of the Proportionality Equation.

A problem with the interpretation of the component of the natural environment in the proportionality equation is that its interpretation is complicated by the fact that a number of nuclear weapons States are unwilling to accept any rule of IHL that would \textit{a priori} prohibit

\(^{165}\) See also Henderson, p. 192.

\(^{166}\) Henderson, p. 207.

\(^{167}\) See the report by Human Rights Watch on Schools and Armed Conflict, available online: [http://www.hrw.org/sites/default/files/reports/crd0711webwcov.pdf](http://www.hrw.org/sites/default/files/reports/crd0711webwcov.pdf).
the use of these weapons.\textsuperscript{168} Outside the scope of nuclear weapons, the two major cases on damage to the natural environment as a result of armed conflict pertain to the use of herbicides in the war in Vietnam\textsuperscript{169} and the oil spills that occurred during the Gulf Wars in Iraq and Kuwait.\textsuperscript{170}

Except in circumstances where a certain part of the natural environment would qualify as a military objective, the natural environment must be deemed to be of a civilian character.\textsuperscript{171} In fact, IHL provides for special protection of the natural environment.\textsuperscript{172} This includes provisions on the use of certain means and methods of warfare and the rather general statement that "\textit{[c]are shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage.}"\textsuperscript{173} It is worth noting that the provision in article 8 of the Rome Statute that deals with the prohibition of disproportionate attacks in international armed conflicts, also mentions "widespread, long-term and severe damage to the natural environment."\textsuperscript{174}

Although there does not seem to be an agreed definition of the term 'natural environment',\textsuperscript{175} it is likely for any substantial attack to have some effect on the natural environment. There seems to be no doubt that the protection of the natural environment should, as a minimum, be taken into account during the planning and executive phases of targeting decisions.\textsuperscript{176} According to Koppe, this 'duty of care' (or 'due regard') that is part of article 55(1) API, has developed into customary IHL.\textsuperscript{177} The treaty provisions of articles 35 (3) and 55 API were declared part of customary IHL in rules 43-45 of the ICRC Customary Law
Study.\textsuperscript{178} However, the customary character of these rules has since been contested.\textsuperscript{179} This discussion is reflected in the Commentary on the HPCR Manual on Air and Missile Warfare:

\begin{quote}
"Some members of the Group of Experts were strongly of the opinion that the protection of the natural environment “must” be taken into account when planning and conducting air or missile warfare attacks. In their view, expected collateral damage to the environment, if excessive, requires that any missile or missile attack must be aborted. The majority of the Group of Experts reached the conclusion that such a high bar is not mandated by customary international law and that the ‘due regard’ criterion adequately reflects the state of the law of international armed conflict today."\textsuperscript{180}
\end{quote}

Yet, it seems safe to conclude that the natural environment should be taken into account as part of the collateral side of the proportionality equation, because as such, in principle, the natural environment is a civilian object.\textsuperscript{181} According to Schmitt, “consensus exists that environmental damage constitutes collateral damage.”\textsuperscript{182} However, the value that should be attributed to damage to the natural environment for the purpose of the proportionality calculation does not seem straightforward. It may be argued from the definition of the war crime in the ICC Statute, that not any damage to the natural environment should be counted as collateral damage, but only that which is expected to be ‘widespread, severe and long-term’. It is notable that for civilians and other civilian objects, there is no such additional requirement. It would imply that damage to the natural environment is not automatically included on the civilian side of the proportionality equation, but only in certain instances, when it is expected that a certain threshold is met, which is that the damage will be sufficiently widespread, severe and long-term. However given the designation of the natural environment as a civilian object, it is submitted that this interpretation would be incorrect. It is on the other hand a reality that the conduct of active hostilities entails consequences for the natural environment. Normally, this damage to the natural environment is not severe enough to add meaningful weight to the civilian side of the proportionality equation. Yet, if the environmental damage caused by an attack is expected to be disproportionate to the anticipated military advantage, it is still prohibited.\textsuperscript{183} When damage to the natural environment is expected, it must be ensured that those means and methods of warfare are chosen, that prevent environmental damage as much as possible. Commanders thus particularly need to take expected damage to the natural environment into account when

\textsuperscript{178} Henckaerts & Doswald-Beck 2005a, pp. 143-158.


\textsuperscript{180} See the HPCR Manual on air and missile warfare, Commentary, p. 207.

\textsuperscript{181} The natural environment should not be seen as a fully independent entity but rather as a prerequisite for the health and survival of the human population. See also Blix, p. 150.

\textsuperscript{182} Schmitt 2006a, p. 293. See also Koppe 2008, p. 164, Boivin, p. 74, Henckaerts and Doswald-Beck 2005a, p. 145. See however the HPCR Manual on air and missile warfare, Commentary, p. 207.

\textsuperscript{183} Rogers 2012, p. 234.
they expect the consequences of a planned attack to be widespread, severe and long-term, because an additional layer of IHL protection needs to be taken into account on that situation. However, as long as the expected damage to the natural environment fails to satisfy the additional requirements, it is taken into account as damage to regular civilian objects. Nonetheless, “[i]n order to satisfy the requirement of proportionality, attacks against military targets which are known or can reasonably be assumed to cause grave environmental harm may need to confer a very substantial military advantage in order to be considered legitimate. At a minimum, actions resulting in massive environmental destruction, especially where they do not serve a clear and important military purpose, would be questionable.”

11.7.3 Dual-use Objects and Proportionality

‘Dual-use object’ is as such not a term defined in IHL rules, but it may nonetheless be used to describe objects that are used by both the civilian population and by the military. These objects become military objectives as a result of such military use, provided these objects also satisfy the second prong of the definition of a military objective. Therefore, these objects lose protection against direct attack as civilian objects. The status of dual-use objects is thus dependent on their concrete use. Examples of dual-use objects include roads, bridges or railroads that are normally used by civilians but are also used during armed conflicts to transport military equipment or personnel. Airports that are simultaneously used by military and civilian aircrafts are another example. Some dual-use objects are under certain circumstances essential to both the military and the civilian population, such as oil production facilities, electricity generation facilities and grids. It is important to stress that the mere use of an object simultaneously by civilians and the military is not sufficient to identify it as an object that may be attacked. As becomes clear from the wording of article 52 (2) API, there is an additional requirement. In order to become a legal military objective, it needs to be ascertained that a definite military advantage is to be gained under the circumstances ruling at the time, and subsequently, the proportionality calculation needs to be conducted. Watkin notes that the term dual-use objects is problematic because the term masks the fact that an object is either a valid military target, or a civilian object that is not liable for attack. It seems that the special characteristic of a dual-use object is that if it is attacked, it “inevitably affects the civilian population” and thus “the attack on a dual-use object can be considered as the attack on a military objective with collateral damages.”

184 ICTY OTP Kosovo report, para 22.
185 Sassòli and Cameron, p. 57.
186 Kolb and Hyde, p. 132, see also Benvenuti, p. 516 and Sassòli and Cameron, pp. 57-58.
188 Watkin 2007, p. 16.
189 Dörmann 2008, p. 87.
Dual-use objects may thus ‘change sides’ in the proportionality equation as soon as the military starts using it or weigh in partly on both sides of the proportionality equation. This last point does not seem straightforward, because it means that even though a certain object has been identified as a military objective, it nonetheless also counts partly on the civilian side of the proportionality equation.

It is clear that the simultaneous use by civilians and the military of a dual-use object will put a larger burden on the attacker. The military advantage that may be gained must be sufficiently high in order to prevent the attack from being disproportionate. Especially when there are many civilians present in the vicinity of the object, additional precautionary measures may be necessary. As long as the object is still also used by civilians, the remaining civilian characteristics should not be discounted altogether on the civilian side of the equation. The object itself has lost its protection from direct attack, but “the loss of the civilian function also performed by that object cannot be allowed to disappear from all calculations as if it had never been performed.” An example may illustrate how this may be dealt with in practice:

Suppose during an armed conflict a section of a large bridge crossing a big river is used as a cover for a military objective by nature, such as a surface-to-surface multiple launch rocket system (MLRS) and its crew. The bridge is therefore now used for a clear military purpose, and makes an effective contribution to the military action because it is expected to be used in the ongoing struggle between the parties to the conflict. The bridge is normally used for civilian purposes and therefore it would be a civilian object if not the MLRS was hidden underneath. It is clear that possible harm to civilians as a result of the fact that they happened to be driving their car over the bridge at the time of the attack on the MLRS, may be foreseen as counting as incidental damage. The question now is whether the damage to the bridge itself and the indirect effects this may have on the civilian population, must also be taken into account as incidental civilian damage. It seems to this author that the use of the bridge as cover for the MLRS, that particular section of the bridge has lost its protection as a civilian object. That is not to say that the entire bridge has now become a military objective, but the section that serves to hide the MLRS has and therefore it has lost its protection as a civilian object. As a result, the direct damage done to the bridge when planning the attack on the MLRS should not be taken into account as incidental civilian damage. However, foreseeable indirect effects the attack on the bridge may have for the civilian population, depending on the circumstances ruling at the time, must be taken into account.

It may be noted that the solution as proposed in this section is also of use for cultural objects that have become military objectives, because it would enable, if not require, the attacking side to take the cultural value of a military objective into account.

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191 Dörmann 2008, p. 87: “the civilian part of the object affected by the attack, including foreseeable reverberating effects, must be counted among the incidental civilian damage in addition to the possible civilian damage to civilian property in the vicinity.”

192 Shue and Wippman, p. 565.

193 See the discussion in the Chatham House Report on proportionality, Gillard, p. 35.
11.8 Combatants *Hors De Combat* and Other Protected Persons and Objects

The previous section addresses the civilian side of the proportionality equation. Civilians, including those who are wounded, sick or detained as well as civilian objects are incorporated into the proportionality equation on the basis of their civilian status. Excluded are civilians who participate directly in hostilities, because they have lost their protection against direct attack for such time as they directly participate. Nonetheless, one may wonder whether categories of persons and objects must also be taken into account without a *prima facie* civilian status, but which are specifically protected or exempted from direct attack nonetheless. The first example of such persons is the category of combatants or fighters *hors de combat*, such as wounded, sick, shipwrecked and captured soldiers. Equally to civilians, they may (no longer) be attacked. The question may be raised whether these persons must therefore also be included in the civilian side of the proportionality equation. Secondly, the same question may be asked for military medical personnel and military chaplains, because they are not combatants, although they are clearly not civilian either. Similar questions may arise with regard to specifically protected objects, such as military medical installations and holding facilities for prisoner of war or detained opponents. It must be noted that there are absolute protections in the Geneva Conventions prohibiting the attack of these objects. Nonetheless, it is unclear what could happen if they may be affected as collateral damage to an attack on a military objective, or in a situation where these objects have become military objects.

The text of the IHL proportionality rule is clear and refers only to civilians and civilian objects. Furthermore, the articles containing the IHL proportionality rule are placed in Part IV of API, which has as its topic the “Civilian population”. The protection of medical personnel is covered in Part II of API (title: “Wounded, sick and shipwrecked”), and the rules regarding combatants in part III (“Methods and means of warfare - Combatant and prisoner-of-war status”. A logical inference thus seems to be that the decisive criterion according to the proportionality equation, is the question whether the person or object is of a civilian character. As noted above, civilians are defined as any person who does not fit into the categories of article 4(A)(1), (2), (3) or (6) of GCIII and article 43 API. Damage to military medical objects, and injury and loss of life to medical military personnel, military chaplains and military personnel *hors de combat* thus seems *prima facie* excluded from the proportionality equation, because they are not of a civilian character and not included in the categories referred to in the previous sentence. The 2016 update of the United States Department of Defense Manual explicitly excludes non-civilians from the proportionality rule and instead

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194 See generally also Gisel 2013, pp. 215-230.

195 Henderson, p. 206. However, during an expert meeting on the principle of proportionality on 27 October 2018 in Chatham House, London, one expert noted that not too much weight should be attached to the placement of the IHL proportionality rule in this part of API, because this was not viewed as decisive during the drafting of the rules.

196 As phrased in the ICRC Interpretative Guidance on DPIH: “For the purposes of the principle of distinction in international armed conflict, all persons who are neither members of the armed forces of a party to the conflict nor participants in a levée en masse are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.” See Melzer 2009, p. 20.
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refers to precautionary measures.\textsuperscript{197} In doctrine, Henderson and Merriam make the point that only civilians are part of the IHL proportionality equation.\textsuperscript{198}

Although it must be admitted that combatants and fighters \textit{hors de combat} and military medical personnel and chaplains are uniformed and are part of the armed forces, it must also be born in mind these categories of persons enjoy strong protection under IHL.\textsuperscript{199} Including wounded soldiers and medical personnel into the civilian side of the equation would presumably increase their protection, which would be a result that would be in accordance with many well-established rules and principles of IHL. A situation may for example be envisaged, where a legitimate military objective, for example military equipment of high importance,\textsuperscript{200} is located adjacent to a medical unit where many wounded soldiers and their care-takers are present. Of course, medical installations and equipment enjoy a high degree of protection,\textsuperscript{201} and the presence of a military objective adjacent to it is a violation of IHL. Is the military commander who is planning an attack on the military equipment required to include the persons present near the military objective into his proportionality assessment? Or are these categories of persons simply ignored in the application of the IHL proportionality rule when attacking the military objective?

There is some State practice that indicates that protected persons or objects other than civilian ones are included in the proportionality equation. For example, the Military Manual of New Zealand refers to the “possible harmful effects upon protected persons and objects.”\textsuperscript{202} Similarly, the updated Commentary to GCI argues in favour of the inclusion of wounded members of the armed forces into the proportionality equation.\textsuperscript{203} In doctrine, the

\begin{itemize}
  \item See DOD Manual, para 7.3.3.1 on p. 441 and 442: “The respect and protection due to the wounded, sick, and shipwrecked do not prohibit incidental damage or casualties due to their proximity to military objectives or to a justifiable mistake. Combatants who are wounded, sick, or shipwrecked on the battlefield are deemed to have accepted the risk of death or further injury due to their proximity to military operations.”
  \item Henderson, p. 206, and generally Merriam on the justsecurity blog: see https://www.justsecurity.org/31905.
  \item ILA Report, p. 27. See for example for wounded and combatants, article 12 (1) GCI: “Members of the armed forces (...) shall be respected and protected in all circumstances.”
  \item For example an anti-aircraft installation.
  \item See article 21 and 22 of GCI. Particularly, their protection against attack is absolute and not to be lifted, unless they are used to commit acts harmful to the enemy and a warning to stop those acts is ignored.
  \item 2016 updated ICRC Commentary to GCI, para 1357: “in view of the specific protections accorded to the wounded and sick, namely the obligation to respect (and to protect) them in all circumstances, a fortiori they should also benefit from the protection accorded to civilians. In other words, if civilians are to be included in the proportionality assessment all the more so should the wounded and sick. Indeed, if the wounded and sick were not to be considered for purposes of the proportionality principle, their presence in the vicinity of legitimate military objectives would be legally irrelevant. However, this would contradict the explicit obligation to respect them in all circumstances and the basic rationale of according special protection to them. It would be unreasonable to consider that direct or indiscriminate attacks against the wounded and sick would be strictly prohibited and would amount to a grave breach, while incidental harm and even excessive incidental casualties would not be prohibited. Accordingly, the presence of wounded and sick members of the armed forces in the vicinity of a military objective is to be taken into consideration when carrying out a proportionality assessment prior to an attack. In addition, and on the basis of the same rationale, an attacker must take precautions in accordance with Article 57 of Additional Protocol II in relation not only to civilians but also to wounded and sick members of the armed forces, to protect them from direct attack and collateral damage.”
\end{itemize}
position to include protected persons other than civilians into the proportionality analysis is posited by a number of authors.\textsuperscript{204}

Civilians who are directly participating in the hostilities do not count as incidental casualties during their direct participation, but once they have become wounded, they are always included in the proportionality assessment for the purpose of a planned attack on another military objective in their proximity. The first reason for this is the fact that they never lose their status as a civilian for the purpose of their treatment after they are captured, but that only the accompanying protection against direct attack is suspended until their participation has ended. Secondly, it may be assumed that the direct participation in the hostilities of the civilians has indeed ended as soon as they are \textit{hors de combat}. As a result, civilians who are directly participating are included in the proportionality assessment. To exclude those permanently participating in the hostilities thus seems to imply that their protection is lower after they are rendered \textit{hors de combat}, even though there are no reasons of military necessity to justify this.

Medical personnel generally enjoy a higher level of protection than ‘ordinary’ civilians. For medical personnel, there are no convincing reasons that explain why civilian medical personal would factor into the proportionality equation, and military medical personnel would not. In practice, their tasks are mostly identical. The only relevant differences between the two categories of persons is that the institution that pays their wages differs and that military medical personnel may be armed with small arms for self-defence purposes. Moreover, it seems impossible in practice to take the differences in protection into account when a medical installation that is expected to be affected by an attack on a nearby located military objective contains both wounded civilians and wounded combatants, and both military and civilian medical personnel.

It is submitted that the protection under IHL of persons \textit{hors de combat} and medical personnel is simply too strong to ignore this category of persons altogether. A number of legal bases for this conclusion have been suggested, including the specific articles that provide specific protection to the different categories of persons and objects, assimilation into the categories of ‘civilians and civilian objects’ as included in the IHL proportionality rule and the invocation of the Martens Clause and general principles of IHL.\textsuperscript{205}

The approach by Corn and Culliver is that it is simply irreconcilable with the practice of the conduct of hostilities that attacking forces constantly need to take into account the wounded opponents made by an earlier attack on the military objective. It is submitted that this approach is unconvincing, because it confuses the principle of the proportionality calculation during such a situation with the actual outcome of the equation. In the example used to illustrate the issue, Corn states that it is incompatible with the attack on entrenched Iraqi forces that are about to be enforced by other forces, to take the wounded into account.

\textsuperscript{204} See ILA Report, pp. 27-28, Bartels 2013, p. 304, Corn and Culliver, Gisel and Kleffner 2017 (blog). Note however that except for Bartels and Culliver, the other authors, including the present author, were part of the ILA Study Group responsible for drafting the ILA Report. See also the Sanremo Manual on International Law applicable to Armed Conflicts at Sea, para 13.9.

\textsuperscript{205} See specifically: Gisel, pp. 221-226, Corn and Culliver, pp. 464-466 and Kleffner 2017 (blog).
account. 206 It is submitted that the wounded must nonetheless be taken into account and balanced against the military objective to decisively destroy the military objective. This does not necessarily “require the US commander to postpone a subsequent attack decision in order to first conduct a proportionality assessment to protect the wounded Iraqi soldiers and military personnel in the target area”. In this example, the proportionality assessment can be done on the spot and does not need to take hours, given the direct and concrete military advantage that is at stake. Furthermore, (additional) wounding or killing enemies hors de combat and military medical personnel decreases the expected military advantage in the long run, because affecting them will turn into disadvantage for all parties to the conflict. After all, as a result of the reciprocal character of IHL, it is detrimental to the protection of their own military personnel hors de combat and medical personnel if massive numbers of protected persons are killed during an attack on an otherwise legitimate military objective that only causes minor civilian collateral damage. As far as medical personnel is concerned, it may be added that both the attackers as the defenders would benefit from their work and therefore causing injury or death to them during an attack on a legitimate military objective decreases the military advantage of an operation.

With regard to objects, Gisel makes the point that the category of civilian objects consists of all objects that do not meet the definition of a military objective. Since this definition for objects is two-pronged, in contrast to the definition of combatants and members of a non-State armed group with a continuous combat function, the military medical installations and arguably also military detention facilities for detained opponent fighters must be designated as civilian objects. For this reason, they are covered by the protection of the IHL proportionality rule. 207 Although this seems confusing, given the fact that these objects are certainly ‘military’ in the ordinary meaning of the term. Nonetheless, it is submitted that these objects must be included in the proportionality assessment nonetheless, as is equally done to civilian objects (again, using the word civilian in its ordinary meaning).

In the end, it is not the status of a person or object that invokes their protection by the IHL proportionality rule, but the protection it enjoys at the moment an attack is planned. Any person or object enjoying protection against direct attack, as can be reasonably foreseeable for the attacker, must be included on the civilian side of the proportionality assessment. It is submitted that this is also what any reasonable military commander would do on the basis of common sense. 208 The legal basis for this conclusion is the respective specific protectionary rules of IHL, reinforced by the IHL principle of precautions and the broader IHL proportionality principle (as opposed to the IHL proportionality rule) as described in Chapter 9. 209

207 Gisel, p. 219-220.
208 According to Merriam, the US CDE methodology does take specifically protected persons and objects into account: “at least in the US, our collateral damage estimation process requires us to consider not only civilians, but also other specially protected persons or objects. But that collateral damage methodology is a process, which is not the same thing as a position on the law.” See https://www.justsecurity.org/31905.
209 Here, the positions of Corn and Culliver, based on the Martens Clause, and Kleffner (see Kleffner 2017 (blog)), based on the General principles of IHL, seem to be in agreement with each other and congruent with the position taken above in Chapter 9.
11.9 How to Evaluate a ‘Combination’ of Incidental Loss of Civilian Life, Injury to Civilians and Damage to Civilian Objects?

Having analysed which civilian individuals and objects must be taken into account in the proportionality calculation, a next question is how the ‘combination’ of incidental loss of civilian life, injury to civilians and damage to civilian objects should be calculated. Even though the IHL proportionality rule is not a mathematical formula, it seems safe to conclude that at least to determine the absolute total amount of collateral damage, a simple sum of the totals of expected casualties and total damage to civilian objects could be calculated. It may be more difficult to compare the relative totals of collateral damage when different means and methods of attack may be used in an attack. This would necessitate the assessment of the relative value of the components of the expected collateral damage.

It has been suggested that the value of the damage to civilian objects should be discounted.\(^{210}\) The rationale of this approach seems to be that both in the statements of States and in the media, the emphasis is always on human casualties, not on destroyed civilian property. Although it seems correct that this emphasis is prevalent, it is submitted that this does not imply that there is no legal obligation to include civilian objects in the proportionality calculation. It rather indicates that civilian casualties should be counted more than damage to civilian objects. It is submitted that this is indeed the way the two components of civilian harm must be interpreted, but this is not unlimited. In particular, when some objects are indispensable for the survival of the civilian population in a particular area, or when it may be expected to contain dangerous forces leading to more foreseeable civilian death and injury, arguably, more weight may be attached to the object than to civilians who are expected to be affected by the attack directly.

Obviously, injury is normally less severe than death, since one still has a chance for recovery, which may be assessed on the basis of recognised medical criteria. Yet, the IHL-principle prohibiting serious injury or unnecessary suffering (the SIRUS Principle) paradoxically points in a different direction. The principle dictates that some types of weapons and methods of warfare are prohibited under IHL because the injury they cause is deemed to be superfluous and the suffering this causes unnecessary. This principle leads to the effect that sometimes a certain non-lethal weapon may not be employed against the adversary, because it is outlawed through the application of the SIRUS principle, such as permanently blinding laser-weapons. Thus, instead a means or methods of warfare may need to be employed that will lead to more civilian collateral damage. However, paradoxical as this may seem, it is the legal reality a military commander has to deal with in the conduct of his operations. Military commanders are generally used to be guided in their actions by the law and additional restraints like rules of engagement.

\(^{210}\) Watkin 2007, p. 13. See also Parks 1997, pp. 97-98: “[t]he record of concern for collateral damage to enemy civilian property is virtually nonexistent, suggesting that the pairing up of protection for lives and property in Additional Protocol I may not even see application in future conflicts.”
With regard to civilian objects, it may be argued that it is too simple to qualify damage to civilian objects only in the monetary value of rebuilding the object. After all, the destruction of some civilian objects is less severe than that of others. The destruction of civilian objects that are indispensable for the survival of the civilian population is placed in a more important category by the Geneva Conventions. In addition, the collateral destruction of a modern shopping mall, it could be argued, is not such a great loss as the destruction of unique and irreplaceable cultural property would be. As an example, one could compare the loss of a modern shopping mall to the destruction of the ancient Buddhas of Bamiyan by the Taliban government of Afghanistan in 2001.

Another question is how injury to civilians and loss of civilian life may be valued as compared to damage to civilian objects on the longer term. It would seem, as noted above, that loss of civilian life is always more severe than damage to an object. This may however change if the expected damage to the civilian object will inevitably lead to significant loss of civilian lives on the long term. There is unfortunately no universally accepted method of measurement available to solve this issue and the situation is very different for every single attack. It will therefore be a separate evaluation for every attack that is planned or executed. It is therefore impossible to provide more clarity for this component of the equation other than flagging the issue. It must be left to the discretion of the military commander to evaluate how the combination-calculation must be executed for a future planned attack.

11.10 The Military Advantage Side

The concept of ‘military advantage’ is both part of the proportionality equation as an important component in itself, and as part of the definition of a military objective, which also dictates whether an object is a civilian object. The meaning of the phrase ‘military advantage’ for the determination of an object to be a military objective is, however, not necessarily identical to the definition of the military advantage that needs to be factored into the proportionality analysis. For example: in the latter case, the security of the attacking force may be taken into account, as is discussed below in Section 11.10.3. This is not the case for the determination of whether the destruction of a military objective leads a definite military advantage. Obviously, for the identification of an object as a military objective, there is no assessment required of the civilian damage that may occur in the destruction of that object, because this is part of the proportionality equation that will need to be conducted in the next phase of the targeting cycle. The threshold for the concept of military advantage for the purpose of identifying a military objective, it is submitted, is thus rather low. This type of military advantage may be defined as “any consequence of an attack which directly enhances friendly military operations or hinders those of the enemy” under the circumstances ruling...

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211 See art 54 API.
at the time.\footnote{Commentary on the Harvard Manual on Air and Missile Warfare, p. 45.} It must be borne in mind, however, that the question whether this military objective may actually be attacked, is subject to additional requirements, such as the proportionality calculation and precautionary measures. Therefore, the appreciation of the military advantage that will arise from a certain attack says nothing in itself, because it depends on the counterweight of the expected collateral damage whether it is sufficient to execute the attack.

It is also important to note that the notion of ‘military advantage’ does not equate ‘military necessity’.\footnote{See generally Redse Johansen, pp. 271-308.} If it is deemed that an attack may result in some type of military advantage, that does by no means result in the conclusion that an attack is military necessary. The mere fact that something could be attacked, does not mean that it must be attacked.

**11.10.1 Concrete and Direct Military Advantage**

The IHL proportionality rule puts the additional qualifiers of ‘concrete’, ‘direct’ and ‘military’ to the assessment of the advantage of an attack. These qualifier clearly place extra limitations on the extent to which effects of a planned attack may be factored into the IHL proportionality assessment. These factors imply that there must be a measurable effect\footnote{Watkin 2007, p. 22.} with a “close connection between the action and the attainment of the military purpose.”\footnote{Hampson 1992, p. 47.} Clear examples of military advantageous results that may be expected from an attack are the ground that is conquered by the attack or the effect on the opposing forces, both in terms of casualties and damage to the objects and installations of the enemy.\footnote{Sandoz et al., para 2218, p. 685.} However, military advantage may be deemed to be somewhat broader.\footnote{Watkin 2007, p. 19. Geiss 2012, p. 77.}

A definition of military advantage that may be included in the proportionality equation is formulated in Rule 1(w) of the ICPR Air and Missile Warfare Manual: “Military advantage” means those benefits of a military nature that result from an attack. They relate to the attack considered as a whole and not merely to isolated or particular parts of the attack.” This military advantage must be sufficiently tangible: “[t]he advantage concerned should be substantial and relatively close”\footnote{Sandoz et al., para 2209, p. 684.} It cannot be “based merely on hope or speculation.”\footnote{Commentary on the Harvard Manual on Air and Missile Warfare, p. 92.} Military advantage cannot include advantage which is only political, psychological, economic, financial, social or moral in nature.\footnote{Commentary on the Harvard Manual on Air and Missile Warfare, p. 45.} There is no debate on the fact that the notion of military advantage is comprised of a wide range of tactical gains and military considerations.
Furthermore, the components of that military advantage “need not necessarily derive from the destruction of the specific object under attack [but] may be considered cumulatively.”

Military advantageous effects may be valued in terms of importance (strategic, operational or tactical advantage) and in terms of urgency (urgent advantage, moderate advantage, distant advantage). Whether the terms ‘concrete and direct’ mean that there must be a single ‘causal step’ approach or rather must be defined in terms of a temporal link is debatable and depends highly on the type of military objective subject to attack. There is no single formula outlining how the concrete and direct military advantage must be evaluated in relation to the underlying plan, or commander’s intent. The elements of crimes explaining the meaning of the ‘overall’ military advantage as included in article 8(2)(b)(iv) of the Rome Statute of the International Criminal Court refer to “a military advantage that is foreseeable by the perpetrator at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack.”

Finally, it needs to be emphasised that the probability of success of a planned attack plays a role in the proportionality equation: the probability of a high military advantage may not result in a reckless attack.

The ultimate limit to military advantage is that military advantage cannot be attributed to damage to civilian objects and civilian casualties. This is why the morale of the civilian population cannot be deemed to amount to a military advantage. Military advantage may also be derived from the blockade of a transportation route or a communication line. These types of objects may often be ‘dual-use’ objects. Therefore, the military advantage that is achieved by attacking these objects, also determines whether the objects qualify as military objects in the first place. Similarly, the military advantage that results from attacking objects that support the economic sustainability of the enemy, may only become part of the military advantage if the armed conflict has developed into a situation where it is expected to become a conflict that will stretch over a longer period of time. If not, economic targets must be deemed to be insufficiently ‘military’ to be part of the military advantage of a planned attack and the military advantage that is thus attained is too indirect to be included in the proportionality calculus.

For some types of military operations, such as counterinsurgency operations, the military advantage also consists in part of protecting the civilian population against the dangers of attacks. In this type of operations, attacking an enemy may be dependent not only on its status as a targetable individual, but also on the “how much harm the targeted insurgent could do if allowed to escape.” It is thus also the conduct, not only the status of the individual that must be taken into account in this specific type of operations.

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222 Geiss 2012, p. 77.
224 On this subject, see for example Sassòli and Cameron’s discussion of Dunlaps and Meyers proposal to include civilian objects into the list of legitimate military objectives, Sassòli & Cameron, p. 59-62. See also Parks 1997, p. 77-84.
225 Wright, p. 845.
11.10.2 The “Overall” Military Advantage

It is controversial to what extent the military advantage from an attack should be limited to the tactical level of one isolated attack, or that it must be regarded as part of a larger attack. As a result of the negotiations for the formulation of the definition of the war crime of article 8 (2)(b)(iv) of the ICC Statute, the adjective ‘overall’ was added to the concrete and direct military advantage, because it was deemed that this was now customary law. The ICRC has however argued that the word “overall” to the definition of the crime “could not be interpreted as changing existing law.” The ICRC explained that if ‘overall’ indicates that with regard to a certain military objective, the importance of the military advantage extends a lengthy period of time and affects military action in areas other than in the direct vicinity of the objective, then “this meaning is included in the existing wording of Additional Protocol I and the inclusion of the word ‘overall’ is redundant.”

The conclusion of Section 11.2 may be recalled, which is that the proportionality assessment, including the assessment of the military advantage, must be done on all levels of authority (strategic, operational or tactical level), with the exception that a proportionality assessment on a tactical level does not need to be repeated if it has been done previously on the operational level in a situation in which three conditions are fulfilled: when the tactical operations are (1) part of an pre-existing plan on the operational level and (2) the tactical commander is aware of the fact that he will encounter a certain degree of prima facie excessive collateral damage and (3) the situation as it becomes apparent to the tactical commander in the course of the execution of the operation is as expected in the planning phase.

11.10.3 Military Advantage and Force Preservation

The proportionality equation is meant as a protective rule for the sake of the civilian population, in particular that of the adversary. Thus it may be assumed that it has not developed because there is a need to protect one’s own forces. For this reason, it seems cynical at first glance to include the responsibility for a commander to protect the life of his own soldiers into the proportionality equation when attacking a military objective. It seems to deny the very basic of the IHL proportionality rule, which aims to protect civilians. In general terms, one would therefore assume that the definition of military advantage in the proportionality equation regards the damage that is done to the war fighting capacity of the adversary, not the own capacity. This does not mean that military commanders must

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226 Dörmann 2005a, p. 169.
228 Roscini, p. 422.
229 See for example Krüger-Sprengel, p. 181: “la règle de proportionnalité n’a pas pour objet de faciliter les operations de guerre, mais d’en limiter les effets nuisibles”.
disregard the lives of their own soldiers, or that they have no rights at all. The omnipresent balance between military necessity and humanity argues against that. One could however argue that the IHL proportionality rule is a clash between the right to life of the civilians of the adversary, and that of the soldier. Put in those simple terms, it would seem that the right to life of the civilians of the adversary should be more unconditional than the competing right of the soldiers of the own military. Indeed, the belligerent privilege to participate in hostilities comes with the inescapable fact that soldiers may also be killed in combat. Their protection is however framed in different rules, such as those based on the principle prohibiting superfluous injury and unnecessary suffering. When commanders conclude that a planned attack could be executed in accordance with the IHL proportionality rule, but a large number of their own soldiers may be expected to become a casualty in the course of the operation, commanders may simply decide to cancel or postpone the planned attack to preserve the lives of their own soldiers. IHL does not oblige them to do so, but nor does IHL prohibit it. IHL does, on the other hand, prohibit proceeding with an operation when the expected collateral damage would be disproportionate.

Yet, doctrine and state practice show that the proportionality equation is in fact influenced by the responsibility that is put upon a commander to protect the lives of his own soldiers. In the words of a U.S. Army general: “commanders are morally responsible not to waste lives of their soldiers because they are charged to protect soldiers’ right to life” This is a factor that may be regarded as part of the military advantage that is to be gained. After all, it is militarily advantageous to him not to lose soldiers in combat, because it will negatively influence the morale of his soldiers, and he will have less men to fight his next battle. This applies equally to military equipment that may be lost in an attack. Thus, when identifying a military objective, the commander will take the question into account whether the military advantage is sufficiently significant to justify the danger that his troops will be subjected to when they execute the attack.

Canada, New-Zealand and Australia declared upon ratification of Additional Protocol I that they view the protection of the attacking forces as part of the military advantage that could be gained from an attack. In operation Allied Force in Kosovo, the concept of ‘zero casualty warfare’ was defended (that is in this case: no casualties on the side of the NATO armed forces). The prosecutor of the ICTY deemed it to be one of the difficult and yet unresolved questions surrounding the applications of the proportionality calculation. In the Final Report on Operation Allied Force, he concluded that:

“there is nothing inherently unlawful about flying above the height which can be reached by enemy air defences. However, NATO air commanders have a duty to take practicable measu-

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res to distinguish military objectives from civilians or civilian objectives. The 15,000 feet minimum altitude adopted for part of the campaign may have meant the target could not be verified with the naked eye. However, it appears that with the use of modern technology, the obligation to distinguish was effectively carried out in the vast majority of cases during the bombing campaign.233

Also, there are many notable writers who do include the protection of the own forces into the equation.234 Others agree that “[t]he security of the attacking forces is a factor that must be weighed in the balance when assessing military advantage”235 and “[i]n an effort to improve security of the attacking force, increased collateral damage is permissible.” Schmitt acknowledges that “[s]urvival is a valid factor in the assessment”237 but he however claims that the protection of the own forces is particularly a question of precautions.238 Survival of the own troops would then be a valid factor in the assessment of the proportionality equation but only when “collateral damage and incidental injury are excessive (...) one must further factor in the military advantage that is inherent in combatant and weapon survival.” An example is the circumstances under which it may not be possible to give an ‘effective advance warning’ because of the safety of the attacking force. In the example of the U.S. “Linebacker II” air raids on Vietnam in 1972, “[g]iven the extremely heavy air defenses surrounding Hanoi during the campaign, circumstances obviously did not permit warning the Vietnamese civilians before each raid. Indeed, it is difficult to imagine when such warnings would be practicable except in the case of lightly defended, immobile targets.”240

On the other hand, a number of writers discount own casualties in the proportionality equation.241 As an example, Fenrick notes that one’s casualties among the own forces conducting the attack may not be calculated into the analysis of the military advantage that will be gained.242 Geiss concludes that the safety of the attacking force must be seen as part of the military advantage, but that the real issue is whether that military advantage is sufficiently concrete and direct.243 He states that “the overall aim of protecting one’s own

233 OTP Final Report, paragraph 56.
234 See for example Dinstein 2010, p. 141 and Henderson, p. 205. See also Henderson and Cavanagh, pp. 73-94 and The Commander’s Handbook on the Law of Naval Operations, NWP 1-14 M, July 2007 edition, para 8.3.1: “Naval commanders must take all reasonable precautions, taking into account military and humanitarian considerations, to keep civilian casualties and damage to the minimum consistent with mission accomplishment and the security of the force.”
236 Henderson, p. 205.
237 Schmitt 2006a, p. 298.
238 Schmitt 2006a, p. 297.
239 Schmitt 2006a, p. 298.
240 Carnahan, p. 866.
241 See the discussion in Geiss 2012, p. 73 and 74, referring to Fenrick, Solis and Oeter.
242 Fenrick 2000, p. 78.
243 Geiss 2012, p. 79.
forces would indeed be too abstract to be considered," however if the planned attack "will prevent the imminent annihilation" of the attacking forces, the military advantage of their protection seems to be sufficiently concrete and direct. The requirement that there must indeed be 'imminent annihilation' at stake, seems to be overly strict. It is submitted that also in the event significant losses are expected, this may be factored into the expected military advantage. There is a limit to this: "the focus must be on the forces that are in fact being protected, and the maximum value that may be considered when conducting a proportionality assessment is the relative military value of these forces." However, when there is a choice between different modes of attack, and the mode of attack that saves most lives of the attacking forces is chosen, this in itself does not allow for factoring in the possible losses that would have accrued from the mode of attack that was not chosen. Since that attack never happened, the military advantage of the safety of the attacking troops was in that case never sufficiently concrete and direct to be included in the proportionality equation.

In conclusion, even though it seems counterintuitive and the protection of the attacking forces was never the basis of the proportionality rule, in reality, the safety of the attacking forces is included in the military advantage that may be achieved by an attack. However, the view of Geiss must be accepted that the advantage must be particularly concrete and direct. It may be seen as the far edge of the military advantage that may be included in the proportionality calculation. And even then, caution remains necessary, since "whenever 'force protection' is at issue, self-preservation is at stake" which has the potential to be overstated by the person who feels that his life is on the line, at the expense of the civilian population. In the end, "the idea that the armed forces' own soldiers could be ascribed a greater value in the balancing exercise than civilians is incompatible with the [IHL rule of] proportionality, and would in fact undermine [it]. Self-preservation of the military must not be tantamount to a personalised military necessity exception to the IHL proportionality rule.

11.11 Conclusion

It has been suggested that the uncertainty of the proportionality assessment that is present in the fact that every attack must be assessed on its own merits, renders its protective value presently null and void. The analysis of the components of the proportionality equation in this chapter reveals that diverging opinions indeed exist on almost all components of

244 Geiss 2012, p. 81.
245 Geiss 2012, p. 82.
246 Geiss 2012, p. 86.
247 Geiss 2012, p. 87-88.
249 ILA Study Group, Final Report, p. 34.
250 See for example Shamash, pp. 103-105.
the proportionality equation, and thus the unsurprising conclusion of this chapter is that there is no mathematical proportionality formula. But must the fact that there is no a mathematical formula be understood to mean that the proportionality equation is nothing more than “a thankless game of guesswork”? It is submitted that the IHL proportionality rule requires a thorough analysis of its components as far as circumstances permit. The fog of war may make it impossible to acquire more information concerning possible civilian casualties, or the expectations of military commanders with regard to the military advantage of their planned attack may be misperceived. Nonetheless, military commanders need a sufficient understanding of the components to enable them to conduct an assessment of these factors. The next chapter provides a number of descriptions of factual situations where the IHL proportionality rule is applied in practice.

251 Already in 1979, Krüger-Sprengel proposed in Ankara to initiate efforts on the international level to reach an uniform interpretation of the principle of proportionality. See Krüger-Sprengel, p. 195.
252 Garraway 2005, paragraph 21.
Chapter 12
Chapter 12: Proportionality in Practice

12.1 Introduction

Having established the place of the proportionality assessment in the targeting process, as well as its place in the legal framework applicable to that process, the attention turned in the previous chapter to the analysis of the components of which the IHL proportionality rule consists. This chapter turns to an analysis of its application in practice. A number of examples of factual situations are therefore examined, the purpose of which is to assess which difficulties arise in the practical application of the proportionality analysis in different situations.

Some preliminary remarks with regard to this chapter are required. Although Fellmeth\(^1\) has proposed a thorough methodology to assess practical incidents, the selection of the situations in this chapter is relatively random and its description not based on extensive field-research.\(^2\) This touches upon an important obstacle to analysing the practical application of the IHL proportionality rule. Commanders, or the authorities of their States, are generally reluctant to share how they conduct a proportionality assessment.\(^3\) There are some valid reasons for this. The most important of these is the fact that States regard the actual assessments and the considerations on which these are based as classified. States thus wish to avoid that their opponent is able to predict how the operations will be conducted. In addition States prefer to keep the proportionality assessments classified in order to prevent claims adjudicated before civilian courts in which victims of the hostilities claim compensation for any collateral damage.\(^4\) Although there have been calls on States to declassify the records of proportionality assessments after a certain period of time, this has thus far not happened.\(^5\)

There is no intention to focus particularly on air or land operations, nor is there any particular preference for one or another side in the armed conflicts from which the proportionality assessments in this section are taken. Rather, any selection of factual situations with the purpose of providing further clarity to the application of the principle of proportionality in practice depends in particular on the availability of material from which the actual operation of the proportionality principle may be derived. Therefore, no effort is made to present a representative set of case-studies to cover all aspects, types of armed conflicts, types of operations or political objectives. The situations presented are furthermore not intended to be understood as representing State practice. Attacks conducted

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1 Fellmeth 2012, pp. 136-141.
3 See Krupiy, p. 5, and Fellmeth 2012, p. 131.
4 Fellmeth 2012, pp. 131-133.
5 Sassoli 2005, pp. 204-205.
before the IHL proportionality rule came into existence in API have been omitted, since the commanders deciding on these attacks may be assumed not to have based decisions on the IHL proportionality rule as it exists today.6

As was mentioned earlier, the proportionality rule needs to be applied in advance of as well as during an attack. Therefore, the actual outcome of an attack is only relevant for an analysis of an attack, if exactly that has happened, that was expected in advance. It seems safe to assume that in practice, this does not always happen. Finding proof, or even State practice, of how the proportionality principle has been applied in factual situations is therefore a difficult endeavour. Also, in assessing an attack after the fact, it is difficult not to be biased by its actual outcome. Judicial decisions on the matter are not always clear either.7 Furthermore, since the aim of this section is to assess the application of the proportionality rule in practice, the analysis will not include issues of classification of the conflict. It will be assumed that IHL is applicable as a matter of law.

The general division of the tiers of command in a military organisation consist of a distinction between the strategic, operational and tactical level. It needs to be pointed out that proportionality assessments need to be made not only at the tactical level, but also at the operational and strategic levels, as was mentioned in Chapter 11.8 The analysis of the application of the proportionality rule in Section 12.2 includes proportionality assessments on the strategic level or the operational level, and Section 12.3 assesses a number of incidents on the tactical level. The incidents are presented in chronological order.

12.2 The Strategic and Operational Level.

The assessment of the actual collateral damage of an entire armed conflict, compared to the actual tonnage of bombs dropped cannot count as a practical assessment of the proportionality of a strategic or operational operation.9 This may be different for a proportionality assessment for the purpose of the ius ad bellum. However, the assessment for

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6 See for example Gaughan, p. 229-285. Gaughan studies the Allied air campaign preceding D-Day in 1944 on the basis of the proportionality rule, concluding that the proportionally rule "leaves all but the most extreme and uncontestable cases of excessive collateral damage beyond the reach of international law". See Gaughan, p. 284.

7 See for example Bartels 2013 and Ponti.

8 To recall: The strategic command is the higher command, overseeing the big picture, where the tactical level relates to the lower level of command. In simple terms: at the tactical level, a commander needs to take decisions incident-by-incident, at the operational level, the commanders plans and decides on an attack-by-attack basis, while at the strategic level the decisions regard the overall military campaign. In addition, a ‘grand strategic’ or political level could be defined to which may be referred in ius ad bellum and that is thus outside the scope of IHL. NATO defines the levels as follows: The strategic level: The level at which a nation or group of nations determines national or multinational security objectives and deploys national, including military, resources to achieve them. The operational level: The level at which campaigns and major operations are planned, conducted and sustained to accomplish strategic objectives within theatres or areas of operations. The tactical level: The level at which activities, battles and engagements are planned and executed to accomplish military objectives assigned to tactical formations and units. See http://www.nato.int/docu/stand/stanag/aap006/aap-6-2010.pdf and see AJP 3.9- p. 31 v. See also Olasolo, pp. 158-159, but compare: Henderson, pp. 238-241.

9 See Fenrick 2001, p. 493.
the IHL proportionality rule must be done in advance of and during an operation. The actual
effects would only have some relevance in the unlikely event all tactical attacks went exactly
according to plan and produced exactly both the military advantage and collateral damage
anticipated. It is thus much more difficult to assess the proportionality of a planned attack
on the strategic or operational level. In particular, it has proven difficult to obtain sufficient
information for the purpose of analysing an actual attack on the strategic and operational
level. However, in this section, three examples are analysed.

12.2.1 Kosovo 1999: the NATO Bombing Campaign

The NATO bombings during the Kosovo crisis in 1999 have been the subject of extensive
scholarly analysis.10 The NATO-led air campaign against military targets of the Milosevic
regime started on 24 March 1999 and lasted for roughly two and a half months.

The ICTY Prosecutor established a committee to assess allegations of violations of IHL,
including the IHL proportionality rule, to advise the Prosecutor on the question of whether
a criminal investigation was opportune into some of the incidents that occurred during the
bombing campaign. The work of the committee resulted in the ICTY OTP Kosovo report.11
The Kosovo Report contains a general analysis of the law applicable during the Kosovo air
campaign, as well as an analysis of five specific incidents and a number of recommendations
to the ICTY Prosecutor. The ICTY OTP Kosovo Report concludes that “either the law is not
sufficiently clear or investigations are unlikely to result in the acquisition of sufficient
evidence to substantiate charges against high level accused or against lower accused for
particularly heinous offences (...) [and] [o]n the basis of information available, the committee
recommends that no investigation be commenced by the OTP in relation to the NATO
bombing campaign or incidents occurring during the campaign.”12 The committee draws a
general conclusion from the statistics of the entire bombing campaign. It stated that “[d]
uring the bombing campaign, NATO aircraft flew 38,400 sorties, including 10,484 strike
sorties. During these sorties, 23,614 air munitions were released (figures from NATO) (...) 
[and] it appears that approximately 500 civilians were killed during the campaign. These
figures do not indicate that NATO may have conducted a campaign aimed at causing substantial
civilian casualties either directly or incidentally.”13

10 See for example: Rowe, Rogers 2000, Shamash, Laursen, Benvenuti, Bring, Byron, Fenrick 2001, Medenica and the
proceedings of the ASIL Conference of 2002 and the proceedings of a Conference of 8-10 August 2001 on the subject of the
Kosovo Crisis as published in the Naval War College ILS 78 (2002), edited by A.E. Wall.
11 Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal
12 ICTY OTP Kosovo report, p. 31.
13 ICTY OTP Kosovo report, para 54 on p. 21 (emphasis added).
It may be noticed that the committee found it appropriate to conduct the proportionality equation on such a high (campaign/strategic) level, although there is no further explanation of the yardstick the committee used to reach this conclusion. That the committee based its conclusion with regard to the proportionality analysis on a strategic level is confirmed by the statement that “[i]t has not been possible for the committee to look at the NATO bombing campaign on a bomb by bomb basis and that was not its task.” 14 Furthermore, support for the position that a proportionality analysis must also be conducted on the tactical level of the separate attacks of the operation can be found in the statement of the committee that it “reviewed public information concerning several incidents (…) [and] endeavoured to examine, and has posed questions to NATO, concerning all other incidents in which it appears three or more civilians were killed.” 15 These incidents refer to the tactical level and are therefore addressed below in Section 12.3.3.

12.2.2 The 2003 UK Intervention in Iraq

Section 17 of the Iraq Inquiry Report, or Chilcot Report, published on 6 July 2016 (hereinafter: the Report) contains an analysis of expected civilian casualties, and assessments of actual civilian casualties resulting from the 2003 intervention in Iraq that the United Kingdom carried out as part of the US-led Coalition. 16 The Report addresses in this Section assessments of the human cost of not intervening in Iraq; expected civilian casualties resulting from attacking Iraq and the reports on actual civilian casualties and the UK Government’s response to these latter reports. Apart from an analysis of one particular attack on General ‘Chemical’ Ali Hasan Al-Majid, which is analysed in Section 12.3.5, the Report contains an analysis on a strategic level before the invasion of Iraq started on 20 March 2003.

Of course, the legality of the invasion of Iraq by the US-led Coalition in 2003 is outside the scope of this Chapter, because it would concern an analysis of the proportionality of the attack on the basis of the *ius ad bellum*. It is striking to note however that the Report seems to suggest that the question whether the attack on Iraq was legal under the *ius ad bellum* is dependent also on the degree to which civilians were suffering as a result of repression by the government of Saddam Hussein. Furthermore, the Report seems to take into account the expectation of the UK Government of a number of strategies the Iraqi forces might use that would possibly cause significant civilian casualties, including the use of chemical and biological weapons against coalition forces and that would also affect the civilian population; human shields, suicide attacks and the use of ‘scorched earth’ policies. 17

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14 ICTY OTP Kosovo report, p. 5.
15 ICTY OTP Kosovo report, p. 5.
16 The Chilcot Report is available online on www.iraqinquiry.org.uk.
17 Chilcot Report, para 21-26, on page 176-177.
The Report proves that the UK government did take expected civilian casualties into account before the invasion of Iraq started. Two months before the start of the invasion, the UK Ministry of Defence produced an assessment of the expected civilian casualties from planned UK air attacks following a future invasion.\(^{18}\) The UK Ministry of Defence noted in this regard that more detailed expected civilian casualties would have to be assessed on a case-by-case basis, and “the target set was not yet sufficiently well-defined to allow an estimate to be produced for the air campaign as a whole.”\(^{19}\) However, an analysis of earlier operations over Iraq in 1998 and 1999 “suggested that the civilian casualties for an air campaign would be around 150 killed and 500 injured.”\(^{20}\) Aside from air operations, ground operations were expected to cause additional collateral civilian casualties. Based upon experiences from World War II, the UK expected that if British troops would get engaged in urban warfare in Basra, this was likely to cause another 200-2,000 civilian casualties, depending on the “circumstances, duration and the degree to which civilian casualties are minimised.”\(^{21}\) Admiral Sir Michael Boyce, who was the British Chief of Defence Staff, expected civilian casualties to be in the “low hundreds.”\(^{22}\)

Although it is questionable whether World War II experiences were still relevant for any assessment of expected civilian casualties in 2003, given developments in weaponry and tactics in the meantime, it seems positive that lessons learned from earlier armed conflicts were used to assess proportionality on a strategic level. The other issue at hand here is that there is no assessment of the other end of the proportionality equation in the Section on civilian casualties. Proportionality is of course more than only an assessment of the expected civilian damage. In fact, that assessment is worthless if it is not subsequently put in relation to the military gain sought from the planned operation. The interesting point of the analysis of the Chilcot Report however, is that it seems that other factors are taken into account in assessing the civilian damage of the entire invasion, than those that would be taken into account in the proportionality analysis of a single attack (i.e. on a tactical level). An example of a factor that was mentioned with regard to the entire operation is the human cost that could be expected if the abusive government in power would stay in place. It would seem to be difficult to determine the extent to which the prevention of possible future victims of the regime may be included as a ‘concrete and direct military advantage’. Furthermore, the Report also mentions the potential adverse effects on the safety of the civilian population in post-conflict Iraq as a relevant factor.\(^{23}\) It may be assumed that the Report thus regards this to be part of the expected incidental loss of civilian life and injury to civilians.

\(^{18}\) Chilcot Report, note 27 on page 177, referring to Minute Fry to COSSEC, 3 February 2003, Casualty Estimates – Op TELIC, attaching Paper MOD.

\(^{19}\) Chilcot Report, para 29-30 on page 177.

\(^{20}\) Chilcot Report, para 30 on page 177.

\(^{21}\) Chilcot Report, para 31 on page 178.

\(^{22}\) Chilcot Report, para 40 on page 179.

\(^{23}\) Chilcot Report, para 35-38 on page 178.
It seems that in the end, the Report concludes that the UK Prime Minister himself made the decision on the issue of the proportionality of the planned invasion of Iraq on the strategic level: “Mr Blair concluded that “we must set our strategy: to destroy the regime but minimise civilian casualties”.”

In sum, the analysis in the Report is probably meant as a proportionality analysis on the basis of the *ius ad bellum* standard rather than it is focused on analysing the IHL proportionality of the UK intervention in Iraq. Nonetheless, the material presented in the Report is valuable to assess *prima facie* how a proportionality on the strategic level must be conducted.

### 12.2.3 The 2010 Artillery Attack on South Korea

In June 2014, the Prosecutor of the ICC issued a Report with regard to possible war crimes under the jurisdiction of the ICC. The Report is the result of a preliminary investigation opened by the ICC Prosecutor on 6 December 2010, to evaluate the shelling of South Korea’s Yeonpyeong Island by the North-Korean Armed Forces (DPRK) on 23 November 2010, and assess whether the attack could amount to a war crimes under the ICC jurisdiction.

The ICC Prosecutor inquired in its preliminary investigation whether there was intentional targeting of civilians (Articles 8(2)(b)(i) or (ii)) or a disproportionate attack (Article 8(2)(b)(iv)). For the purpose of its preliminary investigation, the Prosecutor asked both States for additional information with regard to the incidents under review. North-Korea did not respond to this request.

The facts of the attack, according to the ICC Prosecutor, were as follows:

“The shelling of Yeonpyeong Island occurred after military exercises with prior notification by the [South Korean] ROK Marine Corps stationed on the island, including an artillery firing exercise. Such exercises have been conducted annually since 1974. The shelling by the DPRK on 23 November 2010 came in two waves, the first between 14h33 and 14h46, and the second between 15h11 and 15h29. It resulted in the killing of four people (two civilians and two military), the injuring of sixty-six people (fifty civilians and sixteen military) and the destruction of military and civilian facilities on a large scale, estimated to cost $4.3 million. In addition to the military base in the southwestern part of the island and other marine positions, several civilian installations were hit, including the History Museum, locations close to Yeonpyeong Police Station and the Maritime Police Guard Post, the township office, a hotel, a health center and other civilian structures in the town of Saemaeul. As to the total number of artillery shells and rockets fired by the DPRK, the report of the U.N. Command states that a total of 170 rounds were fired, of which 90 landed in the water surrounding

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24 Chilcot Report, para 41 on page 179.  
26 ICC Korea Report, p. 3  
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Yeongpyeong Island. The ROK Government indicated that 230 rounds were fired, of which 50 landed in the surrounding waters. The DPRK publicly acknowledged responsibility for the shelling.28

According to the International Crisis Group (ICG), the 23 November 2010 artillery attacks onto Yeongpyeong Island killed two civilians and two South Korean Marines, and injured two civilians and fifteen South Korean Marines.29 In addition, the ICG Report mentions that the North-Korean attack “was preceded by several warnings, and was executed after meticulous planning.”30 The International Crisis Group held that:

“The ROK had six K9 155-mm self-propelled howitzers deployed on Yŏnp’ŏng Island and they began a live fire exercise at about 10:00am on 23 November. At 2:34pm, after the exercise had finished, the [North Korean] KPA began to fire at Yŏnp’ŏng Island from two bases, Kaemŏri, on the DPRK coast, and Mu Island, which are only about 12-13km from Yŏnp’ŏng Island (...). About 80 of some 170 rounds fired from the North hit the island and around 90 fell into the surrounding waters. The shells hit military and civilian targets killing two civilians and wounding three others. Two ROK Marines were killed and fifteen were wounded. Several homes were damaged and the shells were described as special incendiary rounds designed to penetrate structures and cause extensive damage. The cost of the damage initially was estimated to be about $4.3 million. The KPA shelling came in two volleys. Between 2:34 and 2:46 the KPA fired 150 rounds from Kaemŏri and Mu Island; 60 shells hit Yŏnp’ŏng Island and 90 fell into the surrounding waters during the first wave. The ROK howitzers on the island had their barrels pointing south for their firing exercise; three were unable to pivot and point their fire north. The radar on Yŏnp’ŏng Island also malfunctioned and it took thirteen minutes to return fire. The KPA had deployed MLRS vehicles to Kaemŏri shortly before the attack, and during the first wave of artillery fire, the ROK unit only returned fire to Mu Island while shells were also being launched from Kaemŏri. The slow response enabled the KPA to fire another twenty shells from 3:12 to 3:29; all twenty hit Yŏnp’ŏng Island. The ROK returned fire according to the rules of engagement, which restricted counter-fire to similar weapons systems attacking from the North. ROK fighter planes were scrambled but were restricted from attacking the KPA artillery bases at Kaemŏri and Mu Island.”31

The analysis of the proportionality of the North-Korean artillery attack on the island is complicated by the fact that there is no detailed information available with regard to the DPRK planning process that preceded the attacks. With regard to the South-Korean Army that fired back at the North-Korean, information is also lacking about any expected civilian damage from these attacks in response.32

28 ICC Korea Report, p. 4.
30 ICG Report, p. 27.
31 ICG Report, pp. 27-28 (footnotes omitted).
32 According to a news agency, the South-Korean armed forces response consisted of firing 80 artillery rounds, and a South-Korean military spokesman is reported to have stated that military barracks were hit, resulting in “many casualties and
The ICC Report indicates that the analysis of the Prosecutor of the attacks by the DPRK has been after the fact and did not look at the planning stage of the attacks. The report states that: “Although the attack resulted in injury to civilians and damage to civilian objects, it is not clear that they were the objects of the attack. There are other possible explanations for the striking of civilian objects other than intentional targeting. The fact that military objectives, including the military base on the southwestern part of Yeonpyeong Island, were attacked eliminates any reasonable basis to believe that civilians or civilian objects were the sole object of the attack.”

Furthermore, the ICC Prosecutor notes that “Out of 180 rounds, approximately 150 landed in and around 8 different military areas in various locations on the island and 30 on the civilian area immediately surrounding (...) [and] there are alternative explanations for the civilian impact (targeting accuracy of artillery weapons).”

The Prosecutor held that since a number of military objectives were hit, the attacks did not violate the prohibition of directly attacking the civilian population. With regard to a possible violation of the proportionality rule, in line with the analysis of the application of the IHL proportionality rule in Chapter 10 and 11 above, it is necessary to identify the expected military advantage from the attack as well as the anticipated collateral damage.

The first question is whether the attack was directed at military objectives. According to the ICC Report, most of the attacks were aimed at military objectives and the incidental damage was inherent to the type of weapons that was used. The ICC Report notes on the basis of information provided by South Korea, that “230 rounds were fired, of which 180 struck the island and 50 landed in the surrounding waters. Out of 180 rounds, approximately 150 landed in and around 8 different military areas in various locations on the island and 30 on the civilian area immediately surrounding.” The ICC Report obviously does not specify which exact military objective the attacks were aimed at. Since the North Korean military had warned not to conduct the artillery training exercise, it may be assumed that the artillery pieces that were used during the exercise were the targets of the attack, but lacking information from the North-Korean authorities, this remains purely speculation.

The next question is whether precautionary measures had been taken to avoid or minimise damage to civilian objects or civilian casualties. This also includes a preliminary proportionality assessment. A first factor is whether the North-Korean military commanders could have reasonably expected any civilian damage to occur. On this point, the ICC Prosecutor notes that:

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33 ICC Korea Report, pp. 24-25.
34 ICC Korea Report, p. 25.
36 ICC Korea Report, p. 20.

“In assessing the anticipated civilian damage or injury, a number of factors are relevant. The DPRK had access to maps of Yeonpyeong island and thus would have been aware of the proximity of the civilian areas to the military objects. The DPRK allegedly conducted a firing drill near the Northern Limit Line in January 2010 using the same ‘time on target’ method used in the Yeonpyeong attack. If the DPRK equipment did have low targeting accuracy, leading to the incidental civilian impact, one can presume that the DPRK was aware of this and of the likelihood of the subsequent civilian impact after the January drill. (...) The island is a total 7.3km² and at the time of the attack had a civilian population of 1,361. Thus, while the DPRK could have anticipated a likely civilian impact from its attack, it does not appear that a reasonably well-informed person in the circumstances of the actual perpetrator would have expected such civilian impact to be very high. The civilian population on the island (1,361) was concentrated in one area near the island’s main port; this population does not appear to have been the intended object of the attack (...). The size of the island and its civilian areas meant that many of the shells that missed their targets would fall in uninhabited areas of the island or in the surrounding waters (rather than on civilian areas)”. 

It may be added that the North-Korean Authorities issued an advance warning of an attack in case the South-Korean military would proceed with its exercise, even though at the time it was issued it may have been understood as a threat to the South Korean military rather than a warning directed at the civilian population.

The next phase is to identify the military advantage expected from the attack, after which the actual proportionality assessment can be made. The ICC Prosecutor Report suggests that internal political reasons were behind the attack by North-Korea, however this advantage would present itself on a political level, and is thus not of a military character and irrelevant for the IHL proportionality equation, because the IHL proportionality rule requires the advantage to take into account to be of a military nature. The ICC Report concludes that “[g]iven the context of the attack, principally the DPRK fashioning it as a response to South Korean military activity, one may surmise that the perceived military advantage of the attack was a reassertion of DPRK territorial control of particular waters and a demonstration of its military power in the area.” This could be perceived as a military advantage on an operational level, but it is difficult to understand why this would be directly military advantageous at this particular moment in time, because the same training exercises had been conducted on a yearly basis since 1974. On a tactical level, the ICC Prosecutor notes that “the attack resulted in damage to military objectives and appears to have been directed towards those objectives, including the military base on the southwestern part of the island, three marine helipads, and K-9 howitzers that had been deployed outside of their hardened positions for a firing drill earlier on the same day. Those military objects were damaged or

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37 ICC Korea Report, p. 22 (footnote omitted).
39 ICC Korea Report, p. 23 (footnote omitted).
destroyed during the attack, and the attack may have been timed, in part, to catch the K-9s outside of their hardened positions. It would thus appear that the neutralization of South Korean military assets was also part of the concrete and direct overall military advantage anticipated by DPRK, in addition to the military advantage related to the demonstration of DPRK’s military power in the area.\textsuperscript{40} It is unfortunate that the ICC Prosecutor could only base their findings with regard to the expected military advantage arising from the attack on assumption and actual results, instead of on an operational plan of the North-Korean armed forces. However, the assumed expected military advantage seems to be sufficiently significant to be assessed in relation to the expected civilian casualties and damage, because the latter could be expected to be rather limited.

The ICC Prosecutor acknowledges in the paragraph comparing the military advantage and the civilian damage that “[t]he difficulties of calculating anticipated civilian losses and anticipated military advantage and the lack of a common unit of measurement with which to compare the two make this assessment difficult to apply, both in military decision making and in any ex post facto assessment of the legality of that action.”\textsuperscript{41} Nonetheless, the Prosecutor starts the proportionality equation with a mathematical and quantitative proportionality assessment based on the outcomes of the attacks. With regard to civilian casualties, the ICC Report notes that: “the attack resulted in two military personnel killed and 16 injured, as compared to two civilians killed and 52 injured.” With regard to material damage, the ICC Prosecutor notes on the basis of information provided by the South-Korean authorities, that the attacks resulted in damage “US$4.3 million, but this figure does not distinguish between damage to civilian or military objects.”\textsuperscript{42} In the final paragraph, the ICC Prosecutor concludes with regard to the feasibility of a criminal prosecution in relation to the artillery attack on the South-Korean island that “while a reasonably well-informed person in the circumstances of the actual perpetrator, would have expected some degree of civilian casualties and damage to result from the attack given the relative proximity of military and civilian objects, the information available is insufficient to provide a reasonable basis to believe that the anticipated civilian impact would have been clearly excessive in relation to the anticipated military advantage of the attack, considering the size and population of the island, and the fact that military targets appeared to be the primary object of the attack.”\textsuperscript{43}

Only a few conclusions may be drawn from the ICC Korea Report, it is submitted. One is that although the ICC Prosecutor admits that it has no information on the planning of the attacks by the North-Korean armed forces, it nonetheless uses the result of the attacks in order to draw conclusions with regard to the expected military advantage and anticipated civilian casualties and damage. Although it may seem safe to conclude from the outcomes of the attacks that there is insufficient proof to start a criminal investigation, the information

\textsuperscript{40} ICC Korea Report, p. 23 (footnote omitted).
\textsuperscript{41} ICC Korea Report, p. 23.
\textsuperscript{42} ICC Korea Report, p. 24.
\textsuperscript{43} ICC Korea Report, p. 24.
as presented in the Report provides insufficient information to draw any conclusions with regard to the question whether the IHL proportionality rule was applied, or violated. After all, the yardstick in international criminal law that the anticipated civilian damage was not clearly excessive, is not the applicable yardstick for IHL, which uses the test of excessiveness, not clearly excessiveness. Furthermore, it is worth noting that the Prosecutor looked at the 170-230 projectiles that were launched in two waves as one concerted attack. This seems in line with the opinion of a number of States that the proportionality rule must take into account the overall military advantage expected from the attack. The conclusion of the ICC Prosecutor that “the information available is insufficient” to prosecute the North-Korean military commander for a violation of the ICL proportionality rule applies therefore similarly to the question whether North Korea violated the IHL proportionality rule.

Finally, given the acknowledgement in the ICC Report that the South Korean authorities complied with the request by the ICC to provide information about the attacks, it is peculiar to note that the Report provides no in-depth analysis of the counterattacks on North-Korea by the South-Korean armed forces. After all, it is not the actual outcome of those artillery attacks, of which there is only little information available, but the expectation in advance that dictates whether these attacks were proportionate. That information presumably could have been made available to the ICC Prosecutor by the South Korean authorities. Since the forces are located rather close to each other, it could be expected that the South Korean armed forces would continuously monitor civilian presence near closely located North-Korean artillery and make peacetime assessments of expected civilian damage and casualties, including a ratio of the collateral damage it would be ready to accept in case of future use of the artillery assets on Yeonpyeong Island against North Korea.

12.3. The Tactical level

There is general agreement on the position that a proportionality assessment must be conducted on the tactical level of an operation.44 This section presents a number of attacks of which information is available in the open domain with regard to the proportionality analysis that was conducted in the course of the planning of that attack. It must be noted that even if information is available in the public domain, it appears that it is still difficult

44 Note however that according to some States, this must be understood to mean that an on-scene commander must make proportionality calculations, but the individual soldier does not. This position, it is submitted, is incorrect. This became clear during an expert meeting on the principle of proportionality in Quebec in 2016 that this author attended. The position of one expert working for a State was explained as follows: if individual soldiers engaged in combat are ordered to execute a certain attack with their unit, they are not in a position to conduct a separate proportionality assessment for every bullet they fire. It is submitted however that the individuals may have to conduct a separate proportionality analysis, albeit in a split-second. An example is the situation in which an individual soldier is ordered to clear a house of hostile fighters in an urban situation where civilians are also known to be present. The individual soldier who wants to attack an opposing fighter who is in a room where civilians are also present, has to calculate himself whether killing the civilians by tossing a grenade inside the room is excessive. In case that is an disproportionate attack, the soldier violates the IHL proportionality rule.
to distinguish where an issue of proportionality arises, or whether there were questions of
distinction and precautions at issue.\textsuperscript{45}

12.3.1 The Destruction of Mostar’s Old Bridge

The attack on the Old Bridge (Stari Most) in Mostar, Bosnia-Herzegovina was dealt with in
the course of the Prlic case at the ICTY. It its Judgement, the Trial Chamber ruled that the
destruction of the bridge was disproportionate. At the time of its destruction, the historic
Old Bridge, built about 427 years earlier,\textsuperscript{46} was one of the two bridges still intact between the
territories held by the Bosniak armed forces on the east bank of the river Neretva, that cuts
the town of Mostar in two, and a small enclave on the west bank of the Neretva.\textsuperscript{47} The Old
Bridge was used by the civilian population to obtain supplies, but also by the Bosniak troops
at the frontline on the west bank for supplies and communications with the forces located
the east bank. Furthermore, there was another makeshift bridge (the ‘Kamenica’ bridge) and
a small and dangerous path over the mountains to Jablanica that still connected the Bosniak
troops on the west bank to their headquarters.\textsuperscript{48} The Old Bridge was destroyed by a tank of
the Bosnian Croat forces (HVO) that fired at it “all day long”\textsuperscript{49} on 8 November 1993. The next
day, “a few tank shells, which landed at the base of the eastern side of the arch on the south
side of the Bridge, brought it down.”\textsuperscript{50} The Kamenica bridge was destroyed just days after the

\textsuperscript{45} See for example R.J. Barber, p. 499: Barber looks at two particular incidents in Afghanistan and comes to the conclusion
that in both cases there was a violation of the principle of proportionality. However, in neither case she actually performs
a proportionality calculation. Her conclusion should have been that it was unknown how many civilian casualties could
be expected. Therefore, the problem here is not one of proportionality, but of precautions. Another example is the ICTY
case of the Prosecutor v. Galic, in which the ICTY Trial Chamber considered proportionality with regard to the shelling of
a football game where military personnel were present in the stadium. According to Bartels: “The incident concerned
a recreational football match in Sarajevo, held on a parking lot surrounded by tall buildings. The match, in which some
members of the Bosnian Muslim forces took part, was watched by a crowd of approximately 200, consisting of both
civilians and soldiers. Evidently, neither the soldiers nor the civilians were at the time directly participating in hostilities.
Naturally, the soldiers themselves remained legitimate targets but, owing to the circumstances, it was not possible to see
who was and who was not targetable. The trial chamber noted that none of the evidence suggested that the Serbian forces
knew that soldiers were amongst the players and spectators at the football match, but went on to consider that had the
SRK troops been informed of this gathering and of the presence of ABiH soldiers there, and had [they] intended to target
these soldiers, this attack would nevertheless be unlawful. Although the number of soldiers present at the game was
significant, an attack on a crowd of approximately 200 people, including numerous children, would clearly be expected
to cause incidental loss of life and injuries to civilians excessive in relation to the direct and concrete military advantage
anticipated. It would not have been necessary to make this observation. The Bosnian-Serb forces were not able to make a
distinction between civilians and the soldiers, first, because they could not see the location that was being targeted and,
second, because of the means used. Therefore, the group consisting of spectators and football players was targeted as a
whole. The attack in itself was thus indiscriminate on that basis, irrespective of the anticipated incidental damage.” See

\textsuperscript{46} Petrovic, p. 265.

\textsuperscript{47} See also Bartels on the EJILTALK blog, http://www.ejiltalk.org/prlic-et-al-the-destruction-of-the-old-bridge-of-mostar-
and-proportionality/

\textsuperscript{48} ICTY Trial Chamber, Prlic et al., Judgement, Part III, para 1583.

\textsuperscript{49} ICTY Trial Chamber, Prlic et al., Judgement, Part III, para 1581.

\textsuperscript{50} Petrovic, p. 75.
Old Bridge was, leaving the Bosniak troops as well as the Bosniak residents on the western bank of the Neretva mostly isolated.

The Trial Chamber conducted an assessment of the attack on the old bridge, concluding that “although the destruction of the Old Bridge by the HVO may have been justified by military necessity, the damage to the civilian population was indisputable and substantial. It therefore holds by a majority, with Judge Antonetti dissenting, that the impact on the Muslim civilian population of Mostar was disproportionate to the concrete and direct military advantage expected by the destruction of the Old Bridge.” 51

With regard to the military advantage of destroying the Old Bridge, the Trial Chamber held that the bridge was “essential to the [Bosniak troops] for combat activities of its units on the front line, for evacuations, for the sending of troops, food and material, and that it was indeed utilised to this end (...) [and furthermore the Bosniak troops were] holding positions in the immediate vicinity of the Old Bridge.” 52 Therefore, “its destruction cut off practically all possibilities for the [Bosniak Army] to continue its supply operations.” 53 The question whether the Old Bridge qualified as a military objective, by use, location or both, may thus be answered in the affirmative. Referring to the second prong of the definition of a military objective of article 52 (2) API, Petrovic argues that: “[a]s for the use of the Bridge itself for military purposes, there is no evidence that there was fighting between the two opposing forces at the time. Even if the Bridge was used for military purposes there is no evidence that such a use was posing any significant threat to the HVO forces at the time.” 54 It is submitted however that in general terms, there does not necessarily need to be proof of a direct plan of the HVO soldiers to attack the Bosniak enclave on the west bank of the Neretva, or that the use of the bridge posed a threat to the HVO soldiers, in order for it to be targetable at that time. That seems to be a too restrictive understanding of the second prong of the definition of a military objective. Therefore, it is assumed that the Old Bridge was a military objective at the time it was destroyed, 55 although it must be accepted that there was also a continued civilian use of the Old Bridge and that it was important for transporting food and other goods to the remaining civilians in the enclave.

51 ICTY Trial Chamber, Prlic, et al., Judgement, Part III, para 1584. In his dissent, Judge Antonetti states on this topic on page 325: “I fail to see how the principle of proportionality could be applicable in this case. If the Old Bridge was a military objective, it quite simply had to be destroyed. In any event, there is no such thing as proportionate destruction.” This is clearly an incorrect statement: the proportionality rule instead applies only in case the target is a military objective.

52 ICTY Trial Chamber, Prlic, et al., Judgement, Part III, para 1582.

53 ICTY Trial Chamber, Prlic, et al., Judgement, Part III, para 1582.

54 Petrovic, p. 266.

55 See also Petrovic, p. 127, arguing that there was no significant military use of the Old Bridge. Also, since article 23(g) of the 1907 Hague Regulations states that it is forbidden “[t]o destroy or seize the enemy’s property, unless such destruction ... be imperatively demanded by the necessities of war”, it would have been interesting to see how the Trial Chamber would weigh this factor.
The military gain the HVO sought by destroying the Old Bridge may assumed to have been the defeat of the remaining Bosniak soldiers on the west bank of the Neretva, as well as repressing the positions of the Bosniak troops near the bridge. However, the objective of making it impossible to use the Old Bridge for bringing reinforcements to the opposite side of the river seems to have been reached already on the evening of 8 November. In fact, the civilian population on the west bank only got fully isolated after the Kamenica Bridge was destroyed. Furthermore, there was a system of ‘pulleys’ installed, that allowed food and other supplies to be transported over the river Neretva in baskets.

On the other end of the proportionality equation, the destruction of the Old Bridge also resulted in “the Muslim enclave on the right bank of the Neretva, in virtually total isolation, making it impossible for them to get food and medical supplies resulting in a serious deterioration of the humanitarian situation for the population living there.” Thus, although there is no mention in the Trial Chamber Judgement of the presence of civilians on the bridge during the attacks, the collateral damage seems to consist of the more indirect results of the destruction of the bridge. The Trial Chamber also attached value to the “significant psychological impact on the Muslim population of Mostar”, although unfortunately there is no explanation of the weight the Trial Chamber attached in the proportionality assessment to the loss of the Old Bridge, which was found to be of “great symbolic importance primarily for the Muslims.”

Instead, the Trial Chamber concluded that “the destruction of the Old Bridge, in view of its immense cultural, historical and symbolic value for the Muslims in particular was extensive”.

It is unfortunate that the ICTY Trial Chamber did not include an appreciation of the fact that the Old Bridge may be seen as protected cultural property, and how that would have impacted the proportionality assessment. The Old Bridge obviously enjoyed general protection under the article 27 of the 1907 Hague Regulations and customary IHL, and although it was never added to the lists of cultural property protected by the UNESCO Convention, it was certainly eligible for the protection provided by the UNESCO Convention. Furthermore, there is no assessment in the ICTY Trial Chamber Judgement whether the destruction of the Old Bridge would be in violation of the restrictions on attacking objects indispensable for the survival of the civilian population.

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56 ICTY Trial Chamber, Prlic et al., Judgement, Part III, para 1581 and Judgement, Part II, para 1318.
57 ICTY Trial Chamber, Prlic, et al., Judgement, Part II, para 1291.
58 ICTY Trial Chamber, Prlic et al., Judgement, Part III, para 1583.
59 ICTY Trial Chamber, Prlic, et al., Judgement, Part III, para 1583.
60 ICTY Trial Chamber, Prlic et al., Judgement, Part II, para 1364.
61 ICTY Trial Chamber, Prlic, et al., Judgement, Part III, para 1585.
62 Petrovic, p. 121-148 and 268. Petrovic notes that The Old Bridge was also not entitled to the special protection as provided for in article 8 of the 1994 UNESCO Convention. See Petrovic, p. 134.
63 Article 54 API and its customary law corollary.
In conclusion, although it seems that the Trial Chamber left room\textsuperscript{64} for the Appeals Chamber to further clarify the application of the IHL proportionality rule to the attack on the Old Bridge, this has not happened.\textsuperscript{65}

\textbf{12.3.2 The Attack on Milan Martic}

The trial of general Ante Gotovina at the ICTY has given rise to a number of critiques to both the judgements of the Trial Chamber and of the Appeals Chamber.\textsuperscript{66} The case focused on a number of issues that related to the conduct of hostilities taking place during Operation Storm in August 1995, among which the shelling of the town of Knin. In particular the artillery shelling that targeted the leader of the Serbian Krajina region, Milan Martić, raises issues regarding the proportionality rule. The Trial Chamber found that the Croatian forces (HV) “reported firing a total of twelve shells of 130 millimetres at Milan Martić’s apartment on two occasions between 7:30 and 8 a.m. on 4 August 1995. Further, on the evening of 4 August 1995, the HV fired an unknown number of 130-millimetre shells at a location marked R on [map] P2337 where they believed Martić to be present.”\textsuperscript{67}

The first issue in a proportionality assessment is the question whether it was aimed at a military objective. Martić himself was Commander in Chief of the Serb forces and President of the Republic of Serbian Krajina, and as such, he may be labelled as a valid military objective. However, the Trial Chamber did not make clear whether Martić himself was the target of the attacks on Knin.\textsuperscript{68} Rather, the Trial Chamber referred to the military advantage of the attack on his apartment. The Trial Chamber noted that “firing at Martić’s apartment could disrupt his ability to move, communicate, and command and so offered a definite military advantage. [The testimony of witness] Rajčić recognized that the chance of hitting or injuring Martić by firing artillery at his building was very slight. Rajčić testified that the HV sought to harass and put pressure on Martić and that the HV took the rules of distinction and of proportionality into account when deciding whether to target the apartment block.”\textsuperscript{69}

\begin{footnotesize}
\begin{enumerate}
\item See also Lederman on the Just Security blog: https://www.justsecurity.org/31281/legalit-striking-isils-oil-facilities-cash-stockpiles/
\item As Milanovic noted in his summary of the judgement on the EJILTALK blog: [https://www.ejiltalk.org/an-eventful-day-in-the-hague-channeling-socrates-and-goering/], it “does not directly engage with the ‘pure’ IHL proportionality question, as the majority and dissent did at trial.”
\item See for example Blank 2012, Bartels 2013, and Ariav.
\item ICTY Trial Chamber, Gotovina et al., para 1910, p. 966-967.
\item Ariav, p. 343.
\item ICTY Trial Chamber, para 1910, p. 967.
\end{enumerate}
\end{footnotesize}
It may be recalled that when an attack is aimed at a combatant, there is no need to emphasize how the attack renders any military advantage, because combatants may be attacked at any time. The fact that Martić was the commander in chief of the Serb Krajina forces obviously makes killing him more military advantageous than killing a regular soldier. However, if it was the residence of Martić that was the subject of the attack, it needs to be examined whether it qualified as a military objective. The first prong of the definition of a military objective dictates to determine whether the object made an effective contribution to military action. For a residential building, arguably, that may only be true when Martić would have been present himself, or when there was knowledge that the structure was used by Martić for military purposes, or contained military objectives, such as military planning documents, communication systems or weapons. Since it appears that the Trial Chamber could not conclude that the attacking Croatian forces knew the location of Martić, even though it seems that two locations were attacked where it was assumed that he was present, it is difficult to imagine the Trial Chamber meant to conclude that Martić himself was the target of the attacks. With regard to the second prong of the definition, however, disrupting Martić’s ability to effectively command his forces, seems to have the potential to render a substantial military advantage to the attacking Croatian forces.

For the purpose of the discussion of the proportionality assessment with regard to the attack on Martić’s residence, it is necessary to assume that the attacks were aimed at a military objective. The next questions are whether any collateral damage was anticipated and whether sufficient precautionary measures were taken to minimise it. With regard to the issue of expected collateral damage, the Trial Chamber considered that “Martić’s apartment was located in an otherwise civilian apartment building and that both the apartment and the area marked R on P2337 were in otherwise predominantly civilian residential areas. The Trial Chamber has considered this use of artillery in light of the evidence on the accuracy of artillery weapons (...) and the testimony of expert Konings on the blast and fragmentation effects of artillery shells. At the times of firing, namely between 7:30 and 8 a.m. and in the evening on 4 August 1995, civilians could have reasonably been expected to be present on the streets of Knin near Martić’s apartment and in the area marked R on P2337. Firing twelve

70 Article 52(a) API: “Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”

71 Blank 2012, p. 9: A group of experts discussing the Gotovina Case found that: “It is essential then to examine the value of the target in the context of the entire operation (and not merely as an individual object of attack) - in this case, Martić was the supreme military commander of the SVK during a deliberate attack against improved enemy defensive positions protecting their most vital strategic asset: their capital city. The experts agreed that almost any military commander would consider disrupting the ability of such a commander to influence the command, control, and communication of his forces during the decisive phase of an attack to be one of the highest priority targets. In the context of Operation Storm, Martić was perhaps the most valuable target in the city of Knin. (...) Disrupting Martić’s ability to influence the battle, whether by targeting him directly, severing his command and control capabilities, or fixing him in place and isolated from his operational command post, for example, therefore offered a tremendously significant military advantage, particularly from the perspective of the commander at the time of the attack. Intelligence showing that Martić was in the building at the designated time would be relevant as well to the determination of the value of the building as a military objective.”
shells of 130 millimetres at Martić’s apartment and an unknown number of shells of the same calibre at the area marked R on P2337, from a distance of approximately 25 kilometres, created a significant risk of a high number of civilian casualties and injuries, as well as of damage to civilian objects.”

However, any reference to precautionary measures taken by the attackers is missing in the analysis of the ICTY.

With regard to the assessment of the excessiveness of the expected damage to civilian objects and civilian casualties, the Trial Chamber considers: “that this risk was excessive in relation to the anticipated military advantage of firing at the two locations where the HV believed Martić to have been present.” The Appeals Chamber however stated with regard to the proportionality assessment of the Trial Chamber that it: “was not based on a concrete assessment of comparative military advantage, and did not make any findings on resulting damages or casualties.” It is noted that this is a particularly incorrect statement, since it is not the actual resulting damages and casualties that must be taken into account in accordance with the IHL proportionality rule, but the expected incidental damage.

It may be noted that the proportionality analysis as conducted by the ICTY Trial Chamber concerns only the attack on Martić’s apartment and the other area where he was believed to be present. No proportionality analysis was conducted by the Trial Chamber with regard to the totality of the artillery attacks on the four towns that were attacked by artillery during the first phase of Operation Storm. Therefore, it seems that the analysis of the Trial Chamber was limited to the tactical level, whereas an (additional) analysis on the operational level could also have resulted in valuable insight in the way the proportionality analysis must be conducted. The Appeals Chamber notes in a footnote that it “also notes that the Trial Chamber declined to determine the proportionality of the overall attack on Knin”. In addition, both the Trial and the Appeals Chamber failed to properly identify which military advantage could arise from attacking the regional military commander, although the Trial Chamber did state that there was significant risk of causing incidental civilian damage.

In conclusion, despite the potential in the facts of the case, as well as the extensive evidence that was available in the case, the Gotovina Case has provided little useful guidance on the practical application of the proportionality rule.

72 ICTY Trial Chamber, para 1910, p 967.
73 See also Blank 2012, p. 11-12.
74 ICTY Trial Chamber, para 1910, p. 967.
75 ICTY Appeals Chamber, para 82, p. 28.
76 Ariav, p. 347.
77 Footnote 252, on p. 28 of the ICTY Appeals Chamber Judgement.
78 Bartels 2013, p. 291.
79 There was significant debate concerning the decision of the Trial Chamber to assess only those attacks that resulted in a 200 meter vicinity of a military objective in Knin. It is submitted that the 200-meter radius is merely a factual finding with no connection to a correct application of the IHL proportionality rule. See also Kolb 2017, p. 484. Especially the Judgment of the Appeals Chamber has been heavily criticised. See for example Kolb 2017, p. 487, claiming that the Appeals Chamber “rendered a disgraceful service to the Tribunal”.

12.3.3 Kosovo 1999: the NATO Bombing Campaign

With regard to the five separate incidents the committee reviewed, the first incident (the attack on the bridge over the Grdelica Gorge on 12 April 1999) regarded a military objective on which only just before it was hit, a civilian train crossed. As a result, it is reported that ten civilians died. As such, the pilot expected no civilians to be present on or near the bridge when the bomb was released. Once the pilot saw the train, it was already too late to divert the missile. Therefore, the proportionality rule did not play a role in this incident. However, since the pilot noted that the bridge was not destroyed, it was attacked again by the same aircraft in a subsequent run. This time, again, the pilot became aware only at the very last moment before the bomb hit the bridge, that the train was still present on the bridge. Consequently, it was once again impossible to revert the bomb, and the train was hit for the second time. It seems debatable whether the pilot should not have refrained from attacking the bridge for a second time, until he was certain that the train was no longer on the bridge, given the fact that the pilot knew the train had been hit. One might debate whether this precautionary measure would have been appropriate in this case, however, the pilot gave prevalence to fulfil the mission assigned to him, which was to destroy the bridge.80

The second incident (the attack on the Djakovica convoy on 14 April 1999) regarded objects that were mistakenly identified as military objectives. According to the Report, the attacks were suspended “as soon as the presence of civilians in the convoy was suspected.”81 It thus follows that no proportionality assessment has been conducted, since the attackers did not expect a civilian presence on the location of the attack.

The third incident regards the attack of 23 April 1999 on the Serbian Radio and TV Station (RTS) in Belgrade and the only incident of the Kosovo Report in which the application of IHL proportionality rule is discussed. The Kosovo Report estimates that between 10 and 17 individuals lost their lives during this attack, all of them civilians.82 The discussion with regard to this attack focused mostly on the question whether the station could be identified as a legitimate military objective in the circumstances prevailing at the time of the attack. Unfortunately, the Committee does not share the reasoning behind its conclusion that “[a]ssuming the station was a legitimate objective, the civilian casualties were unfortunately high but do not appear to be clearly disproportionate.”83 However, some effort is put by the committee into explaining the military advantage that the deciding military commander was aiming to obtain:

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80 See also Shamash, p. 138.
“At a press conference on 27 April 1999, another NATO spokesperson similarly described the dual-use Yugoslav command and control network as “incapable of being dealt with in a single knock-out blow (...).” The proportionality or otherwise of an attack should not necessarily focus exclusively on a specific incident. (... referring to the need for an overall assessment of the totality of civilian victims as against the goals of the military campaign). With regard to these goals, the strategic target of these attacks was the Yugoslav command and control network. The attack on the RTS building must therefore be seen as forming part of an integrated attack against numerous objects, including transmission towers and control buildings of the Yugoslav radio relay network which were “essential to Milosevic’s ability to direct and control the repressive activities of his army and special police forces in Kosovo” (NATO press release, 1 May 1999) and which comprised “a key element in the Yugoslav air-defence network” (ibid, 1 May 1999). (...)Not only were these targets central to the Federal Republic of Yugoslavia’s governing apparatus, but formed, from a military point of view, an integral part of the strategic communications network which enabled both the military and national command authorities to direct the repression and atrocities taking place in Kosovo (ibid, 21 April 1999).”

One additional point with regard to this attack, is that there had been a warning of the impending attack on the building, but it is debated whether this was an effective advance warning as required by IHL.

From the text of the Kosovo Report, it becomes clear that the committee regarded the separate attack of the RTS building as part of a much larger operation to disrupt the operations the Yugoslav forces were conducting in Kosovo. This aim could be interpreted to contribute to the military advantage of the strategic level. The committee apparently felt that given the contribution of eliminating the RTS building to the military advantage sought on a strategic level, justified the expected collateral damage of the attack on the building. It is to be regretted that no further underlying analysis of the proportionality assessment of the attack on the RTS building is provided by the committee. If this would have been done, it may have become clear whether the committee in analysing the attack on the RTS building as part of the larger operation, took possible collateral damage of other components of the operation into account as well.

The fourth incident that the committee analysed is the attack on the Chinese embassy in Belgrade that occurred on 7 May 1999, which was clearly a civilian object that was hit by mistake. Therefore, the committee did not discuss proportionality in its analysis of this incident. The fifth incident regarded a military objective where no civilians were present as far as the NATO troops were aware. Therefore, the proportionality rule played no role here,

84 ICTY OTP Kosovo report, p. 27-28.
86 See also Shamash, p. 141, and Laursen, p. 791, calling the treatment of the proportionality assessment by the committee “confusing”.
87 See also Shamash, p. 118-120.
although one could perhaps debate whether the attackers could have taken more extensive precautionary measures to attain more certainty with regard to the presence of civilians.

In sum, only the attack on the RTS building that was analysed in the Kosovo Report concerns an example of the application the IHL proportionality rule on the tactical level. However, there is very little substance in this analysis. Rather, the statements of the committee seem to be focused on a more overall approach in the attack in the RTS building, but offered little clarification for its conclusion that the expected collateral damage of that attack was not clearly disproportionate.

12.3.4 The Killing of Salah Shehadeh

A situation that has attracted quite some attention is the Israeli attack that killed Salah Shehadeh in Darge Street in Gaza City on 22 July 2002. Salah Shehadeh was “one of [Hamas’] senior leaders and Head of its Operational Branch” The Israel High Court of Justice ruled on a petition asking the Israeli authorities to instigate criminal proceedings against a number of persons involved in the decision-making with regard to the attack. The High Court decided that “the petitioners were not able to carry the burden allotted to them, to point out a flaw in the judgment of the JAG and the Attorney General.” It was therefore decided not to open a criminal investigation. The attack has, however, been the subject of an investigation by a Special Investigatory Commission (SIC), that submitted its report on 27 February 2011. The Report of the SIC reveals a number of interesting approaches with regard to the practical application of the IHL proportionality rule in this case.

As far as the facts are concerned, the SIC concluded that “[d]uring the operation, a one-ton bomb was dropped on the house in which Shehadeh was staying, killing him, Hamas activist Zahar Natzer, Shehadeh’s wife Layla and his 15-year-old daughter Iman, who were with him in the house (...) [and in addition] 13 civilians including women and children, who were not directly involved in terrorist activities, (...) and dozens of civilians in the vicinity were injured.” The house in which Shehadeh was staying was located in a densely populated civilian neighbourhood, and as a result of the bomb, the houses close by were either destroyed or severely damaged. The task of the SIC was to “examine the justification

92 SIC Report, para 1.
93 See Weill, p. 617.
for the strike on Salah Shehadeh, the circumstances in which he and the other casualties of this operation were hit and the question of whether there was an effective alternative means to the strike on Shehadeh.”

Remarkably, the SIC concluded that “the difficult collateral consequences of the strike against Shehadeh, in which uninvolved civilians, mostly women and children, were killed and many others injured, became clear in hindsight, as disproportionate in the circumstances of the incident in question. Such was the view of the Commission and this was also the assessment in hindsight of the great majority of the senior officials involved in the planning and implementation of the operation, who stated that if they had foreseen in real-time the scope and gravity of the collateral damage which actually resulted, the operation would not have been carried out. The said consequence was unintended, undesired and unforeseen. It did not stem from disregard or indifference to human lives.” Furthermore, the SIC stated that “(...) a gap arose between what was expected and what actually occurred. The central reason for this gap was incomplete, unfocused and inconsistent intelligence information with regard to the presence of civilians in the structures adjacent to the Shehadeh house (the garage and huts), where most of the civilians died. (...) This gap stemmed from incorrect assessments and mistaken judgment based on an intelligence failure in the collection and transfer of information to the various echelons involved in the points of contact between the different agencies involved, and from a lack of sufficient understanding regarding the uncertainty that was created as a result of this unfocused, inconsistent and incomplete information which was before the decision-makers.”

The conclusion of the SIC is that “[t]he decision-makers foresaw proportionate harm to uninvolved civilians.” They however misjudged the magnitude of the expected civilian harm. The SIC concludes that there is no reason to assume that criminal responsibility may arise from the attack because there were some failures that lead the decision makers to expect that the attack to be proportionate.

The report of the SIC reveals that the SIC was willing to deliver an appraisal of the proportionality rule in this case based on its outcomes and conveys its opinion that the attack would have been disproportionate if the decision makers had anticipated the collateral damage that actually occurred. Approval for the conclusion of the SIC comes from a very notable author, the late professor and judge Antonio Cassese. He states in a witness statement relating to the Shehadeh Case that “there can be no doubt that the damages caused were awfully out of proportion to the advantages gained: nobody would deny the manifest disproportion between the death of 15 innocent civilians, the injury of 150 persons and the
destruction of 9 buildings, on the one hand, and the objective to kill one single individual, however dangerous he might have been, on the other."\textsuperscript{98}

Although it is commendable that Cassese shares his view with regard to the excessiveness of the collateral damage in this situation, his statement seems quite categorical. It seems possible that the military advantage of killing certain crucial figures during armed conflict could in some situations justify the collateral damage as it presented itself in this attack.

With regard to these conclusions, however, Niv\textsuperscript{99} notes that the SIC: “neither specifies its line of thinking nor lays down the legal analysis which underpins its determined decision. It appears that the Commission relies primarily on the fact that most of the security officials who testified before it, stated that had they known the consequences of the attack in advance they would not have executed it, as, in their opinion, the said result is not proportional.”\textsuperscript{100} Also, Niv notes that it is “hard to understand how the Commission decided that the deaths of 13 civilians and the wounding of dozens was not proportional when the target was a master terrorist who was responsible, in one year alone, for the deaths of hundreds of civilians and soldiers and the wounding of thousands - which seems to illustrate the military advantage in his elimination."\textsuperscript{101} Therefore, the military advantage of disrupting these operations by taking out the person deciding upon these attacks, as well as protecting civilians that were a substantial part of victims of the attacks by Hamas, seem to result in considerable military advantage. Whether the commanders deciding upon the attack could reasonably have expected the magnitude of collateral civilian damage that actually resulted attacking Selah Shehadeh, is unknown. Niv notes that “the limited legal practice publicized in this matter [i.e. in this case the Kunduz Fuel trucks case and the ICTY OTP Prosecutor Kosovo report on the airstrike on the RTS in Belgrade] does not support the conclusions of the Commission.”\textsuperscript{102}

In sum, the Selah Shehadeh Case firstly proves that any proportionality calculation is only as good as the information on which it is based. In situations where military commanders are expecting a substantive military advantage, but they are unable to attain more or better information on the expected outcomes of an attack, the main question seems to be whether the commanders would have the duty to wait for a next opportunity to launch the attack. That is an issue of precautions, however, rather than proportionality. The option to postpone an attack seems to be easier to obtain in a targeted killing operation during armed conflict where the threat of the person that is targeted is not imminent, than in an attack during a large scale conventional armed conflict where own troops and civilians are under a direct threat. It may be said that the situation in Gaza at the time of the attack on Selah Shehadeh, as not being a ‘hot battlefield’ at the time, may have played a role why the SIC came to the conclusion that the attack would be proportionate if the decision makers would have had

\textsuperscript{98} Cassese 2006, http://ccrjustice.org/sites/default/files/assets/files/Professor%20Cassese%20declaration.pdf
\textsuperscript{99} Niv, see https://sites.google.com/site/almaihl2010en/opeds/the-disproportion-in-the-shehadeh-commission-s-proportionality-test.
\textsuperscript{100} See Niv.
\textsuperscript{101} See Niv.
\textsuperscript{102} See Niv.
more information. Furthermore, unfortunately, in both the SIC report on the attack on Selah Shehadeh and in Cassese’s statement, as has been the case in most reports dealing with the practical application of the IHL proportionality rule, a thorough factual and legal analysis supporting the conclusion is lacking.

12.3.5 The Attack on General ‘Chemical’ Ali Hasan Al-Majid

The Chilcot Report contains an analysis of one particular attack on the tactical level that was carried out at 05:30 local time on 5 April 2003 against General Ali Hasan Al-Majid. General Al-Majid was known as ‘Chemical Ali’ as a result of his earlier involvement in the attack of Kurdish regions using chemical weapons. In April 2003, however, General Al-Majid was “described as responsible for co-ordinating resistance to the Coalition within Southern Iraq and therefore as a combatant”.

With regard to the military advantage of attacking the General therefore, it was assessed that this consisted not only killing of one member of the Iraqi armed forces, but the removal from command of a “key Iraqi military figure [which] was expected to deliver considerable military advantage thus ultimately minimising casualties on both sides. It is clear that in the international armed conflict between the coalition and the Iraqi regime in 2003, general Al-Majid was a legitimate military objective, because he was not just a regular combatant, but a leading general in the Iraqi military that the Coalition had fought in the early days of the invasion, and who was now a leading figure in the resistance against the occupying Coalition troops. The military advantage of killing general Al-Majid may thus be described as considerable.

With regard to expected civilian damage and casualties, the Report states that the UK military had undertaken an assessment on 4 April 2003 using a procedure called the “Rapid Collateral Damage Assessment” based on the expectation that General Al-Majid would visit a small group of houses in Basra. It assessed that in addition to the house where the general was expected to reside, seven other civilian houses might be affected by the strike on General Al-Majid. The assessment predicted that 39 casualties might be expected in case the strike would be launched during the day, and 51 if the strike would be launched

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103 Chilcot Report, para 54-80 on page 182-185.
104 Chilcot Report, para 56 on page 182, see also Human Rights Watch (HRW), Report, “Off-Target”, available online: https://www.hrw.org/reports/2003/usa1203/4.htm p. 28: “U.S. aircraft bombed a building in al-Tuwaisi, a residential area in downtown Basra at approximately 5:20 a.m. on April 5, 2003, in an attempt to kill Lieutenant General Ali Hassan al-Majid. Al-Majid, known as “Chemical Ali” because of his role in gassing the Kurds in the 1988 Anfal Campaign, was in charge of southern Iraq during the recent war. Initial British reports indicated that al-Majid was killed in the attack. CENTCOM later reversed this claim and changed al-Majid’s status back to “at large.” Coalition forces ultimately captured al-Majid on August 21, 2003.” (footnotes omitted).
105 Chilcot Report, para 78, on page 185.
106 Chilcot Report, para 56, on page 182.
during the night.\footnote{Chilcot Report, para 57, on page 182.} Even though General Al-Majid was identified as a time sensitive target, the authority for approving the strike was referred up to the political level. The advice of the UK Contingency Commander in that process was that the attack would not violate the proportionality rule, although a description of a thought process on which that advice was based is not cited in the Report.\footnote{Chilcot Report, para 59, on page 182.} There is furthermore no mention in the Report whether this assessment is based on the attack being launched during the day or during the night, which would enable a more exact analysis of the proportionality assessment. Ultimately, the attack was approved by the UK Defence Secretary, but it was subsequently cancelled since it was reported that General Al-Majid had already left the location.

One day later, however, at 05:20 in the morning, the location was attacked by US forces, using a 500lb precision guided bomb. General Al-Majid was not hit by the attack. The bomb destroyed at least two adjacent civilian houses, killing a considerable number of civilians.\footnote{Human Rights Watch reports that seventeen civilians died as a result of the attack. HRW, Off Target, p. 30.} Human Rights Watch reports that “[t]he collateral damage estimate done on the target appears to have allowed for a high level of civilian damage. This attack may have been approved due to the perceived military value of al-Majid. Had smaller weapons been used, however, many civilian lives may have been spared.”\footnote{HRW, Off Target, p. 32.}

Combining the available facts presented in this case, could mean that in cases where considerable military advantage is expected because an important military leader is expected to be hit, a number of more than fifty expected civilian casualties is not deemed excessive. This is based on the assessment of the British armed forces that fifty civilians would be killed in case of an attack at night and the timing of the actual attack. Whether such a quantitative approach has indeed been followed in planning this attack remains however uncertain due to insufficient information. In the particular case of General Al-Majid the intelligence on which the planners of the attack relied, proved to be inaccurate, which leads to the conclusion that the civilians who died in this particular attack died as a result of a proportionality analysis that was based on inaccurate information with regard to the expected military advantage. One may wonder whether the probability of attaining the desired military gain in this attack was sufficiently likely to occur. There is however insufficient information available to evaluate whether this constitutes a violation of the precautionary measure to ascertain that the attack is aimed at a military objective, or how the presumably low probability of success in this attack was taken into account.
12.3.6 The Attack on the Kunduz Fuel Trucks

On 3 September 2009 at about 20:00 local time, two fuel tankers filled with gasoline and diesel fuel were stolen from a private company at a location about 15 kilometres from the Afghan city of Kunduz. The commander of the nearby German unit, Colonel Klein, was made aware of the theft, and when the two tankers were located some hours later, the fuel trucks were stuck in a sand bank in the Kunduz River. Eventually, in the early morning of 4 September, the two fuel trucks were destroyed by bombs dropped by two US aircrafts, on the orders of Colonel Klein. A substantial number of persons were killed in the attack, including a number of civilians.\footnote{Exact numbers are unknown, however the estimates range between 40 and 140 individuals, including ‘many’ civilians. See Von Der Groeben, p. 473.}

The attack on the Kunduz fuel trucks was investigated by the United Nations Assistance Mission in Afghanistan (UNAMA), the German Parliament\footnote{Report of the German Parliamentary Investigation Committee: Deutscher Bundestag, 17. Wahlperiode, Drucksache 17/7400 (hereinafter ‘PIC Report’), available online at http://dipbt.bundestag.de/extrakt/ba/WP17/394/39492.html.} and the NATO-led International Security Assistance Force (ISAF).\footnote{Henn, p. 623.} In addition, the case was the subject of proceedings resulting in the decision of 16 April 2010 of the Federal Prosecutor-General, dismissing criminal proceedings against Colonel Klein and another member of the German armed forces. According to one commentator, “it remains unclear what exactly happened before the bombing, what the commander’s motivations for the airstrike were and how many of the victims were civilians.”\footnote{Henn, p. 623. See for one summary of the facts of the case: Heintschel von Heinegg and Dreist, p. 834-851. For cockpit footage of the attack: see for example https://www.youtube.com/watch?v=nexiUdIm568} Another commentator held that the case proved the “lack of definite criteria by which to evaluate the proportionality of an attack”\footnote{Andresen, p. 25.}.

The military advantage expected from the attack on the fuel trucks must be evaluated in the light of the fact that fuel tankers had been used as driving bombs during recent attacks elsewhere in Afghanistan. In addition, the German forces had been warned in the months preceding this incident, that their camp would be attacked by vehicle bombs in the near future. The commander estimated during the night of 3 September 2009 that there was no alternative to destroying the stolen fuel tankers, because a recovery operation was too dangerous, given the estimate he had obtained from a human source that there were about 70 opposing fighters located at or near the location of the tankers, including one or more regional commanders.

However, Heintschel von Heinegg and Dreist conclude from the available facts that “[a]t no point in time did the colonel have reason to believe that civilians were present at the location [and] he only wanted to know as much about the situation as possible and to receive all available information about any changes whatsoever which might have occurred on the
sand bank.”

Thus, it is submitted, there could be no violation of the proportionality rule by Colonel Klein, because he expected no civilian casualties and he had no further options to verify whether civilians were present at the sand bank. Nonetheless, the German Federal Court of Justice conducted a proportionality assessment on the basis of the assumption that the presence of civilians on the location of the fuel tankers was expected.

The German Federal Court of Justice found that: “Even if the killing of several dozen civilians would have had to be anticipated (which is assumed here for the sake of the argument), from a tactical-military perspective this would not have been out of proportion to the anticipated military advantages. The literature consistently points out that general criteria are not available for the assessment of specific proportionality because unlike legal goods, values and interests are juxtaposed which cannot be “balanced.” Therefore, considering the particular pressure at the moment when the decision had to be taken, an infringement is only to be assumed in cases of obvious excess where the commander ignored any considerations of proportionality and refrained from acting “honestly,” “reasonably,” and “competently.” This would apply to the destruction of an entire village with hundreds of civilian inhabitants in order to hit a single enemy fighter, but not if the objective was to destroy artillery positions in the village. There is no such obvious disproportionality in the present case. Both the destruction of the fuel tankers and the destruction of high-level Taliban had a military importance which is not to be underestimated, not least because of the thereby considerably reduced risk of attacks by the Taliban against own troops and civilians. There is thus no excess.”

Furthermore, the German Federal Court of Justice found that “The standard of prohibiting excess first requires a military advantage of a tactical nature …, such as the destruction or weakening of hostile troops or their means of combat, or territorial gain …). Collateral damage such as the death of civilians is not out of proportion merely because the military advantage is only a short-term advantage which does not decide the conflict. Thus, the bombarding of a broadcasting centre by NATO in Belgrade with the foreseeable result of numerous civilian deaths was not considered to be out of proportion, even though the anticipated tactical advantage only lay in the interruption of the adversary’s telecommunication for a few hours …). In the present case the bombing pursued to military goals, namely the destruction of the fuel tankers robbed by the Taliban and of the fuel as well as the killing of the Taliban, including not least the high-level regional commander of the insurgents. The anticipated military advantage, namely on the one hand the final prevention of using the fuel and the fuel tankers as “driving bombs” or to fuel the insurgents’ militarily used vehicles and on the other hand the at least temporary disruption of the Taliban’s regional command structure fall within the usual, recognized tactical military advantages …) The fact that the goal mentioned in second place was not fully achieved is irrelevant for

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116 Heintschel von Heinegg and Dreist, p. 838, deriving this from the PIC report.
117 A similar approach is taken by Von der Groeben, See Von der Groeben, p. 478-483.
118 Germany, Federal Court of Justice, Federal Prosecutor General, Fuel Tankers case, Decision, 16 April 2010, para 2 on p. 63.
the legal assessment because the expectations at the time of the military action based on the facts are decisive.”

Von Der Groeben’s analysis of the attack on the fuel trucks, which also assumes that the commander had knowledge of the presence of civilians at the sand bank of the Kunduz River (which he reportedly did not), takes the approach to differentiate between a defensive and an offensive military aim. He argues that a mathematical approach is possible if it is assumed that the attack was aimed at enhancing the safety of the German soldiers at the nearby German camp, because in the case of a non-imminent threat, the number of soldiers ad the number of civilians that are expected to be harmed by respectively the expected attack on the German camp and the civilians expected to be affected by an instant attack on the fuel tankers stuck in the river. Therefore, according to Von Der Groeben, the three decisive factors are the: “aim to protect soldiers, the non-imminence of the threat, and the comparison between civilians’ and soldiers’ lives.” He then argues that the attack is disproportionate if the absolute number of affected civilians is expected to be higher than the absolute number of affected German soldiers, based on three arguments:

1. the soldiers, given their belligerent privilege, have to accept some degree of risk in order to save civilians. This argument is even more important, during missions in which the strategic goal is the protection of civilians;
2. given the fact that there is no imminent threat, other options must be considered, especially since the harm caused to soldiers by a non-imminent attack is less certain than the harm that will be caused to the civilian population by striking the fuel tankers immediately; and
3. comparing the risk to the lives of the soldiers and those of the civilians “at least allows us to put numbers on both sides of the equation”, whereas in most cases of attacks it is much more problematic to compare the desired military gain to expected civilian damage in terms of death and injury of civilians as well as damage to objects.

Van Der Groeben notes that the tables turn when the desired military gain would consist not only of a defensive component, but also of an offensive one, particularly the objective to attack the opposing forces, including some important local commanders. The military advantage would then be of a higher value, adding to the defensive military advantage that would arise from enhancing the safety of the German troops by depriving the opposing forces from vehicles that would probably be turned into ‘driving bombs’ and the fuel that could be used for the vehicles of the opposing forces.

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119 Germany, Federal Court of Justice, Federal Prosecutor General, Fuel Tankers case, Decision, 16 April 2010, para 4 on p. 66.
120 Von Der Groeben, p. 481.
121 Von Der Groeben, p. 481-482. Von Der Groeben admits that “The suggested formula is of course a very tentative attempt to clarify the notion of proportionality, and it is only applicable where an attack is intended to protect soldiers’ lives. But it shows that the proportionality test can go beyond just describing the evident cases.”
122 Von Der Groeben, p. 482.
It is submitted that the approach taken by Von Der Groeben, to differentiate between an offensive and a defensive military advantage makes sense as a model to further analyse the components of which the IHL proportionality rule is comprised. The effort to ‘put numbers on both sides of the equation’ however seems to oversimplify the assessment of the anticipated military advantage. It is therefore submitted that the approach is useful in terms of enabling a deep analysis of the values that must be attached to the two sides of the equation, but the probability of the expected result is the main complicating factor that Von Der Groeben’s analysis fails to take into account sufficiently. It is submitted that the uncertainty whether the expected results will materialise makes it impossible to use a exclusively quantitative analysis.

To sum up, on the basis of the public available information about the attack on the Kunduz fuel trucks, the IHL proportionality rule was never an issue, because the commander did not expect civilians to be present. Whether additional precautionary measures should have been taken to confirm this, is unclear on the basis of the available information. Nonetheless, the incident demonstrates (when it is assumed that the commander did have reason to believe that civilians were present) that the military advantage expected from an attack may also include defensive considerations. It is submitted that although in some cases a mathematical comparison between expected collateral damage and anticipated military advantage may be possible, the situation of the Kunduz Fuel Trucks is not an example in point.

12.3.7 Firefight along the Baghlan River

Written as a diary of operations (in German), Mike Zimmermann, commander of a company deployed to Afghanistan in 2010, describes a firefight in which he and his unit were engaged during sixteen hours, during a patrol in an area along the Baghlan River.123 During this period, the company, lost a ‘Dingo’ military vehicle, but Zimmermann’s troops suffered no casualties. Nonetheless, the diary provides exemplary insight into the considerations of an on-scene commander who is balancing the purpose of his operation, the safety of his own troops and the legal boundaries that apply to the operation, which includes a proportionality assessment. The description proves particularly that the proportionality rule finds application not only in offensive operations, but also in attacks in response to an attack. Although the diary contains no description of the legal framework applicable to the operation and the rules of engagement guiding the commander in this specific operation, it is assumed that the rules of customary IHL apply to the situation, including the IHL proportionality rule.

The facts of the case, as described by Zimmermann, regard the assignment to his unit of conducting a patrol aimed at the reconnaissance of an area called Wazgari. The aim of the operation was to meet with local leaders and to explore the area to enable a future operation to be conducted there. During the operation, one of the military vehicles got stuck in the

123 Zimmermann, pp. 31-38.
river Bahglan, and quickly thereafter it becomes clear that opposing forces are present in the region. Soon, the company finds itself ambushed and it starts to receive small-arms fire from different sides. The firefight gets intense, leaving the company pinned down to its position near the river, and their enemy attacks them using small-calibre firearms, RPGs, and BM-1 rockets. After a while, the company identifies the location of the main firebase of their opponents, overseeing the entire area, some 900-1200 metres to the east of their location. The company commanders decides to attack the main firebase of the opponent using their 120 mm calibre ‘Mörser’ mortar, in order to be able to retreat from the firefight. However, the mortar observer, who is responsible for directing the mortar grenades to the correct location, reports to Zimmermann that he has observed a number of women and children near the opposing fighters. Zimmermann describes that he inquires whether the mortar observer is able to confirm the direct participation of the women and children in the hostilities towards his company, or whether the presumed civilians are used as a human shield. Zimmermann notes that both circumstances were common practice during earlier incidents, and that the opponents were well aware of the restrictions this would place on his response. Since the observer was unable to confirm either situation ‘with a hundred percent certainty’\textsuperscript{124}, the commander decides to refrain from firing the mortar for the time being, because he considers ‘the risk to hit uninvolved women and children’\textsuperscript{125} to be too big.

The company commander proceeds to describe the underlying difficult dilemma he faced, which is the question of his soldiers why he decided to prefer the lives of the civilians over theirs.\textsuperscript{126} He asks himself the question whether he should protect the women and children and sacrifice his soldiers, or whether he should protect his soldiers and sacrifice the women and children.\textsuperscript{127} The commanders then justifies his decision by explaining that although he tries his best to protect the lives of his soldiers, others too have the right to life. The commanders solves his dilemma by trying a different option, which is to drop two air-delivered bombs closing in on the enemy’s position, which gives the commander the opportunity to regroup and give the order to retreat during the lull in the shooting following the impact of the air-delivered munitions.

It is submitted that the description of the firefight along the Baghlan river proves that military commanders do not necessarily put the safety of themselves and their men above the possibility of causing collateral civilian damage. Even though the dilemma is vexing, the commander in the situation described above seems to conduct a proportionality calculation for the planned operation to attacking the enemy’s main firebase by a mortar. He assessed the expected military advantage, consisting of retreating from the firefight without sustaining casualties as well as killing hostile troops. Furthermore, he assessed the

\textsuperscript{124} Zimmermann, p. 35: “...er kann es nicht mit hundertprozentiger Sicherheit sagen”
\textsuperscript{125} Zimmermann, p. 35: “Das Risiko, unbeteiligte Frauen und Kinder zu treffen, ist mir zu gross”
\textsuperscript{126} Zimmermann, p. 36: “Warum nicht, Herr Hauptmann? Sollen lieber wir sterben?”
\textsuperscript{127} Zimmermann, p. 36: “Soll ich also Frauen und Kinder schützen und meine Männer opfern oder soll ich Frauen und Kinder opfern um meine Männer zu schützen?”
expected collateral damage based on the information available to him, consisting of killing or wounding civilians (an unknown number of women and children) present at the location from which the opponent fired. He concluded that the proportionality equation would result in excessive collateral damage and postponed the mortar attack, and proceeded to figure out an alternative course of action that also resulted in the military gain he was aiming to achieve.

In conclusion, it is important to note in this case that the commander did not fall into the trap of the understandable reaction to think that in this situation the notion of self-defence or self-deprivation would bypass a meaningful proportionality analysis. Also, it may be noted that the commander seems to have required a 100 percent certainty in the assessment of the question whether the women and children may have lost their protection due to directly participating in the hostilities or by functioning as a voluntary human shield. This would seem to comply with the presumption of civilian protection of article 50(1) API.

It is submitted that the firefight illustrates that military commanders do not necessarily take the safety of their own troops as an absolute factor in their proportionality analysis. He takes the factor into account as a relevant factor for determining the military advantage of the planned attack, but accepts that the possibility of collateral damage serves as a contra weight against the responsibility he feels to bring his soldiers home safely.

12.4 Conclusion

The examples analysed in this chapter could easily be augmented by an unlimited number of further situations analysing attacks on all appropriate levels. As an example, no studies have been included in the realm of cyber-operations. Furthermore, human rights organisations have produced a massive number of reports concerning incidents that involved a very wide variety of contexts.

The analysis in Section 12.2 reveals that in none of these situations, a detailed yardstick is used to come to a conclusion on a proportionality analysis on the strategic or operational level. The committee in the Kosovo Bombing held that it found no evidence to conclude that the entire bombing campaign was aimed at causing substantial incidental civilian casualties, looking at the totality of civilian victims. It is submitted that this methodology seems insufficient for assessing the potential excessiveness of the incidental civilian damage and casualties of that bombing campaign. This is true, first of all, because the anticipated military advantage of the campaign does not seem to be made explicit. As a result, there is no factor of military advantage against which the expected civilian damage can be balanced. Secondly, looking primarily at situations in which three civilians died has no causal relationship to the factor of incidental damage that should be assessed by the committee for the purpose of a proportionality analysis on a campaign level. First of all because the three civilian deaths are looked at in hindsight, whereas the proportionality analysis should be made
on a prospective basis, and secondly because the number of three civilian deaths seems to be chosen randomly. After all, an attack can be prohibited because it is disproportionate even in situations in which no civilian deaths actually occurred, although excessive civilian deaths were expected. Furthermore, it is incorrect to exclude damage to civilian objects from the analysis. The conclusion is therefore that the report contains only helpful statements on the overall proportionality of the entire bombing campaign in the sense that the IHL proportionality rule must be applied at the several levels of command.

The Chilcot Report may be used to assess *prima facie* which factors must be taken into account in the IHL proportionality analysis on the strategic level. The Report shows that States can, and in this situation apparently do, take expected civilian damage and casualties into account before a campaign is launched. The Chilcot Report thus seems to indicate that the British Government took its responsibilities under API seriously in the sense that an analysis was made of the expected civilian damage before the invasion was started. It is commendable that the British armed forces looked into the expected collateral effects of both their planned air and their ground operations and based this assessment on the lessons learned during earlier operations. The methodology for that assessment seems to be a primarily quantitative analysis and with regard to the scope of the expected incidental civilian damage and casualties, the phase after the removal of the Saddam Hussein government is also taken into account. The military advantage side of the proportionality assessment seems to take into account which civilian suffering would be avoided by removing Saddam Hussein from power. Nonetheless, the Chilcot report is indeterminate about the issue of whether the analysis is meant to be based on the *ius ad bellum* or must be understood as a description of the IHL proportionality analysis by a State on a strategic level.

In the situation of the Korean artillery attacks, the ICC Prosecutor acknowledges that the conclusions were not based on the prospective plans of the North-Korean armed forces, but instead on the results. This alone makes the conclusion that no prosecution is recommended for violation of the ICL proportionality rule inevitable. The report is nonetheless interesting because it indicates that the ICC Prosecutor believes that a quantitative analysis is appropriate. It is however unclear why the ICC Prosecutor bypasses the issue of the application of the IHL proportionality rule to the South-Korean counterattack, given the fact that the South Korean authorities reportedly showed willingness to provide information to the ICC Prosecutor with regard to the incident.

The situations on a tactical level reveal that sometimes the assessment of the military advantage of an attack is complicated by the different levels on which that advantage is expected to materialise. The military advantage of the attack on the RTS building alone was small, but must be assessed in relation to the bigger picture of the objective to disable the communications and command and control system of the entire Yugoslav armed forces. Similarly, the military advantage of the attack on Martic was disrupting his ability to exercise his command, not necessarily attacking the two buildings in which he was believed to be present. The military advantage of killing Salah Shehadeh and General Al-Majid could also
be deemed to be more significant than killing one commander: it may be argued that it also was intended to end the string of attacks that they had reportedly ordered, and safeguard both the own troops and the civilians that could be affected by future attacks ordered by them. The question however arises to what extent these uncertain future advantages may be taken into account, because they would potentially allow a higher ratio of permissive collateral damage but perhaps not qualify as ‘direct and concrete’. Nonetheless, in terms of quantitative assessment, the situations of the attack on Salah Shehadeh and General Al-Majid show that presumably, expected civilian casualties between 20 and 50 civilian lives may be considered acceptable by States when a high-level commander is attacked.

The two situations involving German armed forces indicate that the safety of one’s own forces is taken into account when the military advantage of an attack is assessed. This is the opinion of the German Federal Court of Justice in the Kunduz Fuel Tankers situation and of the on-scene commander in the situation of the fire-fight along the Baghlan River. The latter situation however indicates that there is a limit to that: the safety of the own forces do not justify a full disregard for civilian casualties on that basis, but it also proves that the IHL proportionality rule finds application not only in offensive operations, but also in attacks in response to an attack.

In sum, it is submitted that the situations in this chapter demonstrate that commanders do conduct proportionality analysis on different levels, and may adjust their operations, or even in some cases refrain from launching an attack they were planning or even ordered to execute. Still, it remains difficult to deduct actual guidance for how the assessment of proportionality must be done according to military practice, primarily due to the absence of accounts of military commanders that describe their thought process. It is however submitted that the practice presented in this chapter enables a further elaboration on the application of the IHL proportionality rule in practice in the next chapter.
Chapter 13
Chapter 13: Assessing Proportionality

"Le principe de proportionnalité occupe donc un place enviable en droit international humanitaire et sous-tend l’ensemble du droit des conflict armés. On peut toutefois se demander si cette présence affirmée n’est pas précisément trop idéale pour être efficace! Ne serait-il pas paradoxal que l’une des branches du droit international où ce principe est le plus nettement affirmé soit également celle où sa mise en œuvre soit l’une des plus difficiles?"

13.1 Introduction

Having established the place of the proportionality assessment in the targeting process, as well as its place in the legal framework applicable to that process, the attention turned to the analysis of the components of which the IHL proportionality rule exists. In the previous chapter, a number of factual situations is analysed in order to illustrate how the IHL proportionality rule was, or was not, applied in practice.

This chapter aims to formulate guidance for conducting a proportionality assessment of a planned attack. This chapter therefore turns to a further analysis of how the IHL rule on proportionality must be applied. To this end, Section 13.2 discusses whether the factors of which the assessment consists, can be meaningfully balanced, or must be seen as inherently incomparable. Section 13.3 discusses the question of whether an objective application of the proportionality rule is possible and measures parties to a conflict may take to improve the objective application of the IHL proportionality rule are identified. Section 13.4 assesses whether the term ‘reasonable military commander’ must be understood to constitute the correct yardstick for applying the IHL proportionality rule. Section 13.5 builds on this by seeking to provide guidance for military commanders that may assist them in assessing proportionality by providing a preliminary analysis of the question of how the term ‘excessive’ must be understood.

13.2 Are the Components of the IHL Proportionality Rule Comparable?

Military operators and commanders have to take a large number of factors into account and determine the relative value of each factor as precise as is feasible, using all information that is reasonably available to them, before they can decide whether the planned attack is in accordance with the IHL proportionality rule. Some commentators have made the
remark that the expected “concrete and direct military advantage” and the “incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof” are incomparable as unequal factors. Olasolo mentioned that the two factors of the proportionality calculation have “hardly anything in common.”

Fenrick notes, “[i]t is much easier to formulate the principle of proportionality in general terms than to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to a particular military objective.”

Be that as it may, the IHL proportionality rule nonetheless requires the commander to perform an analysis of the underlying factors, to make an assessment of the two sides of the equation and finally to decide whether the expected collateral damage is excessive compared to the anticipated military gain. Furthermore, there is a legal obligation in the principle of proportionality, based on the obligation to protect civilians as much as possible, to assess the correct value of those components that can be objectively determined.

Therefore, pointing to the fact that the factors are dissimilar, is at times correct but never very helpful. It is clear that the proportionality assessment is not only comprised of quantitative factors, but qualitative factors also play a role. For example, the military advantage of killing three ordinary foot soldiers must be deemed to be much lower than an attack the expected military advantage of which is that the three most important commanders of a non-state armed group will be killed. Similarly for collateral damage, the destruction of one civilian building may be minor collateral damage if it is a normally abandoned shepherds-shed in a rural area, than if the building is a school that is normally used for educating the local youth, or an important museum. Therefore, incommensurate factors may perhaps only in exceptional cases be compared in a quantitative sense, but they certainly can in a qualitative sense.

A mathematical assessment may be possible only in exceptional cases. For example, when a planned attack will destroy a military objective where one hundred enemy combatants are present and the attack is expected to cause the death of only two civilians. But usually, the expected military advantage and collateral damage remain dissimilar in nature, for example, when the expected destruction of vital civilian infrastructure needs to be compared to the destruction of a number of enemy tanks that block the advancement of the attacking forces.

Comparing dissimilar factors is however not unique to IHL proportionality. As has been noted in Part III, different manifestations of the proportionality principle are found in many branches of international law, as well as in national law. In each different field, it is used to strike a certain balance. Mostly, the law requires to balance between rather different things. In fact, almost every proportionality equation that is found in international law is a matter of comparing unequal entities. It is therefore submitted that different factors can certainly be compared, it just depends on the question one is asking.

2  Olasolo, p. 158.
3  Fenrick 2000, p. 58.
4  This obligation is based on article 51 (1) API, article 57 (1) API and article 57 (2) (ii) API.
Coming back to the IHL proportionality rule, it may be relevant to assess whether the quantitative and qualitative factors in the IHL equation result in an objective test of excessiveness. The next section analyses this issue.

13.3 The Search for an Objective IHL Proportionality Rule

This section clarifies whether balancing the quantitative and qualitative factors in the IHL proportionality equation result in an objective test of excessiveness, and if not, whether there would be a need to restrict the subjectivity of the application of the proportionality rule. Furthermore, this section addresses which measures may be taken to improve the objectivity of the proportionality rule. In essence, these measures do not relate to the rule itself, but to its application, and these measures may be expected to assist in putting the IHL proportionality rule into practice.

Many authors have commented on the subjectivity of the IHL proportionality rule. For example, Blix stated that the line between permissible and excessive collateral civilian damage “necessarily contains a large subjective element.” Similarly, Oeter noted that “[o]bjective standards for the appraisal and balancing of expected collateral damage and intended military advantage are virtually non-existent.” The experts who drafted the HPCR Manual on Air and missile warfare, however, view the IHL proportionality rule as “objective in that the expectations must be reasonable.”

One could ask why one would want to search for an objective rule of proportionality and what it means for a rule to be ‘objective’. According to one dictionary, ‘objective’ means “not influenced by personal feelings or opinions; unbiased or fair.” The term ‘objective’ is used here as to mean that the outcome of an analysis is not only dependent on the personal ideas of the individual who conducts the proportionality assessment, but that the law speaks for itself, and anybody applying the rule would come to the same outcome in the same situation. One may argue that only if that is the case, the rule is clear enough to function as a legal rule, and sufficiently precise to be applied by the professionals who are trusted with the responsibility to decide on life or death of civilians who happen to be in the vicinity of military objectives. As such, an objective rule would exist if the balance would consist only of quantitative factors that may be measured against a set metric yardstick. An example of such a rule would be if it read that an attack is always disproportionate if it is expected to kill five civilians more than it is expected to kill enemy soldiers. Thus, if the planned attack...
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is expected to affect no civilian objects, but it is expected to kill ten civilians and only three enemy soldiers, and there is no other direct and concrete military advantage attached to killing the three soldiers, the planned attack is illegal in this example. Unfortunately, the IHL proportionality rule does not operate as objectively as the rule that was just introduced, primarily because there is no mathematically quantifiable yardstick applicable as in the fictive interpretation of the rule in the example. Depending on who the three enemy soldiers are, the value of killing these three soldiers could be non-excessive when compared to the expected collateral damage of killing ten civilians. Therefore, even if the IHL proportionality rule would include a mathematically quantifiable yardstick (which it does not), the rule would still not be fully objective because the personal ideas of the individual who conducts the proportionality assessment play a role in assessing the value of the factors that need to be balanced.

Nonetheless, it would be of great assistance to military commanders when as many factors as possible are assessed in as objective terms as possible, before the IHL proportionality assessment is conducted. The next section assesses why this is the case.

### 13.3.1 The Passive and Active Protection Rationales for an Objective Proportionality Rule

A first and obvious ground why the rule on proportionality should be objective, may be called the ‘passive protection rationale’. This entails that the rule aims to protect the civilian population by prohibiting excessive casualties among civilians who refrain from taking a direct part in the hostilities. This protection of those who do not, or no longer, participate in the hostilities is one of the major underlying rationales of IHL in general, and the IHL proportionality rule in particular. It is submitted that in order to obtain that purpose, the protection of these civilians should not be dependent on the subjective perspective of the military commander, but on objective parameters.

A second reason why an objective rule must be preferred over a subjective rule, is that of the ‘active protection rationale’. This means that with the responsibilities of the members of the armed forces to lawfully attack military objectives while also causing civilian casualties and destroying civilian objects, these professionals also run the risk of prosecution for a violation of IHL. The advantage of a more objective IHL proportionality rule is that it would provide military commanders with more clarity and guidance on how to implement the rule. Objective parameters would allow them to make decisions that are more predictable, and decrease their chances to end up being prosecuted for violating the proportionality rule. The active protection rationale thus requires the rule to be sufficiently objective for the members of armed force to be protected from prosecution, since the parameters of the rule are clear enough to be applied in a more or less predictable manner.¹⁰

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¹⁰ See for example Olasolo, p. 162: "Logically, the more intense the pressure of the media and public opinion concerning the adequate application of the proportionality rule (and the more numerous the national and international investigations..."
active protection rationale for individuals, this applies similarly to States. Wright notes in this context that “[b]ecause an attack with excessive collateral damage engages both [S]tate and individual responsibility, there must be an objective quality to the assessment.”

As such, the proportionality rule enhances the protection of civilians in armed conflict and similarly assists the commanders to remain within the limits to warfare set by IHL. There is, however, another side to this coin. One may argue that if the States that codified the proportionality rule in Additional Protocol I would have wanted a more precise or objective rule, they would have come up with one. Professor Frits Kalshoven was one of the persons present during the drafting of the part of API in which the proportionality rule is laid down. He wrote: “weighing the expected collateral damage against the anticipated military advantage will never be a job for one’s pocket calculator.” In doctrine, it is widely acknowledged that the proportionality principle is a very subjective rule. This would decrease the relevance of the active protection rationale and raises the question whether this rule is of any use to military commanders at all. It may - and has – however be argued that a subjective or imprecise rule provides the members of the military with more leeway and flexibility in targeting, than a very precise rule would. Given this latitude for military commanders, it seems difficult to successfully prosecute military commanders for violating the proportionality rule. There are indeed very few cases in which a violation of the IHL proportionality rule has been established. To shield their military commanders from prosecution for causing collateral damage except in the most clear cases may have been a desired outcome for the States that negotiated the IHL proportionality rule as it stands today.

It is submitted that in the circumstances where the IHL rule on proportionality must be applied, no rule can be formulated that covers every possible scenario in which an attack is planned. The question thus remains how objective the proportionality rule can be formulated in the first place. It is furthermore submitted that an objective rule does not necessarily mean that the outcome of the rule must be measurable in mathematical terms. Objectivity can also follow from relative factors. For example: the IHL proportionality rule can assist in finding when an expected outcome of an attack must be deemed to be more proportionate than another outcome would. Thus, a commander who assesses these two different outcomes, is able to decide which outcome is less and which is more excessive in terms of the balance between expected collateral damage and military advantage. Therefore, it follows that even if the components of the proportionality equation perhaps cannot be determined in a measurable way, they can still be compared and the rule is therefore useful.

11 Wright, p. 840.
12 Kalshoven 1992, p. 44.
13 See for example Dinstein 2008, p. 5: “The difficulty is that military advantage and civilian casualties are like the metaphorical apples and oranges: a comparison between them is an art, not science.”
14 Bartels 2013, pp. 271-315.
In order to be able to decide whether the collateral damage of an attack is inside the limits set by the IHL proportionality rule, it is necessary to assess the subjective or objective character of the different factors that need to be taken into account in the application of this rule, because it impacts on the subsequent question whether the IHL proportionality rule as a whole can be seen as either an objective or a subjective rule.

13.3.2 Are the Factors in the IHL Proportionality Rule Objective or Subjective?

The IHL proportionality rule is comprised of many different factors, as was analysed in depth in Chapter 11. As follows from the debates among academics, a number of the aspects of the proportionality analysis could profit from further clarification in order to improve the protection the civilian population may enjoy from this important rule as well as assist commanders in applying the rule. Unfortunately, the conclusion is that the exact legal meaning of many of these factors remains unsettled and subject to heated scholarly debate. Furthermore, the value attached to these factors in a proportionality assessment is dependent on the actual circumstances and context of the planned attack.

First, there is the fact that only military objectives may be attacked. Although IHL provides for a definition of a military objective, that definition itself consists of a number of subjective factors. Secondly, once a military objective has been identified, the next question in the context of the IHL proportionality rule is what the ‘concrete and direct military advantage’ is that would follow from attacking that military objective. In order to justify the loss of life and limb of civilians and damage to their belongings, the military advantage that justifies that loss must be sufficiently (1) concrete, (2) direct and (3) military, which is a more elaborate test than that which is necessary to identify a military objective. The question whether the military advantage may be expected to be ‘concrete and direct’ depends on many factors, such as the information available to the attacking commander and the importance of the target in the overall campaign. Thus, even if the military advantage may be determined easily in a quantitative sense (such as the number of enemies expected to be killed or injured or the expected number of enemy tanks destroyed), the military advantage that these effects have on the operation still depends on other factors, such as the proximity to the zone of hostilities and the danger they pose to own troops. The concrete and direct anticipated military advantage that will result from a planned attack will therefore be too dependent on its context to characterise it as completely objective. A qualitative analysis is always required to compare different outcomes that are expected from different possible modes of attack and as a result the military advantage expected from an attack will always remain a subjective factor.

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15 For example, whether an object is a legitimate military objective based on its location, like a bridge or a certain hill, depends primarily on the question of whether given the circumstances ruling at the time, that object plays a role in the hostilities. Only when that role would render a military advantage, the object in question may be targeted.
The factors that play a role on the other side of the balance include the expected injury or death to civilians and damage to civilian objects. The protection of civilians depends on the question of whether the civilians refrain from participating directly in the hostilities. This too is a difficult question, depending on a number of subjective parameters. But for the purpose of assessing the proportionality of a planned attack, it is crucial to establish the civilian status and protection of persons who are expected to be affected by the planned attack. After all, that decides on which side of the proportionality equation these individuals must be counted. For civilian objects, the difficulty is that any civilian object can, and often is, also used for military purposes. That means that it can be unclear whether the destruction of an object must count as collateral damage or as part of the military advantage that follows from an attack. Nonetheless, for technologically advanced militaries, it will be possible to actually place a quantitative number to the civilians that are expected to be affected by a planned attack, using sophisticated CDE methodology. In addition, it will in some cases be possible to put a monetary value on the expected damage to civilian objects. Therefore, it is submitted that it is possible, at least in theory, to find an objective value for the expected civilian damage.

Nonetheless, when the foreseeability of reverberating effects on the collateral damage for civilians must be assessed, the analysis turns into a qualitative analysis, which will consequently be assessed differently by different military commanders. Therefore, the expected collateral damage for larger operations may be expected to have a subjective character. This is the result of the fact that the temporal aspect of both the anticipated military advantageous outcome of the attack and the civilian damage that it is expected to cause, are undefined. Although it is a given that the anticipated military advantage must be ‘direct’, it is questionable whether effects from the attack that will become military advantageous in a later stage of the operation, may also be given weight in the equation. The test whether the effects are foreseeable is only satisfactory up to a certain point in this respect. Direct effects of wounds may certainly be counted as collateral damage, but the question may be asked whether effects on the health (including mental harm) of the civilian population that may only be expected to materialise a number of years later, must also be taken into account as being foreseeable. In this respect, one may also think of an attack using weapons that could cause serious diseases after a certain period, or attacking water facilities that will perhaps not directly lead to serious consequences for the civilian population, but that only after a longer period because of the decrease of the hygienic situation, depending on how the conflict develops.

16 See ICRC Commentary on AP I, Sandoz et al. para. 2208: “this system [talking of 57(2)(q)(iii)] is based to some extent on a subjective evaluation”; Bothe et al., para 2.6.2 on Art. 51: “the judgment must be subjective”, Wright, p. 839, Oeter 2013, p. 197.
Henderson and Wright claim that the IHL proportionality test of excessiveness is 'hybrid', because it is an objective ('reasonable') assessment of the subjective factors of military advantage and civilian damage. The subjective element of the proportionality assessment, according to Henderson and Wright, is thus the evaluation in good faith of the factors military advantage and civilian damage. The objective part follows, from the "resulting balancing [to be] objectively reasonable in ensuring that the civilian deaths, injury, or property destruction are not excessive." In most scenarios, the value of both the expected military advantage and the expected collateral damage is not clear-cut and must be characterised as least as partly subjective.

It is thus submitted that the IHL proportionality assessment remains a partly subjective standard, although in some instances, parts of the components of the IHL proportionality assessment may be valued objectively. Taken in its totality, the IHL proportionality is thus both subjective and objective, and thus a hybrid assessment. However, the objectivity may be determined to a certain extent by labelling the standard as "objective but qualified". Then it seems that the question of whether an objective proportionality assessment can be accomplished is moot, in spite of the preference for an objective test for reasons of the passive and active protection rationale. Instead, it is submitted that every attempt to phrase the IHL proportionality assessment in purely objective terms at some point ends up in the assertion that it must be made reasonably. Nonetheless, the qualification of those that need to conduct the proportionality assessment as a reasonable military commander, must be made as objective as possible. Therefore, the next section assesses in which ways the objectivity of the IHL proportionality assessment can be enhanced.

13.3.4 Measures to Limit the Subjective Application of the IHL Proportionality Rule

It is submitted that even if it would be impossible to achieve a fully objective proportionality rule in IHL, there is nonetheless a number of measures that may be taken to further objectify the IHL proportionality rule. These measures are to a certain extent procedural in nature.

The first procedural measure that can be taken to enhance the trust that can be given to the military commander, is through maximising the efforts in providing them with proper training in IHL in general. A thorough knowledge of the interpretation of the factors that need to be taken into account in the proportionality analysis, as discussed in Chapter 11, will increase the objectivity of the proportionality assessment of an actual attack during armed
conflict. It must however be acknowledged that setting high standards for the training of military commanders is not the whole story, because some targeting decisions are often made on a much lower level. Therefore, group-commanders and even foot-soldiers must also, as a minimum, be trained in the principles and basic rules of IHL.

Connected to the measure of improving the knowledge on how the factors of the proportionality assessment must be understood, is conducting training in peacetime through different exercise scenarios during which proportionality assessments must be made. The experience that results from these proportionality assessments made in a training environment is likely to increase the ‘reasonableness’ of a proportionality analysis that needs to be conducted during actual armed conflict. This is the result of an enhanced familiarity with the process of balancing the different components and of discussions with other military commanders and staff officers that is possible in the context of military exercises. Thus, the outcomes of proportionality assessments will become more predictable – and thus more objective.

Furthermore, armed forces may achieve a higher degree of objectivity in the application of the proportionality principle by institutionalising their targeting procedures, such as those that have been analysed in Chapter 10. The purpose of these procedures is to ensure that the targeting process takes all relevant factors into account and includes a genuine effort of minimising collateral damage by taking precautionary measures and to ensure that the proportionality of the attack is assessed before the decision is taken to launch, postpone or cancel a planned attack.

Fourth, the objectivity of the process may be enhanced by ensuring that the military commander has access to well-trained (military) legal advisers. It is crucial that these legal advisers are aware of the effects of the means and methods that the military commander has at his disposal to execute the attack. It is the job of the legal adviser to provide the military commander with advice on the options the commander has to launch a planned attack or attain a sought military gain within the limits set by the rules of IHL. Wright has argued that in this role, military lawyers are often “the first-line defenders of human rights in combat environments.”

Fifth, a more objective IHL proportionality rule can be strived for by using procedures, software and equipment that maximise the correct assessment in advance of the likely effects of certain weapons and certain modes of attack that may be used. In Chapter 10, a description of systems like the Collateral Damage Estimate Methodology was provided. It has been argued that following a check-list may be of assistance here. These types of checklists do exist, and mostly follow the IHL rules as explained in Chapter 10. Many of the procedures the military used for targeting purposes are classified, however, some are available in the

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21 As required by article 82 API.
22 Wright, p. 821. See also generally Newton 2007, and more specifically the ‘Populated Area Targeting Record’ on p. 894.
open domain. An example is the collateral damage sheet or form for Air Force support in urban operations.\textsuperscript{23}

Sixth, although the IHL proportionality rule is to be applied before an attack, evaluating an attack after it has happened can also be useful for enhancing the objectivity of future attacks. These evaluations could include a permanent procedure of conducting a thorough battle damage assessment after an attack (BDAs).\textsuperscript{24} It must be noted that BDAs would first and foremost serve to analyse whether the sought military advantage has been attained, or whether an additional attack is necessary. Arguably, however, the knowledge that an attack will be investigated in cases where collateral damage has occurred, will be an incentive for military commanders to assure that they plan attacks in a manner that the outcome will be proportionate. Moreover, the military commander may as a result adopt the practice to better document the considerations that were at the basis of the decision to launch the attack. Obviously, investigating an attack after it has occurred entails that the ex-post investigators have the difficult task to seek to acquire the value of the factors relevant for the proportionality assessment as they were perceived by the military commander ex-ante. Furthermore, presumably, the parties to an armed conflict may not be too enthusiastic about accepting a duty upon their forces to conduct these types of investigations. This applies particularly for less-sophisticated armed forces, and in cases where conducting an ex-post investigation is not feasible.

Another measure is that parties to an armed conflict must conduct in-depth studies into the effects certain weapons have under certain circumstances, through intensive testing of these weapons. This obligation already exits to a certain extent, since States that are parties to API are bound by article 36 API, that proscribes these States to review the legality of new weapons systems. When it is clear what damage will be done by a certain mode of attack using a certain weapon, it is also possible to conduct a more precise collateral damage estimation (CDE), as discussed in Chapter 10. Presumably, this will enhance both the knowledge of the commander about the anticipated military advantage of the attack and the magnitude of the expected civilian collateral damage. When these factors can be determined up to a very detailed level, a more precise – and arguably more objective – proportionality analysis can subsequently be conducted.

\textsuperscript{23} According to US military doctrine, Battle Damage Assessment (BDA) is part of the Combat Assessment procedure. It aims to “to compare post-execution results with the projected results generated during target development.” See United States, Joint Chiefs of Staff, Joint Publication 3-60, Joint Targeting (13 April 2007), Appendix C, page C-4. Available online: https://www.aclu.org/files/dronefoia/dod/drone_dod_jp3_60.pdf

\textsuperscript{24} There have been a number of writers who suggested that it should be imperative to permanently assign units the task to conduct ex-post investigations of all attacks that resulted in collateral damage. See for example Reynolds, p. 104-106, who suggests that ‘collateral damage response teams’ should be deployed. Also, Cohen suggests that the proportionality rule should be supplemented by the duty to conduct an ex post review if civilian deaths have resulted. See Cohen 2009, p. 38. This resembles the international human rights law duty to investigate, see generally Margalit.
Other measures that could be taken to strive for a maximum degree of objectivity of the proportionality assessment include efforts to maximise the quality of the sources of intelligence for commanders, and measures that aim at ensuring the mental and physical state of commanders at the point in time they need to decide on the proportionality of a planned attack. In practice, however, these decisions often need to be made under time-pressure in the stressful and chaotic circumstances of hostilities.

Some procedures that are in place in more sophisticated militaries restrain the execution of attacks much more than the proportionality rule could ever do in practice. These procedures are the result of policy, rather than law, and may be put down in certain rules of engagement. A specific example is the requirement that in cases where a certain higher number of collateral casualties is expected, the decision must be taken up the chain of command. Corn describes these measures as ‘civilian casualty benchmarks’. He notes: “higher levels of command establish limits on the maximum number of anticipated civilian casualties a subordinate commander may permissibly risk through a targeting judgment.”

In these cases where the collateral damage is expected to surpass a certain threshold of magnitude, the decision to launch the attack needs to be taken by a commander in a more senior position. The potential restraining factor contained in this, is that the commander referring the decision up to higher levels of command will consider the planned attack with more precision, and the targeteer will draft the target folder with more care. The reason for this is that the subordinate military officers may be expected to refrain from wasting the valuable time of their superiors with targeting requests of poor quality. Also, in these cases, the decision is made by a more experienced commander who is less emotionally involved with the planned attack, feels less sense of urgency, and has a broader view of how the tactical operation fits into the bigger picture. Furthermore, higher commanders may be assumed to have a larger number of more experienced staff officers and specialists at their disposal, who are able to further refine the analysis of the components of the proportionality assessment of the planned attack. Thus, a more objective outcome of the proportionality assessment may be expected.

Furthermore, there is another “highly significant benefit of reserving proportionality judgments to higher levels of command, because as the judgment is progressively elevated, the commander entrusted with the judgment will be able to consider a broader range of alternative targeting options.”

The following section addresses the concept of the ‘reasonable military commander’. After a discussion of the question of whether the ‘reasonable military commander’ constitutes an objective element of the proportionality assessment, the issue is addressed whether the ‘reasonable military commander’ must be seen as the applicable legal standard providing the yardstick for assessing the components of the IHL proportionality rule.

26 Corn calls these types of procedures “a procedural tool to enhance the ultimate substantive proportionality judgment”. See Corn 2014, p. 462.
13.4 The ‘Reasonable Military Commander’

It is concluded above that the military commander, no matter on what level of decision making this military commander is placed, is responsible for the IHL proportionality assessment. The question of whether military commanders may be trusted with such a daunting task is therefore not relevant, because it is a truism that anybody who plans, decides upon or executes an attack is responsible for conducting this assessment. But that does not mean that there are no limits to how the responsible military commander must apply the IHL proportionality rule. One of the most important of these limits is reasonableness.

It needs to be reminded in assessing the concept of the reasonable military commander, that this concept has been introduced by the jurisprudence of international criminal tribunals. In that context, the tribunals need to apply, *ex post*, a different yardstick of proportionality than the military decision maker needs to in planning and deciding on future attacks. At first sight, it thus seems to be a valid question whether this concept of the reasonable military commander could potentially add substance to the legal obligations of commanders that are to apply the IHL proportionality rule in practice. However, to reverse the issue: if it is not the reasonable military commander, then how can the person responsible for conducting the IHL proportionality assessment be referred to? Furthermore, as Henderson and Reece note, there are good reasons to use the term reasonable military commander, because “this standard has the advantage of having gained acceptance among practicing lawyers, academics, NGOs and militaries.”

This section assesses first to what extent the concept of the ‘reasonable military commander’ provides an objective yardstick for assessing excessiveness. Subsequently, remaining subjective factors are identified. Finally, the question is addressed of whether the concept of the ‘reasonable military commander’ constitutes a meaningful yardstick for assessing excessiveness in applying the IHL proportionality rule.

13.4.1 The Objectivity of the Concept of the ‘Reasonable Military Commander’

The concept of the ‘reasonable military commander’ was suggested by the office of the Prosecutor in the ICTY OTP Kosovo Report of 2000. It held that “[a]lthough there will be room for argument in close cases, there will be many cases where reasonable military commanders will agree that injury to non-combatants or the damage to civilian objects was...
clearly disproportionate to the military advantage gained.” The ICTY Trial Chamber echoed the relevance of the reasonable commander in addressing the IHL proportionality rule in the *Galic* Case. The Trial Chamber held that “[i]n determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.” The Trial Chamber thus does not require the person as such to be reasonable in the assessment of excessiveness, but whether the military commander is *reasonably well-informed* and whether the available information is *reasonably used*. It may be suggested that these two issues are embedded in the standard concerning causality and foreseeability of the effects of the planned attack and the precautionary obligations rather than in the assessment of whether the persons conducting the assessment of the two sides of the proportionality analysis are reasonable themselves.

According to one dictionary, the term ‘reasonable’ means in this context “in accordance with reason, not absurd.” The term ‘reason’ in that latter context must be understood as “what is right or practical or possible; common sense or judgement”. A preparatory background document for an ICRC Expert meeting held in Quebec in June 2016 notes a number of further descriptions found in military manuals describing the terms ‘reasonable’ in connection with a military commander carrying out IHL proportionality assessments. These descriptions basically boil down to the conclusion that the ‘reasonable’ military commander is expected to act in ‘good faith’, ‘rationally’, ‘honestly’ and even ‘objectively’. These different words to describe how military commanders must make proportionality assessments, it is submitted, do not amount to a materially different yardstick. Rather it may be assumed that military commanders conduct their proportionality assessments reasonably. This is because the training and experience of military professionals is aimed at respecting the principles and basic rules of IHL, among which is the IHL proportionality rule. The respect for this is “a matter of sound military judgement [and the IHL proportionality rule serves] not so much to limit military effectiveness as to provide legal reinforcement for professional military values.” Thus, it is submitted, the adjective ‘reasonable’ in the term reasonable military commander may be understood to be satisfied when the subjective features of military commanders have been sufficiently limited. It has been submitted above in Section 13.3.4 that the subjective features of military commanders can be limited to a certain extent by assuring that a number of procedural measures have been taken.

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30 ICTY OTP Kosovo report, p. 19 (emphasis added).
31 ICTY, Prosecutor v. Stanislav Galic, Trial Chamber, Judgement, 30 November 2003, para 58.
34 Carnahan, p. 868.
The objectivity of the reasonable military commander may be argued to increase when all the measures that enhance their objectivity have been taken into account. In more concrete terms, this means that the reasonableness is enhanced as long as, for example, it can be proven that the commanders have been well-trained, particularly in IHL. In addition, it can be determined whether the subordinate staff-officers, targeteers, group-commanders and foot-soldiers have also been trained in the principles and basic rules of IHL. This could relatively easily be ascertained by requiring a minimum amount of training hours, or by imposing the members of the military to pass an exam on their respective level of required knowledge. It is furthermore the duty of the leadership of armed forces to ensure that a sufficient level of knowledge and training exists within the different components of the armed forces, including forces consisting of conscripts or reserves. In addition, it can be objectively established whether the military commander has access to well-trained legal (military) advisers. This too, would constitute an objective element in the total calculation. Furthermore, a minimum number of years of military experience in targeting decisions can be required from military commanders. With regard to specific attacks, it can be assured by using checklists whether military commanders have had sufficient access to the information that assists them in determining whether the expected civilian casualties may be excessive. If available, this applies equally for the question whether auxiliary means such as CDE methodology have been used to assess the damage planned attacks may cause and predict the expected collateral damage. These systems are often able to provide reliable expectations on the damage the use of certain munitions or fuses may cause, thus enabling commanders to assess the expected collateral damage as accurate as possible. These types of decision support tools, including computer programs that provide calculations for different options for decision makers, are obviously not available in all circumstances and to every level of decision making.

13.4.2 Remaining Subjective Factors for ‘Reasonable Military Commanders’

Even when all procedural measures have been taken, subjective factors remain that influence the outcome of the proportionality analysis. Some of these remaining subjective factors seem inherent to the judgment of human beings. For example, when the decision makers and their staff have already put considerable effort in determining the factors of a planned attack, it may perhaps be understandable that they develop the preference to go ahead with the attack. This psychological effect may arguably entail that slightly more emphasis is put on the importance of the military advantage sought by the attack than is put on preventing harm to occur to the civilian population.

Checklists may assist in following the right sequence of assessment that lead to the commander being able to make an informed decision and in making sure that no factors are accidently left out of the assessment because the military commander forgot to take it into account. Obviously, no matrix or checklist could be all-comprising, because there are indefinite factors, with different levels of certainty and expectations.
Another subjective element that remains is the assessment military commanders will make of the value of human life. The ICTY OTP Prosecutor Report notes that with regard to the excessiveness of a planned attack that the answer different military commanders will give “will differ depending on the background and values of the decision-maker.” Some commentators have expressed their general scepticism towards military commanders, because they expect that “the military will naturally tend to overstate the importance of the military advantage part of the equation.” This statement is not new. The commentary to the 1956 Red Cross Draft Rules includes a statement warning that the importance of the expected military advantage should not be overstated. Instead, it must be assessed in the light of experience, which often shows how much the obtained result is inferior to the one that was anticipated. During the deliberations that lead to the adoption of the 1977 Additional Protocols, a Swedish representative is reported to have stated that “a man responsible for an attack against a military object, will sometimes say himself that the suffering that may be caused - as far as he can judge - to the civilian population is not disproportionate to the military advantage he gains by destroying the object, but the people who will suffer by the attack will find the suffering too grave and the military advantage less important. Who is right?” According to one author, this tendency particularly exists when one of the parties is militarily superior. During Operation Allied Force it was reported with regret by one author that “the extensive process of target review combined with a preoccupation to avoid collateral damage resulted in cancelled targets, delayed engagements, failure to produce enough targets to adequately mass, and limited strikes producing inconsequential effects.” The missing factor here seems to be the human factor. Instead of the apparent disappointment of the author that there may have been missed opportunities, there must also have been civilian lives saved. Nonetheless, it may be that political pressure to engage a larger number of targets, or operational considerations to apply ‘overwhelming’ force during an overall attack may lead to commanders dedicating less attention to their obligation to minimise civilian casualties and damage, leading to an approach in which the civilian side of the proportionality assessment is undervalued.

36 ICTY OTP Kosovo report, para 50.
37 Sassoli and Cameron, p. 64.
38 International Review of the Red Cross, 1956, p. 702: “L’avantage militaire ne doit pas se voir attribuer une valeur excessive; il doit, au contraire, être apprécié à la lumière de l’expérience, qui montre souvent combien le résultat obtenu est inférieur à celui qui avait été escompté”
39 Mr. I. Mueller, see Final Record concerning the Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War, p. 68. See https://www.loc.gov/rr/frd/Military_Law/pdf/RC_Final-record-rules-limitation.pdf
40 McPherson, p. 94: “Our tendency when we are in a position of considerable advantage will be to identify with the possible benefits to ourselves and others for whom we have special concern and to dissociate from the costs to persons likely to bear the burdens of use of force.”
41 Reynolds, p. 87.
A further complication for finding an objective standard of reasonableness may be that commanders from different cultures may attach different values to the components of the IHL proportionality rule. It seems furthermore to be a common feature of mankind to be, or become, more or less indifferent to the suffering of the adversary. Yet, the IHL proportionality rule serves to protect all civilians equally. For that reason, a number of writers has suggested that this perception may be prevented by including in the proportionality equation, a ‘reversed assumption’ whether the commander would consider the attack lawful if the expected collateral damage would consist of civilians of his own side. Gomez writes that the subjective character of the IHL proportionality rule is “the Achilles’ heel of the law of war. The rule could perhaps be seen in more practical terms if it stated that an aerial attack expected to cause civilian casualties would be acceptable should it have the same degree of approval as a similar action taking place over a part of the country’s own territory under enemy occupation, in which case the civilian casualties would be compatriots.” In this rather simple way, the danger may be avoided that the lives of civilians of the adversary are seen as less valuable than the lives of ‘own’ civilians would be. This, it is submitted, may be a tool for military commanders to apply in order to enhance the quality of their decisions.

In the end, it must be stressed that making decisions with regard to the IHL proportionality assessment must be done by military commanders, but the outcome of such assessments must not only be acceptable in military terms. After all, the military is part of the civil society as a whole and must not only take military considerations into account when assessing the excessiveness of expected collateral damage. As Bothe put it: “[i]n democratic systems, the values pursued by the military and those society at large cannot be far apart. The value system on the basis of which the military is operating has to conform to that of the civil society, not vice versa.”

13.4.3 Sub-Conclusion

Military commanders are responsible for the application of the IHL proportionality rule in practice, but their margin of appreciation is not unlimited. It is suggested that the IHL proportionality calculation is a subjective standard, although some of its components can and must be objectivised as far as possible in the process of the proportionality calculation. Nonetheless, “[e]ven when the comparison is between the number of military casualties

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42 Reynolds, p. 71: “[t]he value of life ranges among individuals and cultures, making a value determination of civilian casualties compared to a military objective highly variable. (...) A military commander from a depressed, under-developed state with little access to the resources necessary to make the most prudent command decisions cannot be held to the same standard of reasonableness as commanders from highly advanced military states with extensive resources, information, technology, and high situational awareness of the battle space.”


44 See also Krüger-Sprengel, p. 192-193 and Henderson, p. 229.

and civilian casualties, the comparison is still not between human lives and human lives因为在 the military advantage of killing different people varies. There is no other option than to “rely on judgement, although it must be judgement influenced by a reasonable understanding of what will be generally acceptable and understood in humanitarian terms.”47 Military commanders must act in good faith, but “persons acting in good faith may make mistakes.”48 Kalshoven and Zegveld note that it is decisive “whether a normally alert attacker who is reasonably well-informed and who, moreover, makes reasonable use of the available information, could have expected the excessive damage among the civilian population.”49 However, different military commanders may come to different conclusions when faced with identical circumstances.50 This alone suggests that there is no objective yardstick in the phrase ‘reasonable military commander’ other than that the rule is violated in cases where the relationship between the two is such that it was unreasonable for military commanders to have proceeded with the attack.

The references to reasonableness that were made above, are not included in the text of the IHL proportionality rule. Nonetheless, there seems agreement that reasonableness in a key factor in the application of the IHL proportionality rule. This should not come as a surprise, as it was already submitted above in Section 4.3 that “in all (...) fields of international law, it is necessary that the law be applied reasonably.”51 Furthermore, it was concluded that reasonableness is used for a clash between unequal interests, which requires a more qualitative assessment. It is submitted that the IHL proportionality rule fits that description. It is therefore submitted that the ‘reasonable military commander’ is not a separate component of the IHL proportionality rule, but instead the manifestation of the general principle of international law of reasonableness. The term reasonable military commander, it is submitted, does not provide guidance for implementing the IHL proportionality rule additional to that of the general principles of international law. Moreover, the phrase ‘reasonable military commander’ does not in itself enhance the objectivity of the IHL proportionality rule. However, it is submitted that the measures mentioned above will be of assistance in establishing an a priori expectation that military commanders have not acted unreasonably in their assessment of the excessiveness of a planned attack. Procedural measures alone are however insufficient to determine a priori the reasonableness of commanders in their targeting decisions, because there is also a material component.52 In the field of IHL, as a branch of international law, it is the general principle of reasonableness that provides this obligation for States to ensure that their agents (the reasonable military commander) conduct the IHL proportionality assessment reasonably.

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46 Henderson, p. 223.
47 Haines, p. 9.
48 Fenrick 2000, p. 77.
49 Kalshoven and Zegveld, p. 115.
50 See also Henderson, p. 221-224.
51 Barcelona Traction Case, ICJ Reports 1970, paragraph 93.
52 See Section 4.3.
In sum, the concept of the ‘reasonable military commander’ is "the standard against which [the proportionality] decision is to be evaluated is that of a person with all the experience, training, and understanding of military operations which is vested in a ‘reasonable military commander’". It can therefore be understood to mean that in the context of the application of the IHL proportionality rule, military commanders need to make a thorough assessment in good faith of all the different components of the rule as well as the circumstances ruling at the time, and take a reasonable decision to launch, postpone or cancel an attack because of their obligation under the IHL proportionality rule.

13.5 What is ‘Excessive’?

Even though it has been established above that the definition of the components of the proportionality equation is subject to extensive debate, to determine the ratio between the two major components is “the most difficult of all.” As an example, referring to the same attack, Amnesty International and the ICTY OTP reach a very different conclusion on the question whether the NATO attack on a Serbian television station was proportionate.

If it would be accepted that the ‘reasonable military commander’ does not provide definitive guidance for establishing the excessiveness of a planned attack, further analysis of the term ‘excessive’ is required. The interpretation of this term determines the difference between a lawful attack and an unlawful attack in the IHL proportionality rule. The draft that was drawn up by the ICRC contained the word ‘proportionate’, but after the draft article was discussed in the drafting committee, Frits Kalshoven claims to have proposed to use the word ‘excessive’, which was subsequently accepted.

It is useful to stress that when an attack is planned of which it is expected that a large number of civilian casualties and massive damage to civilian objects will occur, this extensive civilian damage does not necessarily lead to a violation of the IHL proportionality rule. Yet, it is worth exploring the fine line between extensive and excessive collateral damage. This is the subject of Section 13.5.1. Subsequently, the attention turns to the question of whether the standard of excessiveness is drawn in terms of ‘excessiveness’ or ‘clear excessiveness’ (Section 13.5.2). Finally, Section 13.5.3 aims to analyse the test of excessiveness as required by the application of the IHL proportionality rule.

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53 Henderson and Reece, p. 11.
55 See Amnesty International, “Collateral damage or Unlawful Killing? Violations of the Laws of War by NATO during Operation Allied Force”, p. 49: "(…)NATO deliberately attacked a civilian object, killing 16 civilians, for the purpose of disrupting Serbian television broadcasts in the middle of the night for approximately three hours. It is hard to see how this can be consistent with the rule of proportionality." and the ICTY OTP Kosovo report, para 71. See also Henderson, p. 221. And see previous chapter, Section 12.3.3.
56 As indicated by Frits Kalshoven during a presentation of this author on ‘Controversial issues surrounding the principle of proportionality in international humanitarian law’ at a research meeting of the Kalshoven-Gieskes Forum on International Humanitarian Law at Leiden Law School on 27 November 2012.
13.5.1 Extensive or Excessive?

It seems fair to say on the basis of the various arguments made above that even an attack that is expected to cause ‘extensive’, or ‘massive’ collateral damage may be lawful, provided that an even more significant military advantage is expected to be the result of that attack. Rogers concludes that ‘extensive’ collateral damage is irrelevant, since “the more important the military objective, the greater the incidental losses before it could be said that the rule of proportionality had been violated.” Geiss agrees that IHL “does not prescribe any absolute limit in relation to collateral damage.” Thus, a very considerable military advantage could potentially justify significant civilian damages and even casualties, i.e. extensive as opposed to excessive collateral damage. Also, the scope of an attack needs to be taken into account to assess the extensiveness of collateral damage: “proportionality is not assessed by looking at the total amount of collateral damage at the end of an armed conflict and then determining whether that collateral damage is excessive when compared against the goals of the armed conflict.”

Yet, obviously, attacks that cause a large quantity of collateral damage are among the first suspects of attacks where the IHL proportionality rule may have been disregarded. Also, the question may be raised of whether the sheer magnitude (extensiveness) of expected collateral damage could be the utter boundary of the test of excessiveness, even when the expected military advantage is expected to be immense. In other words: may the expected vast extensiveness of an attack render an attack that is not excessive nonetheless illegal?

The ICRC Commentary to API states on this topic that “[t]he idea has also been put forward that even if they are very high, civilian losses and damages may be justified if the military advantage at stake is of great importance. This idea is contrary to the fundamental rules of the Protocol - in particular it conflicts with Article 48 (‘Basic rule’) and with paragraphs 1 and 2 of the present Article 51. The Protocol does not provide any justification for attacks which cause extensive civilian losses and damages. Incidental losses and damages should never be extensive.” This statement has however been criticised.

According to Kalshoven, “[t]he principle of proportionality was introduced as a last line of defense [to protect the civilian population]. Must we now recognize yet another, ultimate upper limit beyond which collateral damage that is not excessive in view of the absolutely imperative military necessity of the attack, will by its terrible scale become unacceptable nonetheless?” Kalshoven answers his own question negatively, however, it may be worth to explore the argument slightly further.

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58 Geiss 2010, p. 127.
59 Henderson, p. 201, referring also to Laursen, pp. 795-796 and Dinstein 2004, p. 123. Henderson also mentions Sassoli as another supporter of this view.
60 Kalshoven 1992, p. 44.
61 See for example Henderson, p. 224, Watkin 2007, p. 29.
62 Kalshoven 1992, p. 44.
The question may be asked whether lawful extensive damage to the civilian population is in line with the historical idea of IHL, which is to provide a humanitarian baseline for the accepted fact that the warring parties must be able to conduct their operations. It seems unlikely that the rules of IHL were crafted to allow for extensive civilian damage for reasons of military advantage in the planning phase of an operation, because IHL seeks to prevent massive civilian casualties through a large number of protective rules. It may be argued that all those protective rules, such as the principle of distinction and the prohibition to conduct indiscriminate attacks, are rendered irrelevant when operations are planned with such a high military advantage that extensive civilian damage may be lawful. This is of particular relevance for the use of certain types of weapons. It must be realized that the principle of proportionality only became an accepted part of the codified rules of IHL in 1977. At that time, the nuclear era was 20 years old and the magnitude of the civilian damage and casualties to be expected from the use of nuclear weapons and the devastating effects of the bombings on German cities during the Second World War were clear. The rule of proportionality may therefore have been one of the underlying reasons why the International Court of Justice concluded in their Advisory Opinion that the use of nuclear weapons could be lawful in some cases. This is the claim that any operation is legal, no matter how reckless and potentially devastating for the civilian population, provided it is military sufficiently advantageous. Clearly extensive collateral damage and the use of illegal means or methods of warfare could thus potentially be justified, because the stakes are so high. This is exactly the argument that the International Court of Justice has used in its appraisal of the legality of Nuclear Weapons, and the suggestion put forward by Michael Walzer that it is justified to violate the rules of IHL in case of “Supreme Emergency.”

It is true that the IHL rule of proportionality does not allow the incidental damage that is expected from an attack to be viewed in isolation. However, it is submitted, there is a difference between the civilian side and the military advantage side, when both are stretched to their extremes. The outer limit of the humanitarian part of the proportionality equation is the prohibition to attack civilians and launch indiscriminate attacks. These are absolute legal obligations. The outer limit of the military advantage, at least for a large scale planned attack, leaves ultimately still a choice to the attacker. There is no absolute legal obligation to launch an attack, no matter how advantageous it may be. The ultimate incentive to conduct an attack that would cause extensive civilian casualties, which could be acceptable because of the massive military advantage that is expected from it, is found in ius ad bellum, not in IHL. It may therefore be argued that the limit for the humanitarian side of the IHL proportionality equation is contained within the law, whereas the limit for military advantage is not. This could, in extreme cases, be taken as the legal rationale why attacks that may cause extensive collateral damage could be illegal, even though there is a massive military advantage to be gained. Judge Higgins seems to acknowledge this situation where she writes that “[i]t must

64  Henderson, p. 224-225.
be that, in order to meet the legal requirement that a military target may not be attacked if collateral civilian casualties would be excessive in relation to the military advantage, the “military advantage” must indeed be one related to the very survival of a State or the avoidance of infliction (whether by nuclear or other weapons of mass destruction) of vast and severe suffering on its own population; and that no other method of eliminating this military target be available." It is submitted that the approach to massive military advantage, only in cases where there is no choice at all to attain a certain enormous military advantage, that extensive civilian damage that is non-excessive, may be justified by the IHL proportionality rule. In all other cases, where extensive collateral damage occurs, the planned attack should be cancelled. The legal basis for this rule would be article 57 (1) API, that contains the obligation to take constant care of the civilian population. Of course, the next question is when expected civilian damage may be labelled as ‘extensive’. However, for this, it may be possible for States to address this question in consultations, leading to expectations of operations that will cause more than a certain number of civilian casualties, as ‘extensive’, and thus contrary to the rules of IHL at first sight.

To be clear: practical examples of the situation that has just been described may be found only on strategic levels and in the situations to which the ICJ referred in its Nuclear Weapons Advisory Opinion: when the survival of the State is at stake. In the vast majority of situations, there is no situation where such a huge military advantage could be attained that the extensiveness of civilian casualties would stand in the way of a planned attack. However, the possibility that the extensiveness of an attack stands in the way of its lawfulness under the IHL proportionality rule, it is submitted, should not be dismissed categorically. Nonetheless, the applicable standard of the IHL proportionality rule is ‘excessive’.

13.5.2 Excessive or Clearly Excessive?

The next issue to be determined is the question of what the exact standard is, because the standard of ‘excessive’ as included in the treaty text of Additional Protocol I differs slightly from the standard of ‘clearly excessive’ that is included in article 8(2)(b)(iv) of the Rome Statute, adopted in 1998. The ‘clearly excessive’ standard was copied in the Report of the ICTY Prosecutor on Kosovo of 2000, referring to the attack of 23 April 1999 on the Serbian Radio and TV Station in Belgrade. It is striking to note however that in one the first cases before a criminal tribunal, that of Galic, the ICTY Trial Chamber did not refer to the clearly excessive standard in its explanation of the rule, however it does note with regard to a specific attack on a football match that “although the number of soldiers present at the game was significant, an attack on a crowd of approximately 200 people, including numerous children, was clearly

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65 Nuclear Weapons Advisory Opinion, Dissenting Opinion of Judge Higgins, para 21, p. 588 (emphasis added).
67 ICTY Trial Chamber, Galic, para 58.
excessive in relation to the direct and concrete military advantage anticipated.\footnote{ICTY Trial Chamber, Galic, para 387 (emphasis added).} This of course does not prove anything, because when the collateral damage is ‘clearly excessive’, it is by definition also ‘excessive’.

Rogers is of the opinion that the formulation in the Rome Statute, that includes the adjective ‘clearly’ is “[p]erhaps the closest one can get to an acceptable formulation of the customary law principle of proportionality.”\footnote{Rogers 2008, p. 208.} It must be noted that he seems to primarily have phrased this conclusion when it concerns questions of individual criminal responsibility, and it is for a tribunal to consider that the collateral damage “must be ‘clearly’ excessive before criminal liability can be established.”\footnote{Rogers 2008, p. 210.} Dinstein has suggested that the meaning of the word ‘clearly’ was already implicitly included in the proportionality test, and that it was merely made explicit by the formulation used in the Rome Statute\footnote{Dinstein 2004, p. 120, but in the 2016 version of his handbook on the Conduct of hostilities under the law of international armed conflict, he calls the “value added of the adverb ‘clearly’ obscure. (emphasis added). See Dinstein 2016, note 869 on p. 153. See also Watkin 2007, p. 8.} and that the benefit of the insertion of the adjective is “unclear.”\footnote{Dinstein 2012, p. 269.} Boothby however notes that that the text of API does “not necessarily imply this ‘clearly disproportionate’ element, although its practical application probably does.”\footnote{Boothby, p. 97.}

The difference in wording, it is submitted, should not be interpreted to be of importance for military commanders planning an attack.\footnote{See however Boothby, p. 97: “[w]hile accepting that the Rome Statute fulfills its own purpose in international criminal law and that its interpretation is not determinative of the meaning to be given to the API provision, the former text should, nevertheless be borne in mind when we consider the proportionality principle, not least because it represents the most recent internationally adopted text on the subject”} It is their obligation to cancel or postpone an attack if they believe it will cause excessive civilian damage. Military commanders will normally be well aware that whenever an attack is expected to be ‘clearly’ excessive, they need to consider an alternative. These are the easy cases for military commanders, where the intended operative mode for IHL becomes apparent: it plays its role as a preventive framework guiding military commanders. The fact that the adjective ‘clearly’ is now included in the Rome Statute “must be understood as not to change the existing law.”\footnote{Dörmann 2003a, p. 169.} For international criminal law, on the other hand, the inclusion in the Rome Statute means that for international criminal responsibility to arise, the word ‘clearly’ must be seen as an additional requirement for a disproportionate attack to constitute a war crime under the Rome Statute.\footnote{McCormack and Mtharu, p. 196.} The fact that the formulation in the Rome Statute contains the word ‘clearly’ in the definition is not surprising, given the fact that the adjective is added for criminal law purposes. It means that an attack that is not ‘clearly’ disproportionate (but nonetheless disproportionate), is not a war crime under the Rome Statute. This means that when a commander has conducted a
fair proportionality calculation, after which he concluded that the planned attack would be disproportionate, he needs to cancel or postpone it. If he proceeds with it nonetheless because he believes it is not ‘clearly’ disproportionate, he has violated the rules of IHL, but he is off the hook where it regards his individual criminal liability under international criminal law. This is understandable because it is difficult, if not impossible, for a judge to assess ex post the exact circumstances as they appeared to military commanders at the time these had to make proportionality decisions. In fact, that is already hard enough for military commanders themselves, and the IHL proportionality rule thus seems to leave room for situations in which there may be a disproportionate attack that may be blamed on the commander, and on his State of origin, but that does not give rise to individual criminal liability.

Thus, the application of the IHL proportionality rule requires that even when a planned attack is not expected to be ‘clearly’ excessive, but excessive nonetheless, it needs to be cancelled or postponed.

13.6 Conclusion

It is submitted in this chapter that there are a number of objective factors in the proportionality equation, but that it is ultimately a subjective assessment. A number of measures should be taken in order to further objectify the IHL proportionality assessment by military commanders. The remaining subjective components of the calculation must be assessed in good faith and the assessment with regard to the excessiveness of incidental civilian death, injury or damage must be conducted in a reasonable manner, on all levels of command. That does not mean that the ‘reasonable military commander’ provides an objective yardstick. The possibility of a reasonable proportionality calculation conducted in good faith does exist, it is submitted, although much work needs to be done before consensus exists on the interpretation of the different components and thus a more clear-cut application of the IHL rule of proportionality becomes possible. In addition, the yardstick of excessive must not be confused with the term ‘extensive’, or with the yardstick of ‘clearly’ excessive.

The aim of this chapter, which is to formulate guidance for conducting a proportionality assessment of a planned attack, is perhaps only attained to a limited extent. It is concluded that ultimately, the IHL proportionality rule must be accepted as it is: an inherently imprecise and flexible yardstick that nonetheless does play its role as the last line of protection for the civilian population, and an obligation for reasonable military commanders to take that protection seriously into account by refraining from attacks that may cause excessive collateral damage. The ultimate question therefore is how the term excessive must be interpreted in light of all factors impacting on the IHL proportionality rule. This is the subject of the next chapter.
Chapter 14
Chapter 14: Determining Excessiveness and a Plea for Tilting the Balance Towards Humanity

This chapter proceeds in Section 14.1 to further explore the term ‘excessive’ and dissects a number of factors that affect the assessment of military commanders whether expected collateral damage may be excessive. Section 14.2 introduces the probability of success of an attack as a third component of the IHL proportionality rule. Section 14.3 suggests a number of rationales for attaching more weight to the prevention of causing collateral civilian damage and casualties in the scale than is done traditionally, tilting the balance towards humanity. Section 14.4 discusses policy and operational factors that also may affect the assessment of excessiveness of collateral damage. Section 14.5 revisits the discussion about the level of authority making a proportionality assessment in the context of how this level affects the factors to be taken into account. The last two sections of this chapter address the question of whether there is a need to clarify or change the IHL proportionality rule and suggest one way ahead to acquire more guidance for commanders to apply the IHL proportionality rule.

14.1 Determining Excessiveness

Sivakumaran warns that “[t]he concept of excessive is such that any explanation, even that designed to elucidate the test, may have the effect of distorting rather than clarifying the meaning.” Wright similarly concludes that “there is no overarching definition of ‘excessive’ because the variables in the proportionality standard are relative to each other.” Nonetheless, the proportionality calculation must be conducted and notwithstanding the fact that shedding more light on the interpretation of the term excessive is a difficult task, it has to be done.

When an imprecise word contained in a legal text, such as the term ‘excessive’, must be interpreted, the first and most obvious way is to look at the normal use of the word. According to one dictionary, ‘excessive’ means: “greater than what is normal or necessary” or “extreme”. In other words, the term excessive is used to assess the relation between two or more factors. If that relation is in balance, it may be said that the situation is normal, and thus not-excessive. It is tempting to use the example of a scale in this respect. As long as the scale is in balance, none of the factors is excessive in relation to the other. In terms of collateral damage and military advantage, this means that as long as the balance tilts in the direction

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1 Sivakumaran 2012, p. 351.
2 Wright, p. 853.
3 Article 31(1) of the Vienna Treaty on the Law of Treaties: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”
of where the collateral damage is expected to be less significant than the anticipated military advantage, the planned attack is not excessive, even until the situation is in balance. It may even be argued that even when the collateral damage is slightly larger than the military advantage, it is not excessive because the misbalance is not ‘extreme’, nor is the collateral damage ‘clearly’ excessive compared to the anticipated military advantage. This ordinary literal understanding of the word ‘excessive’ in balancing military advantage and civilian casualties and damage then seems to tilt the scale in favour of military advantage, because it seems to suggest that even when the two factors are in balance, the collateral damage cannot be said to be excessive. The standard of ‘excessiveness’ rules out that the standard must be understood as ‘clearly excessive’. As was explained above, this is the standard that applies for prosecutions under international criminal law, thus military commanders must apply a yardstick in IHL that is more protective for civilians and civilian objects than the standard that would constitute a violation under international criminal law. As a result, any claim that an attack is only disproportionate in situations where the ratio between the expected collateral damage and the anticipated military advantage is ‘clearly’ out of balance, is incorrect. However, there are a number of reasons suggesting that the interpretation of the term ‘excessive’ may not be as clear-cut as the ordinary literal meaning would suggest.

If an attack is likely to cause any collateral damage, the question comes up whether the military advantage sought by the attack is significant enough to justify the expected collateral damage. The resulting balancing act that is required must not be understood as a precise measurement between military advantage and civilian injury and loss. In doctrine, a number of writers attempted to clarify the term ‘excessive.’ Dinstein, for example, notes that ‘excessive’ means “that disproportionality is not in doubt”. This however resembles the test of ‘clearly’ excessive, and may therefore seem to permit military commanders too much leeway. According to Kalshoven and Zegveld, military commander are not expected to conduct “an all too subtle weighing process (...): the attacker is obliged to refrain from the attack only if the disproportion between the two sides in the equation ‘becomes apparent’. The possibilities are endless as far as the ratio between the expected damage and the expected military advantage is concerned. However, some basic assertions can be made.

It is useful to introduce a scaled approach in order to assist military commanders in determining excessiveness. For example, the HPCR Manual Commentary proposes the use of the qualifiers ‘marginal’, ‘substantial’ and ‘high’ Wright proposes the use of the words ‘marginal’, ‘moderate’ and ‘substantial’. It is however submitted that a scaled model of only three qualifiers does not do justice to the plurality of situations that will be encountered by military commanders in actual combat circumstances. Therefore, a more refined approach is advisable in order to provide any actual useful guidance for military commanders in order to

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5 Dinstein 2016, p. 155.
6 Kalshoven and Zegveld, p. 115.
7 HPCR Manual on air and missile warfare, Commentary, p. 92.
8 Wright, p. 852.
determine excessiveness in the IHL proportionality rule. The qualifiers that may be proposed are then (ranging from small to large): marginal, minor, medium, major, massive.

It will still prove to be difficult to categorise the two components of the IHL proportionality rule in one of the five qualifiers. What needs to be taken into account, however, is the fact that the factors could be calculated to a certain extent in objective terms before they are balanced in the assessment of excessiveness. Here, States may be able to develop objective guidelines for the assessment of the respective factors, taking into account those factors that count on each level of decision making. As Wright notes with regard to incidental civilian damage: “(...) national militaries may find it useful to establish objective guidelines concerning what amount of civilian death, injury, or destruction would generally be marginal, moderate, and substantial (e.g., anticipated civilian casualties is marginal, 2-4 is moderate, and 5+ is substantial).”

In fact, it seems that sophisticated militaries could connect the categorisation into the five qualifiers introduced above to the assessment they already make for determining when the authorisation for the execution of an attack needs to referred up to the chain of command because of the expected number of civilians that is expected to be affected by the planned attack.

As far as the anticipated military advantage of a planned attack is concerned, again, many factors are relevant, such as the scale of the attack and whether there is a threat to the own forces. Here, context matters so much, that it is more difficult to establish a baseline that may be put into more objective guidelines in order to categorise the military advantage in the terms of the five qualifiers mentioned above. In the public domain, Guisández Gómez has suggested an approach to provide different types of military advantageous aspects of a planned attack with points, with different factors able to subtract or add up points. The aspects taken into account include the importance of the target to the opposing forces; the importance of the target to the attacking side and the distance to the target. It is submitted that depending on which level of command the attack is taking place and the context of the planned attack, it may be possible to devise a methodology to attach value to the anticipated military advantage and subsequently qualify it in the terms of one of the five qualifiers identified above, on the different levels of decision making. This is however an effort that only more sophisticated militaries will be able to conduct in the planning phase of attacks, and which militaries would presumably not be willing to share in public sources. This method may however be completely useless when there is no time for elaborate planning and the tempo of the operation dictates a certain speed in making decisions. Also, because of the overriding importance of the unique circumstances of each planned attack, the resulting parameters must be understood as guiding, not as authorising. A common sense reality check will need to be accompanied with the guidance military commanders will be able to derive from the proposed five-step scaled analysis.

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9 Wright, note 192 on p. 848.
When framed in a matrix, a picture may become clear. There is a line somewhere in the middle where the anticipated military advantage and the expected collateral damage are in balance. The subjective and qualitative character of the IHL proportionality rule will normally not allow for determinations of the excessiveness of an attack that are exactly on that line. Rather, a zone, or area is more likely to exist, in which reasonable military commanders may differ in their opinions of whether the civilian damage expected from a planned attack is excessive. As long as the decisions remain within that zone, none of these commanders may be deemed to be violating the IHL proportionality rule.

It also needs to be pointed out, that the ratio between military advantage and collateral damage is not a straight line. There are some indicators already embodied in IHL, which indicate how the term excessiveness must be interpreted. These factors prove that there is no linear relation between the two factors to be balanced, because the law already provides for guidance in some situations.

First, on the lower end of expected military advantage and collateral damage, the qualifier “concrete and direct” in the definition of the military advantage anticipated means that in case it is expected that a planned attack will result in marginal military advantage and also marginal collateral civilian damage is expected from the attack, it is likely that the planned attack must be labelled as causing excessive collateral damage. This is because when the military advantage is likely to marginal, it may also be expected to be insufficiently ‘concrete and direct’ compared to the marginal collateral damage, and the law does not contain an additional qualifier to the expected collateral damage. Thus, in cases of marginal expected military advantage that is not ‘concrete and direct’, where some limited collateral damage is expected to occur, the balance will usually tilt in favour of the collateral damage. This means that the attack must always be cancelled or postponed in cases where the expected military advantage is only marginal.

Second, on the higher end of expected military advantage and collateral damage, the law contains some indicators that dictate that certain ratios must be labelled as disproportionate attacks. These examples are in the prohibited indiscriminate attacks as defined above in Chapter 10. In particular, these attacks include those prohibited by article 51(4) sub c and
article 51(5) sub a API. It may be argued that these prohibitions are a result of the principle of distinction, not proportionality. However, in the authors view, the IHL proportionality rule is an extension of the IHL rules concerning distinction, and their application is not so fundamentally different that this would stand in the way of considering the IHL proportionality rule and the principle of distinction in conjunction. This is particularly true because the attacks referred to in article 51(4) sub c and article 51(5) sub a API are both in essence aimed (also) at military objectives.

The first of these indicators thus concerns attacks which employ a method or means of combat the effects of which cannot be limited as required by IHL, as prohibited by article 51(4) sub c API. These attacks are prohibited also under the proportionality rule because the expected collateral damage is likely to increase uncontrollably after the military advantage of the attack is expected to be reached. This may be understood to mean that in case it is expected that initially (right after the attack), the collateral damage is not (yet) excessive, but when it is foreseeable that the effects produced by the means or method of attack cannot be contained or limited as required by the proportionality rule, the collateral damage will eventually reach the point that the collateral damage becomes excessive in relation to the sought military advantage of the attack.

The second type of attack (those by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects) are prohibited under the proportionality rule because the practice of the second World War had shown that in these types of attacks the expected ratio of military advantage and collateral damage was in such imbalance, that these attacks would produce excessive collateral damage to the civilian population. Thus, these types of attacks are prohibited both specifically by their respective specific prohibitions on indiscriminate attacks in API, as well as by the prohibition to launch disproportionate attacks under the IHL proportionality rule.

Furthermore, it has been submitted above that for the purpose of the proportionality calculation, while there is no difference in value to be attached to one civilian or another, this is not true for civilian objects. The law determines, for example, that cultural objects and objects that are indispensable for the survival of the civilian population enjoy special protection. With regard to civilians, although the law does not state this, one could argue that if the amount of media attention is taken as an indicator who enjoys broader protection, children and (pregnant) women and the elderly generally would enjoy special protection against attacks. It may be argued that as such, they should attribute extra weight to the civilian scale of the balance as compared to other civilians. By analogy to the law applicable

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11 See ICRC Commentary to API: Sandoz et. al, p. 624, para 1968: “[t]he first type includes area bombardment, sometimes known as carpet bombing or saturation bombing. It is characteristic of such bombing that it destroys all life in a specific area and razes to the ground all buildings situated there. There were many examples of such bombing during the Second World War, and also during some more recent conflicts. Such types of attack have given rise to strong public criticism in many countries, and it is understandable that the drafters of the Protocol wished to mention it specifically, even though such attacks already fall under the general prohibition contained in paragraph 4.”
to civilian objects the same may be argued, depending on the factual situation, for other
categories of persons that are ‘indispensable for the survival of the civilian population’,
namely doctors, firemen and policemen, or even men of fighting age who may be the main
source of income of a certain family. This is however as such not reflected in the law, but
may be elaborated upon more in depth in policy considerations to which States commit
themselves in their practice.

Ultimately, the test of excessiveness requires the military commander to (1) assess the two
components of the proportionality assessment, (2) assign a value to both components, (3)
compare these two values and (4) decide on the basis of that assessment whether the planned
attack would produce excessive collateral damage in the prevailing circumstances, and to
therefore launch, postpone or cancel the planned attack. The dominance of the prevailing
circumstances at the moment the attack is planned make it impossible to formulate a one-
size-fits-all formula the commander may use. Nonetheless, using a checklist to make sure all
factors that need to be taken into account are part of the ultimate assessment may benefit
military commanders who are in the midst of active hostilities. It would assist military
commanders in considering all factors that are part of the IHL proportionality rule.

It is submitted, however, that the IHL proportionality rule is not as simple as the model of
a scale would suggest and as the ordinary literal understanding of the word excessive seems
to indicate. Indeed, it seems that there is another factor that impacts on the determination of
excessiveness, and that is the probability that the anticipated collateral damage, respectively
the military advantage will indeed materialise as expected. Furthermore, it is submitted that
the perceived understanding of the word excessive, attaching more weight to the expected
military advantage than to civilian damage, must be adjusted in the other direction. These
two proposals of adjustments of the ordinary literal interpretation of the word ‘excessive’
will be further expounded in the following two sections.

14.2 Probability of Success as a Factor Determining Excessiveness

It is submitted that the IHL proportionality rule requires military decision makers not only
to balance the value of military advantage and civilian damage, but also, as a third factor,
the probability of success. This factor concerns the estimation of how likely it is that the
operation will in fact go as planned, i.e. that the expected military advantage will in fact
materialise and the probability that the collateral damage will not exceed what is expected
in advance. This factor deals with a different aspect than foreseeability, which concerns the

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12 This factor is referred to as ‘likelihood’ in a background paper prepared by Chatham House for an expert roundtable held
at Chatham House on 9 March 2018, as part of the Chatham House project on ‘Proportionality in the conduct of hostilities:
the incidental harm side of the assessment’. This author is part of that project, the background paper is on file with the
author. See also the final Report: Gillard 2018, pp.17-18 and 20. This study draws a different conclusion than the Chatham
House Report does: the Chatham House Report concludes that likelihood must be addressed when assigning weight to the
two factors in the IHL proportionality rule.
effects of a planned attack that are expected and the question of causality, which concerns
the expectation that a certain effect will result from the planned attack.

Taking this factor into account may prevent operations to be conducted from which a
high value of military gain is expected, and a similarly high (but not excessive) expected value
of collateral damage is anticipated, but with only a small probability that the operation will
materialise as planned. The operations that come to mind in this respect are those attacks by
the US in 2003 that sought to kill Saddam Hussein, but that ended up only killing large scores
of civilians.\(^{13}\) Although it must be accepted that at the time, it was very military advantageous
to kill Saddam Hussein, the probability of the attacks actually hitting Saddam Hussein was
also very small, if not merely speculative, because the attackers were aware that they were
relying on very unreliable information. A similar example is that described in Section 12.3.5,
the attack on General ‘Chemical’ Ali Hasan Al-Majid as well as the attack on Milan Martic as
discussed in Section 12.3.2.

It is submitted that adding the factor of probability of success leads to a more refined IHL
proportionality assessment, because it may assist in tipping the balance between excessive
and non-excessive in close cases. It is however difficult to find a yardstick that defines the
probability of success of a planned attack. As noted in Chapter 13, expectations of the success
of the planned attack are subjective by definition, yet an expectation may become more
objective when there is sufficient information available on the nature of the target and the
amount of civilian objects and civilians that are surrounding the target. This is furthermore
a matter of conducting thorough precautionary measures in the planning phase. The
availability of surveillance assets and other information sources are therefore important in
order to be able to obtain a clear picture of the target and the presence of civilians and civilian
objects. Of course, military planners and commanders will prefer reliable equipment and
information, because if “there are difficulties in anticipating the consequences, that is not
of any use to military planners.”\(^{14}\) The Commentary to the HPCR manual suggests that “[e]xpected’ collateral damage and ‘anticipated’ military advantage, for these purposes, mean
that that outcome is probable, i.e. more likely than not.”\(^{15}\) It seems that such an ‘at least
fifty-fifty’ approach is unsatisfactory, because it significantly erodes both the protection of
the civilian population as well as the effectiveness of the military effort. Lacking a better
term in which probability of success can be measured, as well as taking into account that
the IHL proportionality assessment by its nature is a matter of prediction rather than an
exact science, it is submitted that military commanders and planners must be ‘pretty sure’
or ‘very confident’ that the planned operation will have the effects it is expected to have in
terms of both components of the IHL proportionality assessment. This may be expressed in
a percentage, but it seems more practicable to assess this in terms of a degree to confidence

\(^{13}\) As was claimed by Mr. Garlasco (Former chief of US High-value targeting) during an interview on 60 Minutes, a “couple of
hundred” civilians were killed during 50 airstrikes aimed at killing Saddam Hussein and other high-value targets, whereas
none of the targets were actually hit. See https://en.wikipedia.org/wiki/Marc_Garlasco

\(^{14}\) Garraway 2005, p. 3.

\(^{15}\) HPCR Manual on air and missile warfare, Commentary, pp. 91-92.
a reasonable military commander may have to expect a certain effect. Therefore, in the event a military commander is not sufficiently confident and sure that an attack will have the planned effects, the planned attack is simply very risky. In these situations, it is submitted that commanders must accept levels of collateral damage that are far beneath what would be non-excessive in an operation that has a very high probability of success. Of course, it remains a forward-looking assessment, but that does not justify gambling with certain high civilian casualties and damage against a very small probability of attaining a military advantage. To attack a military objective with a very low probability of success is furthermore contrary to the required level of expected military advantage that must be assessed in the IHL proportionality assessment, which is required to be ‘concrete and direct’.

An example may assist in explaining the factor of probability of success of an attack. Suppose an attack is planned on a high-ranking military commander of the opposing forces. The attack, if it succeeds, will clearly provide a major military advantage. The expected collateral damage is calculated to be medium. Normally, the proportionality rule could be argued to not stand in the way of this attack, because the medium expected civilian damage is not excessive in relation to the major military advantage anticipated from the attack. If the probability of success of the operation is however only very small, this does, it is submitted, put the civilian population in harm’s way to such an extent, that the IHL proportionality assessment must be deemed to be excessive. The result is a three dimensional assessment of excessiveness, taking into account (i) the military advantage anticipated from the planned attack; (2) the expected collateral damage and (3) the probability that the results of (1) and (2) will materialise as expected.

14.3 Tilting the Balance of Excessiveness Towards Humanity

According to some authors, the application of the principle of proportionality is not a question of “balancing” but rather a “test of excessiveness.” Schmitt explains that in his view, it is not a matter of determining whether the concrete and direct military advantage would ‘outweigh’ resulting collateral damage and incidental injury, as in a scale “with the slightest difference tipping the balance.” The test of excessiveness would in his view only ban attacks “in which there is no proportionality at all between the ends sought and the expected harm to civilians and civilian objects. (...) Focusing on excessiveness avoids the legal fiction that collateral damage, incidental injury, and military advantage can be precisely measured. Ultimately, the issue is reasonableness in light of the circumstances prevailing at the time.” It is however submitted that the analogy of the balancing between two different values is the most useful model to use. That model does however not explain what happens when

16 Schmitt 2006a, p. 293 and Boothby, p. 97.
17 Schmitt 2006a, p. 293.
18 Schmitt 2006a, p. 293.
the scale is more or less in balance. Wright notes that “[w]hile the proportionality standard provides constructive ambiguity, the scale should always be tilted in favour of furthering the protection of the civilian population.”19 Taking all considerations into account, it is submitted that the consideration of protecting the civilian population must take precedence over considerations of military advantage in close cases, or when there is a balance between the two components of the IHL proportionality assessment.20

As noted above, the interpretation of the word ‘excessive’ in its ordinary literal understanding, attaches more weight to the expected military advantage than to civilian damage. There are a number of indications that point in the direction that the correct interpretation of the term ‘excessive’ does not render the military commander to interpret the IHL proportionality rule such that an attack is proportionate as long as the expected collateral damage does not exceed the expected military advantage too much. This may be of assistance for military commanders in close cases, or in other words, in those situations where the expected civilian damage and casualties is beneath the standard of ‘clearly excessive’, when compared to the expected military advantage. This also includes the hypothetical situation that a military commander would conclude that the ratio is in balance. In that case, two different interpretations of the rule on proportionality are possible: one is to conclude that since there is a balance, the planned attack apparently does not produce ‘excessive’ damage. The other interpretation, that is suggested as the preferred option, is that when in balance, there is not more military advantage than there is expected collateral damage, and therefore the planned attack must be postponed or cancelled.

The rationales for the latter interpretation, it is submitted, are (1) the purpose of the proportionality rule; (2) the fact that the component of military advantage is qualified in the IHL proportionality rule with the additional qualifiers ‘concrete and direct’; (3) the precautionary rule to take ‘constant care’ of article 57(1) API; (4) the application of principles through the application of the Martens Clause and (5) the allocation of risk on the civilian population for the militaries’ mistakes, faulty intelligence, malfunction of weapons systems or misreading and misunderstanding of information and other factors that cannot be controlled, such as the influence of weather.21

The first rationale is connected to the purpose of the proportionality rule. It is submitted that given the fact that the IHL proportionality rule is codified in article 51 (Protection of the Civilian Population) of Part IV (Civilian Population) of API, in Section I (General Protection Against Effects of Hostilities), Chapter II (Civilians and Civilian Population) of API, as well as in article 57, placed in Chapter IV (Precautionary Measures) of the same section, provides an indication that the rule is aimed at protecting civilians. Therefore, when no clarity exists on

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19 Wright, p. 853.

20 For a similar view: see Sandoz et al., para 1979: “in some situations there will be no room for doubt, while in other situations there may be reason for hesitation. In such situations the interests of the civilian population should prevail.” See also ICTY, Prosecutor v. Galic, IT-98-29-T, Trial Judgement, 5 December 2003, para 58: “[t]he basic obligation to spare civilians must guide the attacking party when considering the proportionality of an attack”.

21 See Dinstein 2004, p. 135 for a list of all the “things that can go wrong as far as civilians are concerned”.

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the issue of which side of the scale must take precedence in close cases, the place of the IHL proportionality rule in API, as well as the context concerning the protection of the civilian population points to the conclusion that the main purpose of the IHL proportionality rule is to provide protection to the civilian population.

The second rationale, it is submitted, is the fact that the component of military advantage is qualified in the IHL proportionality rule with the additional qualifiers ‘concrete and direct’, whereas the component of the civilian damage does not have these additional qualifiers. This points to a conclusion that the drafters of the IHL proportionality rule meant to define the military advantage component as more restrictive in the IHL proportionality assessment than the factor of the collateral damage. It obliges military commanders to take any collateral damage into account, whereas for the factor of the military advantage, only those military advantageous outcomes of a planned attack can be taken into account that are ‘concrete and direct’.

The third rationale that points in the direction of tilting the proportionality scale in favour of the protection of civilians in close cases, is the rule embodied in article 57 (1) API that “constant care shall be taken to spare the civilian population, civilians and civilian objects”. Since this provision applies to not only attacks but to all types of military operations including attacks, the rule may be understood to apply to factual situations where an imprecise rule of IHL must be interpreted. Thus, as the interpretation of ‘excessive’ in close cases is one of these rules, it is submitted that the obligation to take constant care for the civilian population points to an interpretation of the IHL proportionality rule that in close cases, the protection of the civilian population must take precedence rather than the military advantage that may be expected from a planned attack.

A fourth rationale, although its scope is subject to debate, is the application of the Martens Clause, which points to the possibility to use a general proportionality principle (as opposed to the IHL proportionality rule) that may be used to interpret the IHL proportionality rule to the benefit of those not participating in the hostilities, and thus for the protection of civilians.

The fifth rationale for attaching more weight to the prevention of causing civilian damage in cases where only a small difference of value exists between the two components of the proportionality assessment is that IHL allocates the risks of accidents causing civilian damage exclusively on the civilian population. The IHL proportionality rule does not take into account the inescapable fact that the military may make honest mistakes when they are planning attacks. Furthermore, the military may rely in good faith on intelligence that proves to be wrong and use weapons systems that may malfunction from time to time, without running the risk of being blamed for that in terms of a violation of the IHL proportionality rule. In

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22 See above, Section 3.2 for a discussion of the Martens Clause.
23 See above, Section 9.3.
24 However, when there is a certain failure rate attached to the use of a certain weapon system which has proven to cause certain collateral damage, this must be taken into account on the civilian side of the proportionality assessment.
addition, a violation of the IHL proportionality rule does not occur in situations where the military has misread the information on a military advantage to be attained by accident, or plotted the wrong coordinate in a system that serves to deliver a piece of ammunition to a pin-point location. Furthermore, attacks that cause unforeseen damage to civilian objects or civilian casualties as a result of other factors that cannot be controlled, such as the influence of weather conditions are not in violation of the IHL proportionality assessment either. It is submitted that in return for the immunity the military enjoys from accidents such as these, it is only fair that in close cases, the IHL proportionality rule must provide some additional protection to the civilian population when compared to the attainment of a certain military advantage.\(^{25}\)

Lastly, the analysis in the preceding chapters showed that a general principle of proportionality in IHL can be discerned from the different manifestations of proportionality in international law, specifically those applicable in armed conflict and more specifically the standards of moderation that apply within IHL. This general principle of proportionality applies as a touchstone for rules of IHL which have indeterminate components. The discussion in the previous chapters show that the IHL proportionality rule is certainly a rule comprised of subjective factors that require further interpretation. These factors need to assessed in light of the circumstances ruling at the time, with the general proportionality principle in mind. It is also determined that a general principle applicable in a specific legal framework such as IHL can play this role to both moderate the effects of a interpret. This calls for an interpretation of the IHL proportionality rule that favours the protection of the civilian population in the close cases.

It is therefore submitted on the basis of these six rationales, that the interpretation of the IHL proportionality rule must be deemed to tilt more in favour of the humanitarian side aiming to protect civilians, than the use of the word excessive in the IHL proportionality rule would suggest.

### 14.4 Policy or Operational Factors that Affect the Excessiveness of Collateral Damage

It has been suggested that in particular in operations such as the NATO operation Allied Force in Kosovo, the threshold of proportionality should be higher, because it was an operation to save the civilian population, sometimes referred to as a ‘humanitarian intervention’ or an operation arising out of the concept of the ‘Responsibility to Protect’.\(^{26}\) Accordingly, it has been argued that “the tolerance of collateral damage would be very different for an invaded nation in the desperate state of survival compared to a state participating in war for

\(^{25}\) To be fair, it must be noted that in targeting processes conducted by sophisticated armed forces, the worst case scenario for the civilian population is taken into account when a collateral damage estimate is assessed. Therefore, in these cases where such an elaborate procedure is in place, this does not allocate most of the risk to the civilian population.

\(^{26}\) Bothe 2001, p. 535.
economic gain.”

This distinction must be rejected as a matter of law since it is based on *ius ad bellum* concepts, not IHL. Nonetheless, further restrictions for acceptable collateral damage may be placed on the proportionality assessment on the basis of policy considerations. As far as policy is concerned, it seems that the acceptance for collateral damage in accordance with the IHL proportionality rule is lower among the general public than it is according to the law. This may impact on the legitimacy of military operations on the long term, as an experienced general from a sophisticated armed force notes. For example, the IHL proportionality rule provides no basis for placing more weight in the scale on the collateral damage side for young children than for adults. However, military commanders are more likely to accept a higher burden of attempting to minimize civilian casualties in cases where the collateral damage consists predominantly of children. This is for a number of reasons that are unrelated to the IHL proportionality rule as it stands today. One of these may be a desire of military commanders to living without the knowledge that they knowingly placed children in harm’s way, and thus as a preventive measure for their own mental well-being. Second, because they are aware of the fact that children who die as part of collateral damage from a legitimate attack are more likely to shock general public and cause complications on the political level, for example as a result of reports in the press and by advocacy by human rights organisations.

There may also be operational reasons to apply a different understanding of excessiveness, i.e. more protective for the civilian population. A frequently quoted example is any operation that may be characterised as a counter-insurgency operation (COIN). During COIN operations, like the ISAF operation in Afghanistan that started in 2002, the acceptable foreseeable collateral damage would preferably amount to zero. Although an attack that would expect minor civilian casualties would thus be illegal under the restrictions of that particular operation, depending on the military advantage sought, would not *per se* be in violation of the IHL proportionality rule. These restrictions would typically be imposed through rules of engagement. Another example of an operational consideration that may possibly influence the proportionality assessment to the benefit of the protection of the civilian population is the practice of economy of force. “Economy of force is defined as ‘the judicious employment and distribution of forces so as to expend the minimum essential combat power on secondary efforts in order to allocate the maximum possible combat power on primary efforts’.”

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27 Reynolds, p. 88.

28 See Efroni, p. 82: “Experience has shown that, in the realm of legitimacy, the tolerance level for collateral damage – and particularly the extent and nature of such damage - is infinitely lower than the tolerance level for collateral damage set by international law”.

29 Because, as Wright notes: “collateral damage’, quite simply, has the capacity to fuel further violence”. See Wright, p. 854. See also the so-called McCrystal Tactical Directive: NATO/ISAF HQ Kabul, 6 July 2009, see [https://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf](https://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf).

30 Pratzner, p. 91, referring to JCS, JP 1-02, 2013, p. 81.
Chapter 14: Determining Excessiveness and a Plea for Tilting the Balance Towards Humanity

It is likely that policy and operational factors provide a higher level of protection to the civilian population than any strict application of the IHL proportionality rule. But as these factors exceed the scope of the legal rule which is the subject of this study, the description in this section suffice for the purpose of this study.

14.5 Different Factors for Different Levels of Decision-making

The application of the IHL proportionality rule is particular in one sense: it applies to States, but also to the single member of the fighting party in the midst of an armed conflict, as well as to those planning and ordering attacks on much higher levels of command. It was established above that proportionality assessments, including those in the phase in which precautionary measures are taken, need to be conducted on all operational levels of an operation.

Thus, when an operation is conducted only on a limited scale, it is only that level on which the IHL proportionality analysis must be conducted. An example is taking out one particular offensive asset of the adversary, that is a threat to the own troops, or may become so in the near future. This is a limited attack that has no bearing on a larger operation that may be planned and decided on a higher level, such as the operational level. An example can be a planned attack, through a precision airstrike, on an enemy battle tank situated in a village, where there is no plan (yet) to attack that village in order to bring it under the control of the attacking forces. Under these circumstances, that tank is highly likely to become a threat to the own forces in the course of the near future, and therefore qualifies as a military objective. Attacking this tank has no bearing on any other level than on the tactical level, and therefore the only incidental damage to civilian objects and civilian casualties that needs to be taken into account is the collateral damage from this single attack. This is consistent with the interpretation that the military advantage of a planned attack must be assessed for the operation ‘as a whole’, because the scope of the operation in this example is limited to this single airstrike.

It must be noted however that sometimes, the character of the targets may be labelled as ‘strategic’ targets, even when it concerns one isolated attack. For example, in order to achieve air superiority, anti-aircraft systems may be labelled as such. It is of crucial importance on the strategic level that these types of targets are neutralised as soon as possible when a larger military operation starts, because it enables future operations on the operational and tactical level. In these cases, even though it may concern only a limited operation, it may still be a show-stopper for other operations to commence. This type of attacks may take into account more than only the military advantage to be expected on the tactical level, thus for

31 See also Corn: “a requirement to take “constant care” to mitigate the risk to civilians and civilian property must animate all strategic, operational, and tactical decision-making.” See Corn on the Just Security blog, 8 July 2015: https://www.justsecurity.org/24493/obligation-precautions-fundamental-principle-law-war/
a single strike. However, if it does so, it also needs to broaden the scope of the foreseeable collateral damage. It would be incorrect to argue that the military advantage that may be gained on a strategic level by a limited attack, should only consist of the civilian casualties expected from the limited tactical attack.

Similarly, if a number of attacks form a part of a more comprehensive military operation, the military advantage of the operation may be assessed in relation to the operation as a whole, consistent with the declarations of a number of States upon accession to API, and not only from one particular part of the attack. It is also clear, that in case the level of operations are planned or decided upon on an even higher level, that of the strategic level, it must be assured that the operation does not turn into a proportionality level on the level of the ius ad bellum.

Depending on the level of the proportionality assessment, different factors need to be taken into account. For example, expected weapons malfunction may normally not be factored in for a single attack, but cannot be ignored for larger operations. This is because the attacking force normally has figures on the failure rate of its weapons systems, based on previous experience, testing or on assessments provided by the producer of the weapon system. Therefore, these foreseeable factors need to be taken into account in assessing the proportionality of an attack ‘as a whole’, thus often on an operational level. This also includes other factors that are mostly irrelevant for a proportionality assessment on the tactical level, but do play a role in the proportionality assessment on an operational level. First, this must include the factor that not all intelligence that is the basis of some attacks is reliable. This also makes sense from an operational perspective: the commander will seek to achieve a certain objective or effect, and he needs to allocate sufficient use of force in order to achieve that goal. In cases where the information whether that goal may indeed be attained is based on speculation rather than reliable information, the operational objectives of the operational are similarly uncertain to be attained. Therefore, the magnitude of the military advantage expected from the operation is also uncertain, and this factor must be balanced against the risk to harming the civilian population by that operation.

A second factor is the extent to which foreseeable reverberating effects must be taken into account. These effects may be better foreseeable on an operational level than they are on a tactical level. Here too, planning staff on the operational level is expected to analyse the foreseeable reverberating effects on the civilian population, and take these into consideration in the proportionality assessment. These reverberating effects may, for example, also include environmental harm and mental harm to the civilian population, when these are foreseeable based on reliable reports, past experience and feasible research. This is of course not applicable on the tactical level of a single attack, but these factors enter the IHL proportionality assessment as soon as it is conducted on a higher level of command.

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32 See for example the Declarations on Article 51 and 57 API by Italy (27 February 1986), Germany (14 February 1991), the United Kingdom (2 July 1992) and France (11 April 2001).

33 Oeter 2008, p. 186.
Conversely, there are also factors that are less relevant in the proportionality assessment on the operational level, but more relevant on the tactical level. One of these is the factor of self-preservation of the individual soldier or unit. In offensive operations on a large scale, the expected own troops that may be killed by a planned attack is a very relevant operational factor for a commander. Here, the level of decision making and the urgency of the attack also play a role and may result in a less stringent interpretation of excessive in cases where it concerns emerging targets, as opposed to deliberate and pre-planned targeting. It is however not a factor that can be balanced to the expected civilian casualties and damage to civilian structures. On a tactical level, however, a group commander who finds himself and his unit surrounded by enemies and pinned down on a certain location, may certainly take this factor into account when he is planning his next course of action. This right to save your own life is however not unlimited, because of the nature of the profession of the soldier. IHL attaches a different degree of protection to the status of combatants and civilians, which implies that some risk must be assumed by the former in order to safeguard the latter.

It is submitted that the awareness among military commanders to include the correct factors into the IHL proportionality assessment on the appropriate level must be thoroughly integrated in procedures and training. This ensures a realistic application of the IHL proportionality rule that safeguards both the requirements of military necessity as envisioned in the rule as well as the protection of the civilian population.

14.6 Is There a Need to Clarify or Change the IHL Proportionality Rule?

In recent years, a number of subjects and issues within the realm of IHL that needed clarification have been addressed. These issues include, for example, the notion of direct participation in hostilities, detention, the rules that apply to private military companies, the rules that achieved the status of customary IHL and the rules for air and missile warfare. It is noteworthy that there have not been successful efforts to conclude new, additional treaties on these subjects, but that instead there have been a number of expert-processes that have sought to clarify the challenges that were faced in practice. New treaties have been negotiated in the last ten years only on specific types of weapons, more in particular on cluster munitions (2008) and nuclear weapons (2017).

34 Clarke, pp. 79-80.
35 Melzer 2009.
36 The Copenhagen Process on the handling of detainees in international military operation: principles and guidelines, 2014.
37 Swiss Federal Department of Foreign Affairs and the ICRC (2008): The Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict.
With regard to all the uncertainties and controversial issues that accompany the application of the IHL proportionality rule in practice, one may ask the question whether there is a need for new rules on the IHL proportionality rule, or whether an interpretative guidance would be useful for the IHL proportionality rule. The idea to conduct some kind of international process with a view to clarifying the application of the IHL proportionality rule in practice is not a new idea. Krüger-Sprengel underscored the need for the clarification of the IHL proportionality rule in October 1979, just two years after its codification in API, acknowledging that an international process was necessary aiming at reaching a uniform interpretation of the IHL proportionality rule.\(^{40}\)

Fenrick noted in 2000 that the rules with regard to targeting and proportionality must become more transparent: “outsiders, including military experts and legal advisers not directly involved in particular conflicts, should learn from the military planning process. A vigorous informed discussion of targeting and proportionality issues based on case studies, both historical and hypothetical, can contribute substantially to clarification of how the law can and should be applied.”\(^{41}\) Bothe noted in 2001 that “[w]hat is necessary in this respect is the dialogue between civil society and the military, which then has to be reflected in military decision making.”\(^{42}\) It is however unclear how this dialogue with civil society must be held.

Dill noted in 2010 that proportionality is “largely ineffective” and “features a number of design flaws and remains extremely vague”.\(^{43}\) Therefore, she proposed that a similar expert process would be started as the one that was conducted under auspices of the T.M.C. Asser Institute in The Hague and the ICRC that resulted in the 2009 ICRC Guidance on direct participation in hostilities.\(^{44}\) Furthermore, Clarke launched a proposal in 2012 to draft a guidance document on the application of the IHL proportionality rule, outlining a number of issues that should be addressed in such a document.\(^{45}\) Clarke also noted that “ideally, the ICRC would coordinate expert meetings on proportionality and also the drafting of the text.”\(^{46}\)

In more recent years, three separate groups have indeed attempted to clarify parts of the IHL proportionality rule.\(^{47}\) First, a Study Group of the International Law Association on current challenges of IHL devoted considerable effort in offering a further interpretation of

\(^{40}\) Krüger-Sprengel, p. 195: “A l’avenir, il s’agira de trouver, tant à l’échelon national qu’à l’échelon international, une solution aux problèmes suivants poses par l’application de la règle de proportionnalité...les efforts entrepris à l’échelon international en vue d’une interprétation uniforme de la règle de proportionnalité”

\(^{41}\) Fenrick 2000, p. 80.

\(^{42}\) Bothe 2001, p. 535.

\(^{43}\) Dill 2010, p. 1.

\(^{44}\) Dill 2010, p. 8.

\(^{45}\) Clarke, p. 121.

\(^{46}\) Clarke, p. 122.

\(^{47}\) The current author was part of these three processes, and a number of points in the current study have also been proposed in the context of those processes.
the IHL proportionality rule. The Final Report of the ILA Study Group was published in 2017. The ICRC has also repeatedly called for further clarification of the IHL proportionality rule. The ICRC organised an expert meeting devoted to the clarification of the IHL proportionality rule in June 2016 in conjunction with Laval University in Quebec, Canada. A report of the meeting is published in 2018. Thirdly, Chatham House organised an expert Group process that published its report 10 December 2018 on the ‘civilian side’ of the proportionality principle.

What may be drawn from all proposals to clarify how the IHL proportionality rule must be applied in practice, is firstly that it is difficult to attain a common understanding of all the components of the IHL proportionality rule. Secondly, it seems that the assessment of the excessiveness of collateral damage for a specific planned attack by military commanders is an inherently subjective factor. Shamash wonders whether the difficulties in clarifying the IHL proportionality rule result from the reluctance of the international legal community to “come out and say that twenty civilians are worth a bridge.” Given the inherent subjective character of the assessment of expected military advantage, this seems highly unlikely. It is therefore submitted that Dinstein’s observation may be accepted, that although the “subjective evaluation of proportionality is viewed with a jaundiced eye by certain scholars, (...) there is no serious alternative.” Therefore, not even a survey among a large number of experienced and well-trained military commanders would provide, for example, an answer to the question posed by Shamash of how many civilian casualties would be acceptable for the destruction of one bridge. Nonetheless, the points noted above in this and previous chapters may provide at least some additional guidance for military commanders.

Another option would obviously be to dismiss the current IHL proportionality rule because of its inherent subjective character, and draft a new, preferably more objective rule protecting the civilian population. It must be stressed at the outset that this author would not necessarily support changing the existing IHL rule on proportionality, because the outcome of such a process is uncertain and may even result in a rule that is even less useful for the military, and less protective for the civilian population. Nonetheless, for the purpose of having a starting point for a discussion on the subject, it is worth to explore how a different formulation of the IHL proportionality rule could read.

One option in this regard that may be feasible is to introduce a rebuttable prohibition of causing collateral civilian damage and civilian casualties. However, to be clear, such a rule is outside of the law as it currently stands in both treaty and international customary IHL. It would presumably also be found unacceptable to States and to military commanders who need to apply that rule in practice, because it would arguably tilt the balance within the

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49 For an overview of the statements of the ICRC on this issue: see Clarke, p. 96–97.
50 See Gillard 2018.
51 Shamash, p. 127.
IHL proportionality rule too much to the civilian protection, ignoring reasons of military necessity. Thus, in a possible new draft of the rule aiming to minimise excessive expected incidental damage and casualties, some kind of exception based on military necessity is necessary. Therefore, a rule prohibiting incidental civilian damage and casualties needs to reference to a certain proportionate ratio between the military advantage and civilian damage expected to result from the attack. An advantage for adopting a new rule would be that certain small alterations could already be implemented into the rule, such as attaching more weight to human lives than to damage to civilian objects, except specifically protected objects, and factoring in the probability that the effects of the attack will be as expected. Also, combatants hors de combat and medical personnel could be brought into the equation explicitly. Furthermore, the element of probability of success could be made explicit. Lastly, arguably, the rule could be brought closer in line with an interpretation of the level of excessiveness that is more protective to the civilian population than the rule may be understood after a literal reading of the text of the IHL proportionality rule.

This rule could read as follows:

a. Taking into account the probability that the effects of the attack will be as expected, it is prohibited to plan or launch an attack on a military objective which may be expected to cause incidental loss of civilian life or injury to civilians and specifically protected objects, or a combination thereof, except in cases where military necessity imperatively requires the military objective to be attacked and the expected concrete and direct military advantage of that or the overall attack would clearly justify the expected incidental loss.

b. Taking into account the probability that the effects of the attack will be as expected, it is also prohibited to plan or launch an attack on a military objective which may be expected to cause incidental damage to civilian objects, as well as to combatants hors de combat and medical personnel, or a combination thereof, except in cases where considerations of military necessity requires the military objective to be attacked and the expected concrete and direct military advantage of that or the overall attack would justify the expected incidental loss.

An advantage of a rule that would be formulated as such is that there is a stronger prohibition on causing collateral damage. Military commanders would be forced to take an additional mental step in asking themselves whether there would be reasons of imperative military necessity to override the prohibition to cause incidental civilian casualties. This is a moderate version of Shamash’s idea to place the burden of proof that an attack is proportionate on the attacker, since that person is best placed to assess the legality of the attack in terms of proportionality,53 without placing military commanders in a position where it is presumed that they violate the IHL proportionality rule in any event that collateral damage occurs.

53 Shamash, p. 146.
However, the inherent subjective components remain part of the rule and as such, the prohibition still would need further clarification with regard to the question of when the one or the other component of the rule would take precedence. It is assumed that military commanders would not necessarily be in favour of an alternative and more elaborate proportionality rule as formulated above, although the rule may be of use in situations where operational or policy considerations would require a more restrictive regime with regard to causing collateral damage.

14.7 Empirical Analysis as a Possible Way Ahead

Another possible venue to strive for a more objective IHL proportionality rule and to clarify the interpretation of the rule could be empirical analysis. The U.S. Law of War Manual notes that “[t]he weighing or comparison between the expected incidental harm and the expected military advantage does not necessarily lend itself to empirical analysis” but fails to provide a further explanation as why this would be the case. Obviously, however, the exact meaning of excessiveness has been established as a subjective factor, but this does not mean per se that empirical research would be useless. Shamash suggests that much of the uncertainty in the proportionality equation may be eliminated by changing the figures and debate the excessiveness of cases between the two extremes cases of clear disproportionate attacks and clear proportionate attacks. It may thus be valuable to take an empirical approach in order to attempt to reach some general conclusions on excessiveness.

It may be possible to conduct a large-scale survey, in order to find out an average norm where operators and civilians draw the line between excessive and acceptable collateral damage in a number of scenarios. It must be noted, however, that such a survey would presumably require States’ willingness to subject their military and civil personnel to the survey. The data that follows from that survey could provide a wealth of State practice from which more refined assessments with regard to planned attacks may be made. If nothing else, a survey such as the one suggested may provide training opportunities for assessing excessiveness to military commanders and planners.

Furthermore, the results of this survey could be fed into software containing artificial intelligence that is subsequently tasked with running an infinite number of slight alterations of the circumstances of the initial survey. Indeed, it is expected by some people that in the future, autonomous weapons systems will be capable to conduct a proportionality analysis.

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55 Shamash, p. 130.
56 For an example in this direction: see also Janine Dill’s online survey and the critique on this survey by Jensen, Corn and Blank on the Just Security blog: https://www.justsecurity.org/21474/surveying-proportionality-reasonable-commander/ as well as her response: https://www.justsecurity.org/21529/meaning-proportionate-collateral-damage-care-civilians/. See for another suggestion to conduct an empirical study, see Whittemore, pp. 632-634.
without a human decision-maker in the loop, using artificial intelligence.\textsuperscript{57} Possibly, using artificial intelligence may provide an opportunity to narrowing down the grey area between excessiveness and non-excessiveness of collateral civilian damage on the basis of empirical research. Such algorithms could perhaps subsequently be made available to planners and military commanders, for the purpose of assisting them in their responsibility to make decisions. Perhaps, these autonomous weapons systems will thus provide an opportunity in the future for creating a more refined and objective understanding of the proportionality rule. Whether this will lead to a situation in which the proportionality analysis reaches the level of an objective rule, remains unlikely. In addition, it seems questionable whether we should trust an autonomous weapons system, that is really only a very sophisticated ‘pocket-calculator’, to autonomously decide whether collateral damage to civilians is excessive.\textsuperscript{58}

Empirical research could potentially provide insight into the question of whether military decision makers would make different decisions when they base themselves on the current IHL proportionality rule, or on the one as it is formulated above. This insight could potentially provide an incentive to strive for persuading States to agree to altering the current text of the IHL proportionality rule to a more elaborate or precise rule.

\subsection*{14.8 Final remarks}

The probability of success of the operation to materialise as planned must also be taken into account as an inherent part of the proportionality assessment, given its prospective character. The result is a three-dimensional model of proportionality, existing of an assessment of the military advantage anticipated, the expected civilian damage and the probability that these two components will materialise as planned. This chapter shows that there are a number of factors that would support the assumption that the term ‘excessive’ could be interpreted more protective for the civilian population that it would seem at first sight. A scaled approach may be used by commanders in order to assist them in taking a more structured approach in applying the IHL proportionality rule in practice. Changing the rule as it is could provide a number of advantages, such as including combatants \textit{hors de combat} and medical personnel into the proportionality assessment, but it cannot be expected that States would be willing to alter the IHL proportionality rule codified in API at this point in time. Empirical research may in the future possibly be used as a venue to further define the fine line between acceptable and excessive collateral civilian damage and casualties.

\begin{itemize}
\item \textsuperscript{57} Backstrom and Henderson, pp. 493-494. See also Schmitt and Thurnher, pp. 253-257.
\item \textsuperscript{58} Van den Boogaard 2015, p. 283, quoting Kalshoven.
\end{itemize}
Chapter 15: General Conclusions

This chapter contains the general conclusions of this study and aims to answer the questions posed in Part I.

Section 15.1 summarises the conclusions of Part II, which deals with proportionality from the perspective of principles of international law and the principles of IHL in particular. Section 15.2 builds on these findings by a description of the conclusions of Part III, in which the proportionality notions in different fields of international law are analysed as well as the issue of how these findings may be used to inform the application of the IHL proportionality rule. Section 15.3 contains the most important conclusions of Part IV, in relation to the application of the IHL proportionality rule in practice. Section 15.4 provides guidance on how the IHL proportionality rule must be applied in practice. In Section 15.5 number of final remarks are made.

15.1 Principles

Part II of this study examined the category of legal norms in which the IHL principle of proportionality must be placed. Chapter 2 discussed the sources of international law because proportionality is generally referred to as one of the principles of IHL and ‘the general principles of law recognised by civilised nations’ are one of the primary sources of public international law. To this end, the distinction between rules, principles and policies was adopted and it was established that the term ‘principle’ could refer to something different in varying legal frameworks and contexts. Principles are used as a source of international law, importing norms from national jurisdictions, but they may also constitute an independent source of law within a particular branch of international law, providing a general norm. As a result of the different types of principles, principles play different roles in international law. The designation of a norm as a ‘principle’ may indicate that it may serve, firstly, to fill gaps in the law. Secondly, a principle of international law may be used to interpret other rules of international law. Furthermore, it was established that principles may be designated as such because they are deemed to be particularly important norms of a given legal framework. Lastly, norms may be designated as principles because they are the basis of other norms. Usually, a norm referred to as a principle plays several of these roles simultaneously.

Chapter 3 adopts a method of identifying principles of IHL and finds on the basis of this method that proportionality is indeed a principle of IHL, but that there are still different roles that the IHL principles play. The principles of IHL first of all serve as the bone structure of IHL, providing coherency to the entire branch of IHL. Furthermore, principles of IHL have an educational role, because the application of these principles enables the members
of the armed forces to armed conflicts to apply IHL successfully. Lastly, the principles of IHL have a foundational role, providing the basis for specific rules of IHL. It was concluded that proportionality is referred to as a principle because it is deemed to be a particularly important rule of IHL, but also because it plays the role of a broader, substantive principle of IHL: as a principle of IHL in a strict sense.

This answers the main question of Part II: the category of legal norms in which the IHL principle of proportionality must be placed is that of important rules of IHL. The IHL proportionality rule serves to protect the civilian population against excessive collateral damage when attacks on legitimate military objectives are planned and launched. But in addition to this finding, it has become clear that different principles play different roles. Therefore, there is potential for an additional role for proportionality as a principle of IHL, as a substantive principle of IHL. This potential role is examined in Part III, in which proportionality is analysed as a legal notion in international law.

15.2 Proportionality

The origins and content of the notion of proportionality in international law were analysed in Part III, as well as its different manifestations in a number of branches of international law regulating the use of armed force and that apply during armed conflict. The central research question of Part III is the question of what the content of the principle, or legal notion, of proportionality is in international law and in its different branches. Part III thus aims to analyse whether the manifestations of proportionality across the board of international law constitute a general principle of international law applicable during armed conflict and, as an inspiration or otherwise, how this may influence and increase the understanding of the proportionality rule in IHL. To that end, the manifestations of proportionality were compared on the basis of the characteristics of principles of international law as set out in Part II of this study.

In Chapter 4, it was concluded that proportionality is a concept that is inherent in any legal framework, and thus plays a role in any branch of international law. It allows for flexibility in the application of the rules or underlying legal principles and is also crucial in reaching a fair balance between competing interests. Proportionality is used (1) as a tool or legal technique to interpret vague legal rules, related to equity and reasonableness; (2) to balance competing interests in order to provide reasonable and equitable outcomes and (3) to protect the rights of smaller entities from excessive interference from the larger entity. It was furthermore concluded that a general proportionality principle in international law is applicable in peacetime.

With regard to the legal frameworks relating to the use of armed force and applicable in armed conflict, Chapter 5 described proportionality as a mitigating factor in the *ius ad bellum* and in IHRL. Chapters 6 and 7 discussed the manifestations of proportionality within
the legal framework of IHL. The IHL proportionality rule was defined as the prohibition to launch an attack if it may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. In addition to the IHL proportionality rule, other standards of moderation in IHL prevent excessive effects from the use of armed force during armed conflict. These standards include the rules regarding the destruction of enemy property, and the restraints on the use of certain methods and means of warfare against the enemy.

Chapter 8 concludes that the proportionality requirements under IHL and the *ius ad bellum* have common roots, but need to be satisfied primarily within their own frameworks, and thus that there is no integrating relationship between the two rules on proportionality in these legal frameworks. Rather, their relationship is that they work in parallel to the same situation. Parties to an armed conflict thus need to realise that it is their responsibility to sometimes prevent their armed forces from executing certain attacks even though these would be perfectly legal under IHL, because the *ius ad bellum* proportionality rule provides an extra layer of protection to the civilian population. Mostly, however, there is a strict separation between the legal frameworks of the *ius ad bellum* and IHL. With regard to the proportionality rules under IHL and IHRL, it was concluded that they are clearly separate in content and application. Nonetheless, there are factual situations possible in which both proportionality rules must be applied cumulatively, but particularly because the applicability of the IHRL proportionality rule is subject to a large number of conditions when they apply simultaneously, these situations do certainly not occur in every military operation during armed conflict. In IHL, the authority to use lethal force against individuals is mostly based on their status. If these individuals are combatants, they may be attacked. In IHRL however, it is not the status of persons that provides the authority to use lethal force, but the threat persons pose. The proportionality rule in IHRL thus regulates the use of force against the attacked individual, while in IHL, the proportionality equation pertains not to the person who is the subject of the lethal force, but to civilians that may be affected incidentally when a military objective is attacked. Moreover, IHL regulates a primarily horizontal relationship between belligerents, whereas IHRL applies in a vertical relation between the persons against who the armed force is used, and an agent of the governmental authorities under whose jurisdiction those persons may be. As a result of all these factors, it is submitted, that the existence of a general ‘capture rather than kill’ obligation under IHL as a result of the IHRL principle of proportionality must be denied. Therefore, the IHRL proportionality rule in itself does not inform the understanding or practical application of the IHL proportionality rule. It does nonetheless contribute to the identification of a general proportionality principle applicable to the use of armed force and during armed conflict. Comparing the general proportionality principle under IHL to the proportionality principles applicable in the other legal frameworks during armed conflict reveals a strong resemblance between these norms,
because their ultimate purpose is to mitigate human suffering on the one hand, and to provide leeway to authorities to achieve their legitimate objectives on the other hand.

The objective of Part III was to assess whether the different understandings of the principle of proportionality in international law may be used to clarify the IHL proportionality rule. The conclusion of Part III is that proportionality is found in international law at many levels and in different branches of international law. There is a general underlying notion and there are explicit manifestations in more precise rules. It is clear that the IHL proportionally rule is a very specific manifestation of the notion of proportionality, applicable only in the event of attacks during armed conflict. It is also clear that every rule on proportionality that is found in international law, applies primarily in the context of its own legal framework, but is grounded on shared roots. The rule on proportionality in IHL, that aims to mitigate collateral damage during attacks, is no different in that respect. Increasing civilian casualties during armed conflicts in the twentieth century developed into the awareness that the impact of armed conflict on civilians required better regulation in a rule. But the rule is also both the result of, as well as under the continued influence of, the general principle of proportionality applicable in armed conflict. This principle fills gaps in the rules and assists in the interpretation of the rules of IHL. This general principle is also manifest in other legal frameworks that apply during armed conflict, but in spite of the multitude of rules and principles that may be referred to as manifestations of proportionality applicable in different branches of international law, the rules that apply in these branches are not identical. It has been established that different proportionality rules and equations balance different entities and perform different functions. Therefore, even though a general principle of proportionality applicable in international law may be deduced from the cumulative applications of proportionality, it must also be admitted that the rules that may be characterised as manifestations of proportionality in the respective branches of international law, differ to a large extent.

Proportionality is usually applied in international law to evaluate certain conduct in hindsight. Situations where an evaluation in hindsight is possible, include the proportionality analysis for countermeasures or to evaluate an armed response in the framework of ius ad bellum. In particular, it must be conducted in order to evaluate whether certain damage must be compensated. It is clear that for IHL, the proportionality analysis needs to be conducted in advance, as a restraining factor on future conduct. This follows from IHL's character as a preventive framework providing limits for the use of armed force during armed conflict. It may also be necessary to conduct such an IHL proportionality assessment in hindsight, for example by courts or agencies that report on certain incidents (i.e. Human Rights Watch, Amnesty International or UN reporting mechanisms etc.). The main difference is that there must necessarily be much more room for discretionary powers of the actor who has conducted the IHL proportionality equation in advance than for those that do it afterwards. Decisions of military commanders are based on the information that was reasonably available to him during the planning phase and before the launch of an attack. A comparison between the
different manifestations of proportionality in international law prove that there are, from a theoretical perspective, no obstacles to also evaluate the excessiveness of an attack in hindsight, although knowledge that may be acquired after an attack that was not available to the commander before it, cannot be the basis of any (international) criminal prosecution or state responsibility based on a violation of IHL.

The different manifestations of proportionality in international law show that a proportionality test may be conducted on different levels of authority. For example, in IHL, proportionality equations may be conducted on a strategic or governmental level, for example to dictate to what extent the government may restrict human rights of their civilians. However, under IHRL, there is also a proportionality test that applies to the magnitude of armed force that may be used by a single member of security forces. Thus, for military operations to which IHL applies, this would support the view that proportionality analysis may be executed at all levels on which military operations are conducted. Thus, proportionality analysis in other legal frameworks do not rule out a separate proportionality test to be executed on grand-strategic (or *ius ad bellum*?) level, strategic level, operational levels and on tactical levels. Since the nature of the military advantage that is sought on these different levels also differs, this potentially means that it is possible to be more precise and practical in the identification of the standard that applies in a specific situation.

The question is whether an individual military commanders tasked with using lethal force may be expected grasp the consequences of all these different obligations based on different manifestations of proportionality in the conduct of their operations. This calls for thorough training, the integration of the applicable norms into rules of engagement and the availability of sound military legal advice.

It is concluded in Chapter 9 that proportionality within the legal framework of IHL performs the important function of interpreting the rules and principles of IHL in their application in practice, as well as the crucial function as a gap-filler, through the Martens Clause, in factual situations where no specific rule of customary or treaty law is available. This general principle of proportionality in IHL (which is not the rule on collateral damage) is also the basis for a number of specific rules in IHL, among which are the rules on collateral damage, precautionary measures and the specific rules that were identified in Chapter 7. It is suggested in this study that this general principle of proportionality applies as an independent legal norm within IHL. This general principle of proportionality in IHL influences the rules of IHL (including the IHL proportionality rule) to a certain extent in terms of interpreting them and to fill gaps. Proportionality is thus a principle of IHL that moderates the use of force during armed conflict more generally and in addition to the IHL proportionality rule. As such, it seems that there is an important mitigating notion of proportionality present in the entire branch of IHL that serves to achieve the dual objectives of IHL and observe the balance between these objectives. This mitigating notion, that seeks to provide reasonable
and equitable outcomes, is based on a balance between humanity and military necessity. Proportionality as a general principle sometimes works in a similar fashion as the principles of equity and reasonableness on the level of the underlying principles of the international legal frameworks. It is suggested based on the potential for principles as a source of international law, that this general proportionality principle may apply either as a principle or as a rule of international customary law. Although it does not set aside specific rules of IHL, such as the IHL proportionality rule, the principle assists in the interpretation of IHL rules and it fills gaps in IHL by prescribing that a reasonable balance is found in these situations between military necessity and humanity.

15.3 The IHL Proportionality Rule in Practice

In Part IV, it is analysed how the IHL proportionality rule must be applied in practice. Chapter 10 discusses the practical and legal context in which the IHL proportionality rule must be applied in practice. For that reason, the targeting process is described as an introduction to the context in which the IHL proportionality rule must be applied. It is concluded that the IHL proportionality rule must be integrated in any decision making process in the context of the planning and execution of armed force. The legal obligation applies equally to a private firing his weapon as to an attack that is planned in a high joint military headquarters, through an institutionalised procedure conducted by highly trained and skilled targeteers and military commanders. It starts by armed forces considering whether any incidental collateral damage may be expected from a planned attack. If that is the case, first the distinction rule needs to be applied, precautionary measures must be taken and subsequently a proportionality assessment needs to be conducted.

In order to assess the legal context of the IHL proportionality rule, the notions of indiscriminate attacks and precautionary measures are analysed. According to the definition of a disproportionate attack, it is a subset of the wider category of indiscriminate attacks. The place of proportionality in this context shows the link between the principle of distinction and the IHL proportionality rule. The prohibition of indiscriminate attacks covers (1) attacks that fail to take into account whether the target may have a protected status under IHL; (2) attacks using means and methods that are indiscriminate; (3) attacks using means and methods whose effects cannot be contained (such as water, fire, poisonous wells); (4) attacks that fail to treat singular military objectives as separate targets but instead attack an area that also contains civilians and objects and (5) disproportionate attacks. These examples of indiscriminate attacks also indicate which types aimed at military objectives are disproportionate and assist in interpreting the IHL proportionality rule's standard of ‘excessive’.

Military commanders can generally prevent their attacks from being indiscriminate by taking appropriate precautions in attack. The IHL proportionality rule has been drafted in
the context of the rules regarding precautions in attacks and is a precautionary measure in itself, aimed at limiting collateral civilian damage during attacks. The precautions in attack are an important part of the targeting process, where they fit in the different phases and guide the sequence of steps of which the targeting process is comprised. The precautions in attack consist of a number of coherent legal obligations, which form an extensive framework of checks the commander needs to take into account in order to shield civilians and civilian objects from the effects of hostilities. The proportionality rule is only one of these measures. Even in the event all precautionary requirements are complied with, the IHL proportionality rule must be applied as a last step before a planned attack may be launched. Conversely, in case an attacker has refrained from taking precautions in attack, a proportionate attack may still lead to a violation of the precautions rule, if civilian casualties and damage could have been avoided or minimised by taking precautionary measures. One could say that the proportionality rule is a secondary rule that only finds application in situations where it is impossible to take precautionary measures which are expected to avoid all civilian collateral damage.

The discussion in Chapter 11 shows that there is extensive debate on the interpretation of the different components of the IHL proportionality rule. The analysis of the components of the proportionality equation reveals that diverging opinions exist on almost all components of the proportionality equation. As a result, the IHL proportionality rule cannot be captured into a mathematical formula. It however requires a thorough analysis of its components as far as circumstances permit. The fog of war may make it impossible to acquire more information concerning possible civilian casualties, or the expectations of military commanders with regard to the military advantage of their planned attack may be misperceived. Nonetheless, military commanders need a sufficient understanding of the components of the IHL proportionality assessment before they are able to apply the IHL proportionality rule consistent with the circumstances ruling at the time of a planned attack.

The examples analysed Chapter 12 reveal that in none of these situations, a detailed yardstick is applied to come to a conclusion on a proportionality analysis on the strategic or operational level.

On the strategic level, the committee in the Kosovo Report held that it found no evidence to conclude that the entire bombing campaign was aimed at causing substantial incidental civilian casualties, looking at the totality of civilian victims. This method however seems insufficient for assessing the potential excessiveness of the incidental civilian damage and casualties of that bombing campaign. The report does contain helpful guidance in the sense that it shows that the IHL proportionality rule must be applied at the several levels of command. The Chilcot Report may be used to assess *prima facie* which factors must be taken into account in the IHL proportionality analysis on the strategic level. The Report shows an example of a State that took expected civilian damage and casualties into account before a campaign was launched. The British armed forces looked into the expected collateral effects of both their planned air and their ground operations and based this assessment on the lessons learned
during earlier operations. The methodology for that assessment seems to be a primarily quantitative analysis and with regard to the scope of the expected incidental civilian damage and casualties, the phase after the removal of the Saddam Hussein government is also taken into account. The military advantage side of the proportionality assessment seems to take into account which civilian suffering would be avoided by removing Saddam Hussein from power. Nonetheless, the Chilcot report is indeterminate about the issue of whether the analysis is meant to be based on the *ius ad bellum* or must be understood as a description of the IHL proportionality analysis by a State on a strategic level. In the situation of the Korean artillery attacks, the ICC Prosecutor acknowledges that the conclusions were not based on the prospective plans of the North-Korean armed forces, but instead on the results. This alone makes the conclusion that no prosecution is recommended for violation of the ICL proportionality rule inevitable. The report indicates that the ICC Prosecutor believes that a quantitative analysis is appropriate. It is however unclear why the ICC Prosecutor bypasses the issue of the application of the IHL proportionality rule to the South-Korean counterattack, given the fact that the South-Korean authorities reportedly showed willingness to provide information to the ICC Prosecutor with regard to the incident.

The situations on a tactical level reveal that sometimes the assessment of the military advantage of an attack is complicated by the different levels on which that advantage is expected to materialise. The military advantage of the attack on the RTS building alone was small, but must be assessed in relation to the bigger picture of the objective to disable the communications and command and control system of the entire Yugoslav armed forces. Similarly, the military advantage of the attack on Martic was disrupting his ability to exercise his command, not necessarily attacking the two buildings in which he was believed to be present. The military advantage of killing Salah Shehadeh and General Al-Majid could also be deemed to be more significant than killing one commander: it may be argued that it also was intended to end the string of attacks that they had reportedly ordered, and safeguard both the own troops and the civilians that could be affected by future attacks ordered by them. The question however arises to what extent these uncertain future advantages may be taken into account, because they would potentially allow a higher ratio of permissive collateral damage but perhaps not qualify as ‘direct and concrete’. Nonetheless, in terms of a quantitative assessment, the situations of the attack on Salah Shehadeh and General Al-Majid show that presumably, expected civilian casualties between 20 and 50 civilian lives may be considered acceptable by States when a high-level commander is attacked. The two situations involving German armed forces indicate that the safety of one’s own forces is taken into account when the military advantage of an attack is assessed. This is the opinion of the German Federal Court of Justice in the Kunduz Fuel Tankers situation and of the on-scene commander in the situation of the fire-fight along the Baghlan River. The latter situation however indicates that there is a limit to that: the safety of the own forces do not justify a full disregard for civilian casualties on that basis, but it also confirms that the IHL proportionality rule finds application not only in offensive operations, but also in attacks in response to an attack.
In sum, the situations in Chapter 12 demonstrate that commanders conduct proportionality analysis on different levels, and may adjust their operations, or even in some cases refrain from launching an attack they were planning or even ordered to execute. Still, it remains difficult to deduce actual guidance for how the assessment of proportionality must be done according to military practice, primarily due to the structural absence of accounts of military commanders describing their thought process preceding attacks.

15.4 Guidance on Applying the Principle of Proportionality for the Military

This study aims to formulate guidance for conducting the proportionality assessment of a planned attack. It therefore turns in Chapter 13 to a further analysis of how the IHL rule on proportionality must be applied. Section 13.2 discusses whether the notions of military advantage and expected civilian casualties and damage can be meaningfully balanced, or must be seen as inherently incomparable. It is concluded that it is difficult to compare the different components of the IHL proportionality rule, but the law requires military commanders to assess and compare these factors in spite of these difficulties. Furthermore, the components of the IHL proportionality rule may sometimes involve quantitative factors, particularly in the assessment of expected civilian damage and casualties. But even then, a qualitative assessment is required to apply the IHL proportionality rule, because the assessment of the military advantage of a planned attack necessarily involves a multitude of factors that cannot be expressed only in quantitative terms. This confirms the conclusion that it is impossible to formulate the IHL proportionality rule as a mathematical formula.

Section 13.3 discusses whether the quantitative and qualitative factors in the IHL equation can result in an objective test of excessiveness. It is submitted that there are two main reasons for preferring an objective IHL rule on proportionality: the passive and active protection rationales. The passive protection rationale entails that in order to protect the civilian population by prohibiting excessive casualties, the protection of these civilians should not be dependent on the subjective perspective of the military commander, but instead on objective parameters. The active protection rationale means that with the responsibilities of the members of the armed forces to lawfully attack military objectives while also causing civilian casualties and destroying civilian objects, these professionals also run the risk of prosecution for a violation of IHL. An objective IHL proportionality rule can be applied in a more or less predictable manner and would thus protect the members of armed force better from criminal prosecution than a subjective standard would. There are a number of procedural measures the parties to a conflict may take to improve the objectivity of the application of the IHL proportionality rule. These measures are to some extent procedural in nature, and include, among others, the level of knowledge and training of military commanders and the availability of well-trained legal advisers; the existence of procedures and systems to assist the military commanders in quantifying and predicting the
effects of planned attacks. It is however concluded that the IHL proportionality calculation remains a subjective standard, although some its components can and must be objectivised as far as possible in the process of the proportionality calculation.

Section 13.4 analyses the use of the term ‘reasonable military commander’ in the application of the IHL proportionality rule. This term as such is not included in the text of the IHL proportionality rule. Nonetheless, it seems undisputed that reasonableness in a key factor in the application of the IHL proportionality rule. It is concluded that this requirement of reasonableness is not a separate component of the IHL proportionality rule, but instead the manifestation of the general principle of international law of reasonableness. Reasonableness is used for a clash between unequal interests, which requires a more qualitative assessment. It is submitted that the IHL proportionality rule fits that description. The term ‘reasonable military commander’ as such does not provide guidance for implementing the IHL proportionality rule or for enhancing its objectivity. The measures increasing objectivity may assist in determining whether military commanders acted (un)reasonably in their assessment of the excessiveness of a planned attack. But since there is also a material component of reasonableness in the standard of the IHL proportionality rule, the principle of reasonableness must be applied to determine whether a planned attack complies with the IHL proportionality rule. This may also be perceived as a manifestation of the general IHL principle of proportionality seeking to provide an equitable outcome of the balance between humanity and military necessity.

Section 13.5 seeks to provide guidance for military commanders that may assist them in assessing proportionality by analysing the question of how the term ‘excessive’ must be understood.

It is clear that the term excessive is different from the term ‘extensive’. The term ‘extensive’ points in the direction of an absolute maximum of collateral damage that may be prohibited based on the sheer magnitude of its consequences for the civilian population. The IHL proportionality rule however consists of a comparison between two different entities. It is concluded therefore that the extensiveness of civilian casualties and damage usually would not stand in the way of a planned attack, provided the anticipated military advantage justifies it. Nonetheless, the possibility that the extensiveness of an attack stands in the way of its lawfulness under the IHL proportionality rule, it is submitted, should not be dismissed categorically. Based on the obligation to take constant care of the civilian population as well as the general principle of proportionality in IHL, it is submitted that there is a difference between the civilian side and the military advantage side of the IHL proportionality rule, when both are stretched to their extremes. The outer limit of the civilian side of the proportionality equation is the prohibition to attack civilians and to launch indiscriminate attacks. These are absolute legal obligations. The outer limit of the military advantage, at least for a large scale planned attack, leaves ultimately still a choice to the attacker. There is no absolute legal obligation to launch an attack, no matter how advantageous it may be. The ultimate incentive to conduct an attack that would cause extensive civilian casualties,
which could be acceptable because of the massive military advantage that is expected from it, is found in *ius ad bellum*, not in IHL. It may therefore be argued that the limit for the humanitarian side of the IHL proportionality equation is contained within the law, whereas the limit for military advantage is not. Nonetheless, in a normal situation, expected extensive civilian damage is normally *excessive* in relation to the anticipated military advantage. The applicable standard is thus that of excessiveness.

Furthermore, although in international criminal law (ICL) the standard of *clearly* excessive is adopted, the IHL standard for applying the IHL proportionality rule does not contain this additional requirement of clarity of the excessiveness of the civilian damage in relation to the military advantage. The standard of the proportionality rule is thus stricter for IHL than it is in ICL.

It is concluded that the term excessive is used to assess the relation between two or more factors. If that relation is in balance, it may be said that the situation is normal, and thus not-excessive. The ordinary literal understanding of the word ‘excessive’ in balancing military advantage and civilian casualties and damage seems to suggest that even when the two factors are in balance, the collateral damage cannot be said to be excessive. This seems to tilt the scale in favour of military advantage. A number of reasons however may be raised why the interpretation of the term ‘excessive’ may not be as clear-cut as the ordinary literal meaning suggests. It may be useful to adopt a scaled approach in the practical application of the IHL proportionality rule, in which both the expected collateral damage and the anticipated military advantage are categorised in one of five levels. The proposed qualifiers are (ranging from small to large): marginal, minor, medium, major, massive. Using a matrix assists in making the proportionality equation clear. However, because of the overriding importance of the unique circumstances of each planned attack, the resulting parameters must be understood as guiding, not as authorising. The qualitative factors as well as a common sense reality check will need to accompany the guidance military commanders can derive from the proposed five-step scaled analysis. Furthermore, it is submitted that it is mostly a ‘zone’ of excessiveness rather than a sharp dividing line between excessive and non-excessive, as a result of the qualitative factors that need to be taken into account.

IHL already contains some indications in other rules on how the dividing line must be drawn between excessive and non-excessive collateral damage. The dividing line is thus not a straight line. First, on the lower end of expected military advantage and collateral damage, the qualifier “concrete and direct” in the definition of the military advantage anticipated means that in case it is expected that a planned attack will result in marginal military advantage and also marginal collateral civilian damage is expected from the attack, it is likely that the planned attack must be labelled as causing excessive collateral damage. This is because when the military advantage is likely to be just marginal, it may also be expected to be insufficiently ‘concrete and direct’ compared to the marginal collateral damage, and the law does not contain an additional qualifier to the expected collateral damage. Second, on the higher end of expected military advantage and collateral damage, the prohibitions
of indiscriminate attacks dictate that certain ratios must be labelled as disproportionate attacks.

It is submitted that the IHL proportionality rule is not as simple as the model of a scale would suggest and as the ordinary literal understanding of the word excessive seems to indicate. Indeed, it seems that there is another factor that impacts on the determination of excessiveness: the probability that the anticipated collateral damage, respectively the military advantage will indeed materialise as expected. As is discussed in Section 14.2, particularly when the military advantage of a certain planned attack is high, but when the probability that the attack will have the anticipated effect is low, this must be taken into account. Because the probability of success does not detract from either the expected civilian damage, or from the military advantage the attacker hopes to attain, it is submitted that the probability of success must be seen as an additional factor. The result is a three dimensional assessment of excessiveness, taking into account (1) the military advantage anticipated from the planned attack; (2) the expected collateral damage and (3) the probability that the results of (1) and (2) will materialise as expected.

Furthermore, it is submitted that the perceived understanding of the word excessive, attaching more weight to the expected military advantage than to civilian damage, must be adjusted in the other direction. This latter proposal would adjust the ordinary literal interpretation of the word ‘excessive’ and tilt the balance more to the humanity side than it may currently be understood. This may be of assistance for military commanders in close cases, or in other words, in those situations where the expected civilian damage and casualties is beneath the standard of ‘clearly excessive’, when compared to the expected military advantage. This also includes the hypothetical situation that a military commander would conclude that the ratio is in balance.

The rationales for tilting the balance towards preventing collateral damage, it is submitted, are (1) the purpose of the proportionality rule; (2) the fact that the component of military advantage is qualified in the IHL proportionality rule with the additional qualifiers ‘concrete and direct’; (3) the precautionary rule to take ‘constant care’ of article 57(1) API; (4) the application of principles through the application of the Martens Clause (5) the allocation of risk on the civilian population for the militaries’ mistakes, faulty intelligence, malfunction of weapons systems or misreading and misunderstanding of information and other factors that cannot be controlled, such as the influence of weather; and (6) a general principle of proportionality in IHL. These factors are explained in Section 14.3.

Section 14.5 explains how different factors are relevant for the practical application of the proportionality analysis on different levels of decision making. For example, expected weapons malfunction may normally not be factored in for a single attack, but cannot be ignored for larger operations. This is because the attacking force normally has statistics

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2 Note that some systems used by the military to calculate the expected collateral damage of a planned attack do take probability into account when determining the expected results of an attack. Nonetheless, it is submitted that the probability should be regarded separately from the assessment of the military advantage and collateral damage.
on the failure rate of its weapons systems, based on previous experience, testing or on
assessments provided by the producer of the weapon system. Therefore, these foreseeable
factors need to be taken into account in assessing the proportionality of an attack ‘as a whole’,
thus often on an operational or higher level. Thus, each level has its own set of factors that
must be assessed in the IHL analysis. The awareness among military commanders to include
the correct set of factors into their IHL proportionality assessment on the appropriate level
must be thoroughly integrated into procedures, rules of engagement and training.

Section 14.6 discusses the necessity of a different or more precise formulation of the
IHL proportionality rule. To start a future discussion on a different formulation, a possible
alternative wording of the IHL proportionality rule is suggested, taking into account the
factors that are identified in this study.

This rule could read as follows:

a. Taking into account the probability that the effects of the attack will be as expected, it
   is prohibited to plan or launch an attack on a military objective which may be expected
to cause incidental loss of civilian life or injury to civilians and specifically protected
objects, or a combination thereof, except in cases where military necessity imperatively
requires the military objective to be attacked and the concrete and direct expected
military advantage of that or the overall attack would clearly justify the expected
incidental loss.

b. Taking into account the probability that the effects of the attack will be as expected,
   it is also prohibited to plan or launch an attack on a military objective which may be
expected to cause incidental damage to civilian objects, as well as to combatants hors
de combat and medical personnel, or a combination thereof, except in cases where
considerations of military necessity requires the military objective to be attacked and
the expected concrete and direct military advantage of that or the overall attack would
justify the expected incidental loss.

An advantage of a rule that would be formulated as such is that it introduces a stronger
prohibition on causing collateral damage. Military commanders would therefore be forced
to take an additional mental step in asking themselves whether there would be reasons
of imperative military necessity to override the prohibition to cause incidental civilian
casualties. This is a moderate version of Shamash’s idea to place the burden of proof that
an attack is proportionate on the attacker, since that person is best placed to assess the
legality of the attack in terms of proportionality,\(^3\) without placing military commanders in
a position where it is presumed that they violate the IHL proportionality rule in any event
that collateral damage occurs. Also, the suggested rule assigns a higher value to the lives of
civilians than to damage to civilian objects, and a higher degree of protection to specifically
protected objects than to specifically protected persons. However, the inherently subjective

\(^3\) Shamash, p. 146.
components remain part of the rule and as such, the prohibition still would need further clarification with regard to the question of when the one or the other component of the rule would take precedence. It is assumed that military commanders would not necessarily be in favour of an alternative and more elaborate proportionality rule as formulated above, although the rule may be of use in situations where operational or policy considerations would require a more restrictive regime with regard to causing collateral damage.

As a final point, empirical research could potentially provide insight into the question of whether military decision makers would make different decisions when they base themselves on the current IHL proportionality rule, or on the one as it is formulated above. This insight could potentially provide an incentive to strive for persuading States to agree to altering the current text of the IHL proportionality rule to a more elaborate or precise rule.

15.5 Final Remarks

The aim of this study is to formulate guidance for conducting a proportionality assessment of a planned attack. It is concluded that in IHL, proportionality is understood both as a general principle permeating the interpretation and application of all IHL rules, as well as an important rule of IHL. In its practical application, the IHL proportionality rule must be accepted as it is: an inherently imprecise and flexible yardstick that nonetheless does play its role as the last line of protection for the civilian population, and an obligation for military commanders to take that protection seriously into account. Nonetheless, this study suggests that the balance of the proportionality assessment should in close cases tilt more towards protecting the civilian population than the wording of the rule may suggest. Changing the rule as it is could provide a number of advantages, but there is no certainty that States would be willing to alter the IHL proportionality rule in a way that would improve the protection of the civilian population. Applying a general IHL principle of proportionality may be understood to be among the factors that argues in favour of such a suggestion. This would mean that the IHL rule of proportionality is actively influenced by the IHL principle of proportionality, from which the rule has originated. In a way, this may be understood as a return of proportionality to its ethical roots, when proportionality was understood as a general guideline for the commander, applying it to all military operations (including attacks) during armed conflict, because it would ultimately prevent excesses and assist in building a sustainable peace after the armed conflict.
Summary
Summary

This study examined the principle of proportionality as it applies in international humanitarian law (IHL). The study is divided in four parts. The study is introduced in Part I, and its main research questions, its structure and methodology presented. The category of legal norms in which the IHL principle of proportionality must be placed is examined in Part II. In Part III, the notion of proportionality in international law more generally is analysed, as well as its different manifestations in a number of branches of international law regulating the use of armed force and that apply during armed conflict. In Part IV, it is analysed how the IHL proportionality rule must be applied in practice.

Proportionality is generally referred to as one of the principles of IHL. Furthermore, the ‘general principles of law recognised by civilised nations’ are one of the primary sources of public international law. This study adopts in Chapter 2 a distinction between rules, principles and policies. It is established that the term ‘principle’ could refer to something different in varying legal frameworks and contexts. Principles are used as a source of international law, importing norms from national jurisdictions, but they may also constitute an independent source of law within a particular branch of international law, providing a general norm. As a result of the different types of principles, principles play different roles in international law. The designation of a norm as a ‘principle’ may indicate that it may serve, firstly, to fill gaps in the law. Secondly, a principle of international law may be used to interpret other rules of international law. Furthermore, it was established that principles may be designated as such because they are deemed to be particularly important norms of a given legal framework. Lastly, norms may be designated as principles because they are the basis of other norms. Usually, a norm referred to as a principle plays several of these roles simultaneously. Chapter 3 adopts a method of identifying principles of IHL and finds on the basis of this method that proportionality is indeed a principle of IHL, but that there are still different roles that the IHL principles play. The principles of IHL first of all serve as the bone structure of IHL, providing coherency to the entire branch of IHL. Furthermore, principles of IHL have an educational role, because the application of these principles enables the members of the armed forces to armed conflicts to apply IHL successfully. Lastly, the principles of IHL have a foundational role, providing the basis for specific rules of IHL. It was concluded that proportionality is referred to as a principle because it is deemed to be a particularly important rule of IHL, but also because it plays the role of a broader, substantive principle of IHL: as a principle of IHL in a strict sense. This answers the main question of Part II: the category of legal norms in which the IHL principle of proportionality must be placed is that of important rules of IHL. The IHL proportionality rule serves to protect the civilian population against excessive collateral damage when attacks on legitimate military objectives are planned and launched. But in addition to this finding, it has become clear that different principles play different roles. Therefore, there is potential for an additional role for proportionality as a principle
of IHL, as a substantive principle of IHL. This potential role is examined in Part III, in which proportionality is analysed as a legal notion in international law.

The central research question of Part III is the question of what the content of the principle, or legal notion, of proportionality is in international law and in its different branches and aims to analyse whether the manifestations of proportionality across the board of international law constitute a general principle of international law applicable during armed conflict. To that end, the manifestations of proportionality were compared on the basis of the characteristics of principles of international law as set out in Part II of this study.

In Chapter 4, it is concluded that proportionality is a concept that is inherent in any legal framework, and thus plays a role in any branch of international law. It allows for flexibility in the application of the rules or underlying legal principles and is also crucial in reaching a fair balance between competing interests. Proportionality is used (1) as a tool or legal technique to interpret vague legal rules, related to equity and reasonableness; (2) to balance competing interests in order to provide reasonable and equitable outcomes and (3) to protect the rights of smaller entities from excessive interference from the larger entity. It was furthermore concluded that a general proportionality principle in international law is applicable in peacetime.

With regard to the legal frameworks relating to the use of armed force and applicable in armed conflict, Chapter 5 described proportionality as a mitigating factor in the ius ad bellum and in IHRL. Chapters 6 and 7 discussed the manifestations of proportionality within the legal framework of IHL. The IHL proportionality rule was defined as the prohibition to launch an attack if it may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. In addition to the IHL proportionality rule, other standards of moderation in IHL prevent excessive effects from the use of armed force during armed conflict. These standards include the rules regarding the destruction of enemy property, and the restraints on the use of certain methods and means of warfare against the enemy.

Chapter 8 concludes that the proportionality requirements under IHL and the ius ad bellum have common roots, but need to be satisfied primarily within their own frameworks, and thus that there is no integrating relationship between the two rules on proportionality in these legal frameworks. Rather, their relationship is that they work in parallel to the same situation. Parties to an armed conflict thus need to realise that it is their responsibility to sometimes prevent their armed forces from executing certain attacks even though these would be perfectly legal under IHL, because the ius ad bellum proportionality rule provides an extra layer of protection to the civilian population. Mostly, however, there is a strict separation between the legal frameworks of the ius ad bellum and IHL. With regard to the proportionality rules under IHL and IHRL, it was concluded that they are clearly separate in content and application. Nonetheless, there are factual situations possible in which both
Proportionality rules must be applied cumulatively, but particularly because the applicability of the IHRL proportionality rule is subject to a large number of conditions when they apply simultaneously, these situations do certainly not occur in every military operation during armed conflict. In IHL, the authority to use lethal force against individuals is mostly based on their status. If these individuals are combatants, they may be attacked. In IHRL however, it is not the status of persons that provides the authority to use lethal force, but the threat persons pose. The proportionality rule in IHRL thus regulates the use of force against the attacked individual, while in IHL, the proportionality equation pertains not to the person who is the subject of the lethal force, but to civilians that may be affected incidentally when a military objective is attacked. Moreover, IHL regulates a primarily horizontal relationship between belligerents, whereas IHRL applies in a vertical relation between the persons against who the armed force is used, and an agent of the governmental authorities under whose jurisdiction those persons may be. As a result of all these factors, it is submitted, that the existence of a general ‘capture rather than kill’ obligation under IHL as a result of the IHRL principle of proportionality must be denied. Therefore, the IHRL proportionality rule in itself does not inform the understanding or practical application of the IHL proportionality rule. It does nonetheless contribute to the identification of a general proportionality principle applicable to the use of armed force and during armed conflict. Comparing the general proportionality principle under IHL to the proportionality principles applicable in the other legal frameworks during armed conflict reveals a strong resemblance between these norms, because their ultimate purpose is to mitigate human suffering on the one hand, and to provide leeway to authorities to achieve their legitimate objectives on the other hand.

The objective of Part III is to assess whether the different understandings of the principle of proportionality in international law may be used to clarify the IHL proportionality rule. The conclusion of Part III is that proportionality is found in international law at many levels and in different branches of international law. There is a general underlying notion and there are explicit manifestations in more precise rules. It is clear that the IHL proportionality rule is a very specific manifestation of the notion of proportionality, applicable only in the event of attacks during armed conflict. It is also clear that every rule on proportionality that is found in international law, applies primarily in the context of its own legal framework, but is grounded on shared roots. The rule on proportionality in IHL, that aims to mitigate collateral damage during attacks, is no different in that respect. Increasing civilian casualties during armed conflicts in the twentieth century developed into the awareness that the impact of armed conflict on civilians required better regulation in a rule. But the rule is also both the result of, as well as under the continued influence of, the general principle of proportionality applicable in armed conflict. This principle fills gaps in the rules and assists in the interpretation of the rules of IHL. This general principle is also manifest in other legal frameworks that apply during armed conflict, but in spite of the multitude of rules and principles that may be referred to as manifestations of proportionality applicable in different branches of international law, the rules that apply in these branches are
not identical. It has been established that different proportionality rules and equations balance different entities and perform different functions. Therefore, even though a general principle of proportionality applicable in international law may be deduced from the cumulative applications of proportionality, it must also be admitted that the rules that may be characterised as manifestations of proportionality in the respective branches of international law, differ to a large extent.

Proportionality is usually applied in international law to evaluate certain conduct in hindsight. Situations where an evaluation in hindsight is possible, include the proportionality analysis for countermeasures or to evaluate an armed response in the framework of *ius ad bellum*. In particular, it must be conducted in order to evaluate whether certain damage must be compensated. It is clear that for IHL, the proportionality analysis needs to be conducted in advance, as a restraining factor on future conduct. This follows from IHL’s character as a preventive framework providing limits for the use of armed force during armed conflict. It may also be necessary to conduct such an IHL proportionality assessment in hindsight, for example by courts or agencies that report on certain incidents (i.e. Human Rights Watch, Amnesty International or UN reporting mechanisms etc.). The main difference is that there must necessarily be much more room for discretionary powers of the actor who has conducted the IHL proportionality equation in advance than for those that do it afterwards. Decisions of military commanders are based on the information that was reasonably available to him during the planning phase and before the launch of an attack. A comparison between the different manifestations of proportionality in international law prove that there are, from a theoretical perspective, no obstacles to also evaluate the excessiveness of an attack in hindsight, although knowledge that may be acquired after an attack that was not available to the commander before it, cannot be the basis of any (international) criminal prosecution or state responsibility based on a violation of IHL.

The different manifestations of proportionality in international law show that a proportionality test may be conducted on different levels of authority. For example, in IHRL, proportionality equations may be conducted on a strategic or governmental level, for example to dictate to what extent the government may restrict human rights of their civilians. However, under IHRL, there is also a proportionality test that applies to the magnitude of armed force that may be used by a single member of security forces. Thus, for military operations to which IHL applies, this would support the view that proportionality analysis may be executed at all levels on which military operations are conducted. Thus, proportionality analysis in other legal frameworks do not rule out a separate proportionality test to be executed on grand-strategic (or *ius ad bellum*) level, strategic level, operational levels and on tactical levels. Since the nature of the military advantage that is sought on these different levels also differs, this potentially means that it is possible to be more precise and practical in the identification of the standard that applies in a specific situation.

The question is whether an individual military commanders tasked with using lethal force may be expected grasp the consequences of all these different obligations based on
different manifestations of proportionality in the conduct of their operations. This calls for thorough training, the integration of the applicable norms into rules of engagement and the availability of sound military legal advice.

It is concluded in Chapter 9 that proportionality within the legal framework of IHL performs the important function of interpreting the rules and principles of IHL in their application in practice, as well as the crucial function as a gap-filler, through the Martens Clause, in factual situations where no specific rule of customary or treaty law is available. This general principle of proportionality in IHL (which is not the rule on collateral damage) is also the basis for a number of specific rules in IHL, among which are the rules on collateral damage, precautionary measures and a number of other specific rules. It is suggested in this study that this general principle of proportionality applies as an independent legal norm within IHL. This general principle of proportionality in IHL influences the rules of IHL (including the IHL proportionality rule) to a certain extent in terms of interpreting them and to fill gaps. Proportionality is thus a principle of IHL that moderates the use of force during armed conflict more generally and in addition to the IHL proportionality rule. This mitigating notion of proportionality serves to achieve the dual objectives of IHL to regulate the use of means and methods during armed conflict and protect those that do not, or no longer participate in the armed conflict. This mitigating notion, that seeks to provide reasonable and equitable outcomes, is based on a balance between humanity and military necessity. Proportionality as a general principle sometimes works in a similar fashion as the principles of equity and reasonableness on the level of the underlying principles of the international legal frameworks. It is suggested based on the potential for principles as a source of international law, that this general proportionality principle may apply either as a principle or as a rule of international customary law. Although it does not set aside specific rules of IHL, such as the IHL proportionality rule, the principle assists in the interpretation of IHL rules and it fills gaps in IHL by prescribing that a reasonable balance is found in these situations between military necessity and humanity.

In Part IV, it is analysed how the IHL proportionality rule must be applied in practice. Chapter 10 discusses the practical and legal context in which the IHL proportionality rule must be applied in practice. For that reason, the targeting process is described as an introduction to the context in which the IHL proportionality rule must be applied. In order to assess the legal context of the IHL proportionality rule, the notions of indiscriminate attacks and precautionary measures are analysed. According to the definition of a disproportionate attack, it is a subset of the wider category of indiscriminate attacks. The place of proportionality in this context shows the link between the principle of distinction and the IHL proportionality rule. The examples of indiscriminate attacks indicate which types of attacks aimed at military objectives are disproportionate and assist in interpreting the IHL proportionality rule’s standard of ‘excessive’. Military commanders can generally prevent their attacks from being indiscriminate by taking appropriate precautions in attack. The IHL proportionality rule has been drafted in the context of the rules regarding precautions in attacks and is a
precautionary measure in itself, aimed at limiting collateral civilian damage during attacks. The precautions in attack are an important part of the targeting process, where they fit in the different phases and guide the sequence of steps of which the targeting process is comprised. The precautions in attack consist of a number of coherent legal obligations, which form an extensive framework of checks the commander needs to take into account in order to shield civilians and civilian objects from the effects of hostilities. The proportionality rule is only one of these measures. Even in the event all precautionary requirements are complied with, the IHL proportionality rule must be applied as a last step before a planned attack may be launched. Conversely, in case an attacker has refrained from taking precautions in attack, a proportionate attack may still lead to a violation of the precautions rule, if civilian casualties and damage could have been avoided or minimised by taking precautionary measures. One could say that the proportionality rule is a secondary rule that only finds application in situations where it is impossible to take precautionary measures which are expected to avoid all civilian collateral damage.

The discussion in Chapter 11 shows the extensive debate on the interpretation of the different components of the IHL proportionality rule. The analysis of the components of the proportionality equation reveals that diverging opinions exist on almost all components of the proportionality equation. As a result, the IHL proportionality rule cannot be captured into a mathematical formula. It however requires a thorough analysis of its components as far as circumstances permit. The fog of war may make it impossible to acquire more information concerning possible civilian casualties, or the expectations of military commanders with regard to the military advantage of their planned attack may be misperceived. Nonetheless, military commanders need a sufficient understanding of the components of the IHL proportionality assessment before they are able to apply the IHL proportionality rule consistent with the circumstances ruling at the time of a planned attack.

The examples analysed in Chapter 12 reveal that commanders conduct proportionality analysis on different levels, and may adjust their operations, or even in some cases refrain from launching an attack they were planning or even ordered to execute. Still, it remains difficult to deduct actual guidance for how the assessment of proportionality must be done according to military practice, primarily due to the structural absence of accounts of military commanders describing their thought process preceding attacks.

This study aims nonetheless to formulate guidance for conducting the proportionality assessment of a planned attack. It therefore turns in Chapter 13 to a further analysis of how the IHL rule on proportionality must be applied. It discusses whether the notions of military advantage and expected civilian casualties and damage can be meaningfully balanced, or must be seen as inherently incomparable. It is concluded that it is difficult to compare the different components of the IHL proportionality rule, but it is required by law in spite of these difficulties. Furthermore, the components of the IHL proportionality rule may sometimes involve quantitative factors, particularly in the assessment of expected civilian damage and casualties. But even then, a qualitative assessment is required to apply the IHL
proportionality rule, because the assessment of the military advantage of a planned attack necessarily involves a multitude of factors that cannot be expressed only in quantitative terms. This confirms the conclusion that it is impossible to formulate the IHL proportionality rule as a mathematical formula.

It is submitted that there are two main reasons for preferring an objective IHL rule on proportionality: the passive and active protection rationales. The passive protection rationale entails that in order to protect the civilian population by prohibiting excessive casualties, the protection of these civilians should not be dependent on the subjective perspective of the military commander, but instead on objective parameters. The active protection rationale means that with the responsibilities of the members of the armed forces to lawfully attack military objectives while also causing civilian casualties and destroying civilian objects, these professionals also run the risk of prosecution for a violation of IHL. An objective IHL proportionality rule could be applied in a more or less predictable manner and would thus protect the members of armed force better from criminal prosecution than a subjective standard would. There are a number of procedural measures the parties to a conflict may take to improve the objectivity of the application of the IHL proportionality rule. These measures are to some extent procedural in nature, and include, among others, the level of knowledge and training of military commanders and the availability of well-trained legal advisers; the existence of procedures and systems to assist the military commanders in quantifying and predicting the effects of planned attacks. It is however concluded that the IHL proportionality calculation remains a subjective standard, although some its components can and must be objectivised as far as possible in the process of the proportionality calculation.

Chapter 13 also analyses the use of the term ‘reasonable military commander’ in the application of the IHL proportionality rule. This term as such is not included in the text of the IHL proportionality rule. Nonetheless, it seems undisputed that reasonableness in a key factor in the application of the IHL proportionality rule. It is concluded that this requirement of reasonableness is not a separate component of the IHL proportionality rule, but instead the manifestation of the general principle of international law of reasonableness. Reasonableness is used for a clash between unequal interests, which requires a more qualitative assessment. It is submitted that the IHL proportionality rule fits that description. The term ‘reasonable military commander’ as such does not provide guidance for implementing the IHL proportionality rule or for enhancing its objectivity. The measures increasing objectivity may assist in determining whether military commanders acted (un)reasonably in their assessment of the excessiveness of a planned attack. But since there is also a material component of reasonableness in the standard of the IHL proportionality rule, the principle of reasonableness must be applied to determine whether a planned attack complies with the IHL proportionality rule. This may also be perceived as a manifestation of the general IHL principle of proportionality seeking to provide an equitable outcome of the balance between humanity and military necessity.
Ultimately, it is the term ‘excessive’ that must be interpreted in order to provide guidance for military commanders. It is clear that the term excessive is different from the term ‘extensive’. The term ‘extensive’ points in the direction of an absolute maximum of collateral damage that may be prohibited based on the sheer magnitude of its consequences for the civilian population. The IHL proportionality rule however consists of a comparison between two different entities. It is concluded therefore that the extensiveness of civilian casualties and damage usually would not stand in the way of a planned attack, provided the anticipated military advantage justifies it. Nonetheless, the possibility that the extensiveness of an attack stands in the way of its lawfulness under the IHL proportionality rule, it is suggested, should not be dismissed categorically. Based on the obligation to take constant care of the civilian population as well as the general principle of proportionality in IHL, it is submitted that there is a difference between the civilian side and the military advantage side of the IHL proportionality rule, when both are stretched to their extremes. The outer limit of the civilian side of the proportionality equation is the prohibition to attack civilians and to launch indiscriminate attacks. These are absolute legal obligations. The outer limit of the military advantage, at least for a large scale planned attack, leaves ultimately still a choice to the attacker. There is no absolute legal obligation to launch an attack, no matter how advantageous it may be. The ultimate incentive to conduct an attack that would cause extensive civilian casualties, which could be acceptable because of the massive military advantage that is expected from it, is found in ius ad bellum, not in IHL. It may therefore be argued that the limit for the humanitarian side of the IHL proportionality equation is contained within the law, whereas the limit for military advantage is not. Nonetheless, in a normal situation, expected extensive civilian damage is normally excessive in relation to the anticipated military advantage. The applicable standard is thus that of excessiveness.

Furthermore, although in international criminal law (ICL) the standard of clearly excessive is adopted, the IHL standard for applying the IHL proportionality rule does not contain this additional requirement of clarity of the excessiveness of the civilian damage in relation to the military advantage. The standard of the proportionality rule is thus stricter for IHL than it is in ICL.

It is concluded that the term excessive is used to assess the relation between two or more factors. If that relation is in balance, it may be said that the situation is normal, and thus not-excessive. The ordinary literal understanding of the word ‘excessive’ in balancing military advantage and civilian casualties and damage seems to suggest that even when the two factors are in balance, the collateral damage cannot be said to be excessive. This seems to tilt the scale in favour of military advantage. A number of reasons however may be raised why the interpretation of the term ‘excessive’ may not be as clear-cut as the ordinary literal meaning suggests. It may be useful to adopt a scaled approach in the practical application of the IHL proportionality rule, in which both the expected collateral damage and the anticipated military advantage are categorised in one of five levels. The proposed qualifiers are (ranging from small to large): marginal, minor, medium, major, massive. Using a matrix assists in
making the proportionality equation clear. However, because of the overriding importance of the unique circumstances of each planned attack, the resulting parameters must be understood as guiding, not as authorising. The qualitative factors as well as a common sense reality check will need to accompany the guidance military commanders can derive from the proposed five-step scaled analysis. Furthermore, it is submitted that it is mostly a ‘zone’ of excessiveness rather than a sharp dividing line between excessive and non-excessive, as a result of the qualitative factors that need to be taken into account.

IHL already contains some indications in other rules on how the dividing line must be drawn between excessive and non-excessive collateral damage. The dividing line is thus not a straight line. First, on the lower end of expected military advantage and collateral damage, the qualifier “concrete and direct” in the definition of the military advantage anticipated means that in case it is expected that a planned attack will result in marginal military advantage and also marginal collateral civilian damage is expected from the attack, it is likely that the planned attack must be labelled as causing excessive collateral damage. This is because when the military advantage is likely to be just marginal, it may also be expected to be insufficiently ‘concrete and direct’ compared to the marginal collateral damage, and the law does not contain an additional qualifier to the expected collateral damage. Second, on the higher end of expected military advantage and collateral damage, the prohibitions of indiscriminate attacks dictate that certain ratios must be labelled as disproportionate attacks.

It is submitted that the IHL proportionality rule is not as simple as the model of a scale would suggest and as the ordinary literal understanding of the word excessive seems to indicate. Indeed, it seems that there is another factor that impacts on the determination of excessiveness: the probability that the anticipated collateral damage, respectively the military advantage will indeed materialise as expected. As is discussed in Section 14.2, particularly when the military advantage of a certain planned attack is high, but when the probability that the attack will have the anticipated effect is low, this must be taken into account. Because the probability of success does not detract from either the expected civilian damage, or from the military advantage the attacker hopes to attain, it is submitted that the probability of success must be seen as an additional factor. The result is a three dimensional assessment of excessiveness, taking into account (1) the military advantage anticipated from the planned attack; (2) the expected collateral damage and (3) the probability that the results of (1) and (2) will materialise as expected.

Furthermore, it is submitted that the perceived understanding of the word excessive, attaching more weight to the expected military advantage than to civilian damage, must be adjusted in the other direction. This latter proposal would adjust the ordinary literal interpretation of the word ‘excessive’ and tilt the balance more to the humanity side than it may currently be understood. This may be of assistance for military commanders in close cases, or in other words, in those situations where the expected civilian damage and casualties is beneath the standard of ‘clearly excessive’, when compared to the expected
military advantage. This also includes the hypothetical situation that a military commander would conclude that the ratio is in balance. The rationales for tilting the balance towards preventing collateral damage, it is submitted, are (i) the purpose of the proportionality rule; (2) the fact that the component of military advantage is qualified in the IHL proportionality rule with the additional qualifiers ‘concrete and direct’; (3) the precautionary rule to take ‘constant care’ of article 57(1) API; (4) the application of principles through the application of the Martens Clause (5) the allocation of risk on the civilian population for the militaries’ mistakes, faulty intelligence, malfunction of weapons systems or misreading and misunderstanding of information and other factors that cannot be controlled, such as the influence of weather; and (6) a general principle of proportionality in IHL. These factors are explained in Section 14.3.

Section 14.5 explains how different factors are relevant for the practical application of the proportionality analysis on different levels of decision making. For example, expected weapons malfunction may normally not be factored in for a single attack, but cannot be ignored for larger operations. This is because the attacking force normally has statistics on the failure rate of its weapons systems, based on previous experience, testing or on assessments provided by the producer of the weapon system. Therefore, these foreseeable factors need to be taken into account in assessing the proportionality of an attack ‘as a whole’, thus often on an operational or higher level. Thus, each level has its own set of factors that must be assessed in the IHL analysis. The awareness among military commanders to include the correct set of factors into their IHL proportionality assessment on the appropriate level must be thoroughly integrated into procedures, rules of engagement and training.

Section 14.6 discusses the necessity of a different or more precise formulation of the IHL proportionality rule. To start a future discussion on a different formulation, a possible alternative wording of the IHL proportionality rule is suggested, taking into account the factors that are identified in this study. As a final point, it is suggested that empirical research could potentially provide insight into the question of whether military decision makers would make different decisions when they base themselves on the current IHL proportionality rule.

The final conclusion of this study is that in IHL, proportionality is understood both as a general principle permeating the interpretation and application of all IHL rules, as well as an important rule of IHL. In its practical application, the IHL proportionality rule must be accepted as it is: an inherently imprecise and flexible yardstick that nonetheless does play its role as the last line of protection for the civilian population, and an obligation for military commanders to take that protection seriously into account. Nonetheless, this study suggests that the balance of the proportionality assessment should in close cases tilt more towards protecting the civilian population than the wording of the rule may suggest. Changing the rule as it is could provide a number of advantages, but there is no certainty that States would be willing to alter the IHL proportionality rule in a way that would improve the protection of the civilian population. Applying a general IHL principle of proportionality may be understood to be among the factors that argues in favour of such a suggestion. This
would mean that the IHL rule of proportionality is actively influenced by the IHL principle of proportionality, from which the rule has originated. In a way, this may be understood as a return of proportionality to its ethical roots, when proportionality was understood as a general guideline for the commander, applying it to all military operations (including attacks) during armed conflict, because it would ultimately prevent excesses and assist in building a sustainable peace after the armed conflict.
Bibliography
Monographs, articles, chapters and contributions


The Bible, Deuteronomy, chapter 20.


Bothe, M., “Customary international humanitarian law: some reflections on the ICRC Study” (2007), vol. 08, Yearbook of International Humanitarian Law, pp. 143-178. (Bothe 2007a)


Coppetiers, B. and N. Fotion (eds), Moral constraints on war: principles and cases, Lexinton Books, 2002.


Corten, O., Reasonableness in international law, Max Planck Encyclopedia of Public International Law, May 2006.


Franck, T.M., “Proportionality in international law” the Morris Gross Lecture, University of Toronto Faculty of Law, 23 September 2008 (on file with author) (Franck 2008b).


Koppe, E.V., “The principle of ambituity and the prohibition against excessive collateral damage to the environment during armed conflict” (2013) vol. 82, nr. 1, Nordic Journal of International Law, pp. 53-87.


McCormack, T.L.H and P.B. Mtharu, “Cluster munitions, proportionality and the foreseeability of civilian damage” in W. Engdal and P. Wrangle (eds.), *Law at war, the law as it was and the law as it should be, liber amicorum Ove Bring*, Koninklijke Brill BV, 2008, pp. 191-206.


Melzer, N., Targeted killing in international law, Oxford University Press, 2008.

Melzer, N., “Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law” International Committee of the Red Cross, 2009.


Murphy, J.F., “Some legal (and a few ethical) dimensions of the collateral damage resulting from Nato’s Kosovo campaign” (2002) vol. 31, Israel Yearbook on Human Rights, pp. 51-77.


Osinga, F.P.B. and M.P. Roorda “From douhet to drones, air warfare, and the evolution of targeting” in P.A.L. Ducheine et. al. (eds.) *Targeting, the challenges of modern warfare*, Springer / Asser Press, 2016, pp. 27-76.


Pictet, J.S., Development and principles of international humanitarian law: course given in July 1982 at the University of Strasbourg as part of the courses organized by the International Institute of Human Rights, Nijhoff, 1985.


Pratzner, P.R., “The current targeting process” in P.A.L. Ducheine et. al. (eds.) Targeting, the challenges of modern warfare, Springer / Asser Press, 2016, pp. 77-97.


Schwarze, J., European administrative law, Sweet and Maxwell, 1992.


Socha, E, “International responsibility of individuals for breaches of humanitarian law” (2005), vol. 26, Polish Yearbook of International Law, pp. 67-84.


Stahn C., “The International Committee of the Red Cross’ influence on related areas of international law” in R. Geiss et al. (eds.) Humanizing the laws of war: the Red Cross and the development of international humanitarian law, Cambridge University Press, 2017, pp. 139-212.


Wall, A.E. (ed.) *Legal and ethical lessons of NATO’s Kosovo Campaign*, vol. 78, US Naval War College’s International Law Studies, Newport, 2002,


Online Resources (last accessed 21 January 2018)


Roth, K. “Barrel bombs, not ISIS, are the greatest threat to Syrians” Human Rights Watch, 5 August 2015, https://www.hrw.org/news/2015/08/05/barrel-bombs-not-isis-are-greatest-threat-syrians.


Sloyan, P.J., “What I saw was a bunch of filled-in trenches with people’s arms and legs sticking out of them. For all I know, we could have killed thousands” The Guardian, 14 February 2003, http://www.theguardian.com/world/2003/feb/14/iraq.features111


Blogs


Military Manuals and doctrine

Canada:

Germany

Israel

The Netherlands

NATO


Norway

Philippines

Switzerland

United Kingdom
The United Kingdom Manual of the Law of Armed Conflict, Oxford University Press, 2004

United States:
Instructions for the Government of Armies of the United States in the Field, promulgated as General Orders No. 100 by President Lincoln on 24 April 1863, Adjutant General’s Office, prepared by Francis Lieber, LL.D., reprinted in Schindler and Toman, pp. 3-20.


Annotated Supplement to the Commander’s Handbook on the Law of Naval Operations, NWP 9 (REV. A)/FMFM 1-10 (1989)


Reports


Other sources

Blank, L. et al. Amicus Curiae brief, “Application and proposed amicus curiae brief concerning the 15 April 2011 Trial Chamber Judgement and requesting that the Appeals Chamber reconsider the findings of unlawful attacks during Operation Storm”, submitted to the ICTY Appeals Chamber, the Prosecutor v. A. Gotovina and M. Markac, Case No. IT-06-90-A, 12 January 2012, see http://icr.icjy.org/LegalRef/CMSDocStore/Public/English/Application/NotIndexable/IT-06-90-A/MSC7958R0000353013.pdf


Human Rights Committee, General Comment 6, HRI/GEN/1/Rev.9 (Vol I) 176, paragraph 1, UN Human Rights Committee, General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the ICCPR.


ICRC, April 1958, “Final record concerning the Draft rules for the limitation of the dangers incurred by the civilian population in time of war” XIXth International Conference of the Red Cross, New Delhi, October-November 1957, see http://www.loc.gov/rr/frd/Military_Law/pdf/RC_Final-record-rules-limitation.pdf


ICRC, Quebec Expert Meeting on the rules governing the conduct of hostilities: the principle of proportionality, Background Document, June 2016, on file with the author


Table of cases
Table of cases

PCIJ/ICJ

S.S. Lotus Case, France v. Turkey, PCIJ Series A, nr. 10 (1927).

Jurisdiction of the Courts of Danzig (the Danzig Railway Officials), Advisory Opinion, PCIJ Series B nr. 15 (1928).

Factory at Chorzow, Merits, Judgement No. 13, PCIJ Series A, nr. 17 (1928).

Diversion of Water from the Meuse Case (Netherlands v. Belgium), PCIJ (Ser. A/B) No. 70, (1937).

Corfu Channel Case, Judgment of April 9th, 1949, ICJ Reports 1949, p. 22.


Fisheries Case, (United Kingdom v. Norway), Judgement, 18 December 1951, ICJ Reports 1951, p. 132

Reservations to the Convention on Genocide, Advisory Opinion, ICJ Reports 1951, p. 15.

South West Africa Cases, Second Phase, Judgment, (1966) ICJ Reports, p. 34.

North Sea Continental Shelf, ICJ Reports 1969, p. 3.

Barcelona Traction Case, ICJ Reports 1970, p. 3.

Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, ICJ Reports 1980, p. 73.

Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, ICJ Reports 1982, p. 18.


Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p. 136.

ICTY

Prosecutor v. Tadić, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), Case nr. IT-94-1-AR72, Appeals Chamber, 2 October 1995.


Prosecutor v. Dragomir Milošević, (Judgement), Case nr. IT-98-29/1-T, Trial Chamber, 12 December 2007.


**EECC**


Eritrea-Ethiopia Claims Commission, Partial Award Western Front, Aerial Bombardment and Related Claims, Eritrea’s Claim 26, 19 December 2005.

**ICC**


Situation in the Democratic Republic of the Congo in the Case of the Prosecutor against Germain Katanga, No.: ICC-01/04-01/07, 7 March 2014.


**HR courts**


Proportionality in International Humanitarian Law


ECtHR, *Bankovic and others v Belgium and others*, Judgment, 12 December 2001.


ECtHR, *Hassan v. United Kingdom*, 16 September 2014.

**Arbitral Tribunals and Awards**

Special Arbitral Tribunal, *Naulilaa case*, 31 July 1928, 2 RIAA 1011


*Decision by the Arbitrators*, Brazil--Export Financing Programme for Aircraft, Recourse to Arbitration by Brazil Under Article 4.11 of the SCM Agreement, WT/DS46/ARB (adopted Aug. 28, 2000)

Post-Second World War Cases

*Krupp and others*, 15 Ann. Dig. 620, 622 (U.S. Mil. Trib. 1948),

*United States v. Otto Ohlendorf et al.*, 4 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, pp. 1 et seq, p. 467 (1947)

*Ardeatine Caves case* (also known as the Kappler Case) 15 Annual Digest & Reports of Public International Cases, 1948, p. 471.

*Hostages Case* (United Nations v. List and others, 1980 8 WCR 34.

Other International Courts and National Courts

ITLOS, Case between Saint Vincent and the Grenadines v. Guinea, concerning the M/V Saiga (no. 2), Judgement of 1 July 1999.

SCSL, *Prosecutor against Charles Ghankay Taylor*, (Judgment), Case nr. SCSL-03-01-A, Appeals Chamber, 26 September 2013.

SCSL, *Prosecutor against Alex Tamba Brima, et. al* (the AFRC Case), (Judgment) Case nr. SCSL-04-16-T, Trial Chamber II, 20 June 2007.


*Caroline Case*, Note of US Secretary of State Daniel Webster, 24 April 1841, Caroline Case, 29 British and Foreign State papers (1841) pp. 1137-1138.


*Coena Brothers vs. Germany*, decided in 1927, Ann. Dig. 1927-1928.

*Shimoda Case*, International Legal Materials (I.L.M.), nr. 32, p. 626.
The Israeli Supreme Court sitting as the High Court of Justice, The Public Committee against Torture in Israel et al. vs The Government of Israel et al. HCJ 769/02, 11 December 2005.

HCJ 769/02 Public Committee Against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v Israel and Others ILDC 597 (IL 2006) [2006] (Public Committee Against Torture.


Beit Sourik case (HCJ 2056/04, Beit Sourik Village Council et al. v. Government of Israel et al. 58(5) PD, or the English translation in 43 ILM 1099 (2004)), and the case of Alfei Menashe (HCJ 7957/04, Mara’abe et al. v. Prime Minister of Israel et al. or the English translation in 45 ILM 202 (2006)).

Germany, Federal Court of Justice, Federal Prosecutor General, Fuel Tankers case, Decision, 16 April 2010, para 2 on p. 63.

Christiansen and Zuhlke in the Dutch courts that also followed World War II, where the courts observed the equal application of IHL. See Dinstein 2017, p. 182 and accompanying notes.
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1980 United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects
1980 Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices
1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
1995 Protocol IV on Blinding Laser Weapons
1996 Amended Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices UN Charter
1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction
1998 Rome Statute of the International Criminal Court
2005 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem and (APIII)

Other Instruments

1923 Hague Rules on Air Warfare,
1938 Protection of Civilian Populations against Bombing from the Air in Case of War, Resolution of the League of Nations Assembly on 30 September 1938
1948 United Nations Universal Declaration of Human Rights
Samenvatting
Samenvatting

Het onderwerp van dit proefschrift is het beginsel van proportionaliteit binnen het humanitair oorlogsrecht (HOR). Het onderzoek is verdeeld in vier delen. Deel I bevat de introductie van het onderwerp van studie en een beschrijving van de methode, opbouw en belangrijkste onderzoeksvragen van de studie. Deel II onderzoekt tot welke categorie van normen het HOR beginsel van proportionaliteit behoort. Deel III bekiickt proportionaliteit binnen het internationaal recht en analyseert verschillende verschijningsvormen binnen de verschillende onderdelen van het internationaal recht die het gebruik van geweld reguleren en die toepasselijk zijn tijdens een gewapend conflict. In Deel IV wordt gekeken hoe de regel van proportionaliteit binnen het HOR in de praktijk moet worden toegepast.

Deel II

Het beginsel van proportionaliteit wordt algemeen aanvaard als een van de beginselen van het HOR. Door beschaafde naties erkende algemene rechtsbeginselen behoren bovendien tot de belangrijkste bronnen van het internationaal recht. In Hoofdstuk 2 wordt een onderscheid gekozen tussen verschillende type normen, namelijk regels (rules), beginselen (principles) en basisprincipes (policies). Vastgesteld wordt dat de term beginselen binnen het internationaal recht op verschillende manieren wordt gebruikt. Beginselen worden als rechtbron gebruikt om aan te duiden dat een bepaalde algemene norm vanuit nationaal recht binnen het bereik van het internationaal recht is gebracht. Beginselen zijn echter ook een op zichzelf staande bron van een rechtsgebied binnen het internationaal recht. Doordat verschillende types beginselen bestaan, spelen deze beginselen ook verschillende rollen binnen het internationaal recht. Ten eerste is dat de rol van het vullen van hiaten in het recht. Ten tweede worden beginselen gebruikt bij de interpretatie van regels binnen het internationaal recht. Ook worden bepaalde normen aangeduid als beginselen omdat deze tot de belangrijkste regels van een bepaald rechtsgebied behoren. Tenslotte worden normen aangeduid als beginselen omdat zij dienen als basis voor andere normen. Meestal speelt een beginsel meerdere van deze rollen tegelijkertijd. Hoofdstuk 3 stelt een methode voor om vast te stellen welke de beginselen van het HOR zijn en concludeert op basis van de toepassing van die methode dat het beginsel van proportionaliteit inderdaad kan worden gezien als een van de beginselen van het HOR. Als zodanig speelt het verschillende rollen. Om te beginnen kunnen de beginselen van het HOR worden gezien als het geraamte van het HOR, waarmee samenhang wordt gegeven aan het volledige rechtsgebied. Daarnaast worden de beginselen gebruikt als didactisch middel, omdat kennis en toepassing van de beginselen van het HOR leden van de strijdkrachten helpt om het HOR toe te passen zonder alle gedetailleerde regels geheel te kennen. Ook kunnen de beginselen worden gezien als de grondslagen van het HOR, waarbij de regels van het HOR op deze beginselen zijn gebaseerd. Het bleek
dat proportionaliteit enerzijds binnen het HOR als beginsel wordt aangeduid omdat het wordt gezien als een van de belangrijkste regels van het HOR, maar anderzijds ook omdat proportionaliteit binnen het HOR wordt gezien als een breder beginsel dat binnen het HOR moet worden toegepast. Dit wordt aangemerkt als een beginsel ‘in strikte zin’. Hiermee is de belangrijkste onderzoeksvraag van Deel II beantwoord, namelijk tot welke categorie van normen het beginsel van proportionaliteit binnen het HOR behoort. Proportionaliteit is een van de belangrijkste regels van het HOR en is bedoeld om de burgerbevolking te beschermen tegen buitensporige bijkomende schade wanneer aanvallen tegen legitieme militaire doelen worden gepland en uitgevoerd. Maar ook is duidelijk geworden dat beginselen mogelijkerwijs andere rollen spelen, en proportionaliteit ook een rol zou kunnen spelen als zelfstandige inhoudelijke norm binnen het HOR. Die rol is verder onderzocht in Deel III, waarin het juridische concept van proportionaliteit binnen het internationaal recht is geanalyseerd.

Deel III

De centrale onderzoeksvraag van Deel III luidt: wat is de inhoud van het beginsel, of juridische concept van proportionaliteit binnen het internationaal recht en de verschillende rechtsgebieden daarbinnen? De doelstelling van deze vraag is te onderzoeken in hoeverre de verschillende verschijningsvormen van proportionaliteit binnen het internationaal recht moeten worden gezien als een algemeen rechtsbeginsel van het internationaal recht dat toepasselijk is tijdens een gewapend conflict. Met dat doel zijn de verschillende verschijningsvormen van proportionaliteit vergeleken met de kenmerken van beginselen van het internationaal recht, zoals deze in Deel II van de studie zijn geïdentificeerd.

In Hoofdstuk 4 wordt geconcludeerd dat het concept van proportionaliteit inherent is aan ieder rechtssysteem, dus ook binnen ieder rechtsgebied van het internationaal recht. Proportionaliteit geeft flexibiliteit in de toepassing van regels en de onderliggende beginselen en wordt gebruikt om een evenredige balans te bereiken tussen tegengestelde belangen. Proportionaliteit wordt gebruikt als: (1) een juridisch instrument om vage regels te interpreteren in een manier die lijkt op het gelijkheidsbeginsel en redelijkheid; (2) als middel om tegengestelde belangen af te wegen en zodoende een redelijke en billijke uitkomst te genereren; en (3) om de rechten van kleinere entiteiten te beschermen tegen die van grotere. De conclusie is dat in ieder geval in vredestijd, binnen het internationaal recht kan worden gesproken van een algemeen rechtsbeginsel van proportionaliteit.

Ten aanzien van het recht dat het gebruik van dodelijk geweld reguleert tijdens gewapend conflict wordt in Hoofdstuk 5 het beginsel van proportionaliteit beschreven zoals dat geldt binnen het recht om gewapend geweld te gebruiken tegen andere Staten (het ius ad bellum) en binnen mensenrechten. De hoofdstukken 6 en 7 bevatten een beschrijving van verschillende verschijningsvormen van proportionaliteit binnen het HOR. De proportionaliteitsregel binnen het HOR is het verbod op “aanvallen die, naar kan worden verwacht bijkomend verlies van mensenlevens onder de burgerbevolking, verwonding van burgers, schade aan
burgerobjecten of een combinatie daarvan ten gevolge zullen hebben, in een mate die buitensporig zou zijn in verhouding tot het verwachte tastbare en rechtstreekse militaire voordeel.” Naast deze regel bestaan binnen het HOR meerdere andere bepalingen die gericht zijn op het voorkomen van buitensporig geweldgebruik tijdens gewapend conflict. Dit betreft bijvoorbeeld regels over het vernietigen van eigendommen van de vijand en beperkingen op het gebruik van bepaalde methoden en middelen van oorlogvoering tegen de vijand.

In Hoofdstuk 8 wordt vastgesteld dat de proportionaliteitsregels uit het HOR en het *ius ad bellum* een gemeenschappelijke afkomst delen, maarwel binnen het eigen rechtsgebied moeten worden toegepast. Er is dus geen sprake van een integratie van de proportionaliteitsregels van het *ius ad bellum* en het HOR, maar van een parallelle toepassing in de twee rechtsgebieden tijdens dezelfde situatie. Partijen bij een gewapend conflict moeten zich daarom realiseren dat zij hun strijdkrachten in sommige situaties moeten verbieden bepaalde aanvallen uit te voeren die weliswaar legitiem zijn onder het HOR, maar die zijn verboden omdat de proportionaliteitsregel van het *ius ad bellum* een aanvullende bescherming biedt aan de burgerbevolking. Desalniettemin bestaat er doorgaans een strikte scheiding tussen het *ius ad bellum* en het HOR. Ten aanzien van de relatie tussen de proportionaliteitsregels van het HOR en mensenrechten is vastgesteld dat deze duidelijk verschillend zijn voor wat betreft inhoud en toepasselijkheid. Toch zijn situaties denkbaar waarin beide cumulatief moeten worden toegepast. Vooral omdat in die situaties van gewapend conflict de toepasselijkheid van de mensenrechtelijke proportionaliteitsregel is verbonden aan een groot aantal voorwaarden, komt die situatie zelden voor. Voor het HOR geldt dat het mogen aanvallen van personen met name afhangt van hun status: combattanten mogen worden aangevallen. Bij mensenrechten is het niet de status, maar de dreiging die van een persoon uitgaat bepalend. De proportionaliteitsregel bij mensenrechten geldt dus ten aanzien van de persoon die wordt aangevallen, terwijl het bij het HOR gaat om anderen dan de persoon die wordt aangevallen, namelijk om burgers die geraakt kunnen worden bij de aanval van een militair doel. Bovendien reguleert het HOR een voornamelijk horizontale relatie tussen strijdende partijen, terwijl mensenrechten een verticale relatie reguleert tussen een persoon tegen wie geweld wordt gebruikt en de vertegenwoordiger van een staat binnen wiens jurisdictie die persoon valt.

Op basis van al deze factoren moet worden geconcludeerd dat geen verplichting bestaat op basis van de mensenrechtelijke proportionaliteitsregel om binnen het HOR altijd te trachten een persoon gevangen te nemen voordat deze mag worden aangevallen. Daarom is de mensenrechtelijke proportionaliteitsregel op zichzelf niet relevant voor het begrip of toepassing van de proportionaliteitsregel binnen het HOR. Wel draagt het bij aan het bestaan van een algemeen beginsel van proportionaliteit binnen het recht dat ook tijdens gewapend conflict van toepassing is op het gebruik van dodelijk geweld. De vergelijking van het algemene proportionaliteitsbeginsel binnen het HOR met de verschillende proportionaliteitsregels en beginselen binnen de andere rechtsgebieden die op die situatie van toepassing zijn, toont aan dat deze grote gelijkenis vertonen. Uiteindelijk
Proportionality in International Humanitarian Law

zijn deze allemaal erop gericht om enerzijds menselijk lijden te beperken en anderzijds ruimte te bieden aan autoriteiten om hun legitieme doelen te verwezenlijken.

De doelstelling van Deel III is om te bepalen of de verschillende verschijningsvormen van proportionaliteit in de deelgebieden van het internationaal recht kunnen worden gebruikt om de proportionaliteitsregel binnen het HOR te verduidelijken. De conclusie die in Deel III wordt bereikt, is dat proportionaliteit voorkomt op verschillende niveaus en binnen verschillende rechtsgebieden van het internationaal recht, soms als onderliggend beginsel en soms als specifieke regel. Het moge duidelijk zijn dat de proportionaliteitsregel in het HOR een zeer specifieke verschijningsvorm van het proportionaliteitsbeginsel is, die alleen in situaties van gewapend conflict toepasselijk is. Ook is duidelijk dat hoewel iedere proportionaliteitsregel in het internationaal recht binnen het eigen rechtsgebied moet worden toegepast, er wel sprake is van een gedeelde afkomst. De proportionaliteitsregel van het HOR wijkt daarvan niet af. Toenemende burgerslachtoffers en bijkomende schade aan burgerobjecten in de twintigste eeuw leidden tot het bewustzijn dat de gevolgen van oorlog voor de burgerbevolking in een regel moest worden vastgelegd. Deze regel is niet alleen gebaseerd op een algemeen beginsel van proportionaliteit dat geldt tijdens een gewapend conflict, maar wordt er ook nog steeds door beïnvloed. Dit beginsel vult gaten in de regels van het HOR en helpt bij de interpretatie van die regels. Dit algemene beginsel is ook aanwezig in de andere rechtsgebieden die van toepassing zijn tijdens een gewapend conflict. Ondanks de veelheid aan regels en beginselen binnen het internationaal recht die als verschijningsvormen van proportionaliteit kunnen worden gezien, zijn het geen identieke regels. Verschillende soorten proportionaliteitsregels en –afwegingen wegen verschillende belangen en vervullen verschillende functies. Ondanks die verschillen kan een algemeen geldend beginsel van proportionaliteit worden afgeleid uit de cumulatieve toepassing van proportionaliteit binnen het internationaal recht.

Proportionaliteit wordt binnen het internationaal recht doorgaans toegepast om bepaald gedrag achteraf te beoordelen. Dit is bijvoorbeeld het geval bij de beoordeling of een eenzijdige tegenmaatregel onder het internationaal recht proportioneel was of om te beoordelen in hoeverre een gewapende reactie onder het ius ad bellum evenredig was. Deze beoordeling achteraf is vooral van belang om te bepalen in hoeverre schade moet worden vergoed. Voor het HOR geldt dat de proportionaliteitsregel voorafgaand aan een aanval moet worden toegepast, als beperkende factor op toekomstig gedrag. Dit volgt uit het karakter van het HOR als preventief raamwerk dat beperkingen stelt aan het gebruik van geweld tijdens een gewapend conflict. Het kan noodzakelijk zijn om ook achteraf de HOR proportionaliteitsstoets uit te voeren, bijvoorbeeld door een rechtbank of tribunaal of door een organisatie die rapporten uitbrengt over incidenten (zoals Human Rights Watch, Amnesty International of rapporteurs die door de Verenigde Naties zijn aangesteld etc.). Het grote verschil is dat noodzakelijkerwijs meer discretionaire beslissruimte moet bestaan voor diegene die de HOR proportionaliteitsstoets vooraf moet toepassen, in vergelijking met hen die deze achteraf uitvoerden. Besluiten van militaire commandanten zijn gebaseerd op de informatie
die voor hen redelijkerwijs beschikbaar was in de planningsfase en voorafgaand aan het uitvoeren van de aanval. Uit een vergelijking van de verschillende verschijningsvormen van proportionaliteit in het internationaal recht blijkt dat geen theoretische obstakels bestaan om achteraf te beoordelen of een aanval proportioneel was. Echter, kennis die is verkregen nadat de aanval was gepland en uitgevoerd en die niet voorafgaand daaraan beschikbaar was voor de commandant, kan niet dienen als basis voor een (internationaal) strafrechtelijke vervolging of om staatsaansprakelijkheid vast te stellen als gevolg van een schending van het HOR.

De verschillende verschijningsvormen van proportionaliteit in het internationaal recht tonen aan dat een proportionaliteitstoets op verschillende beslisniveaus kan worden toegepast. Binnen mensenrechten, bijvoorbeeld, moet een proportionaliteitsbeoordeling worden gedaan op strategisch- of regeringsniveau om te bepalen in hoeverre een regering mensenrechten van haar onderdanen mag beperken. Echter, binnen de mensenrechten bestaat ook een proportionaliteitstoets die door een enkele agent moet worden uitgevoerd om te bepalen of, en hoeveel, geweld deze mag gebruiken bij het handhaven van de openbare orde. Ten aanzien van militaire operaties waarbij het HOR van toepassing is, ondersteunt deze conclusie de zienswijze dat ook binnen het HOR de proportionaliteitstoetsing op verschillende niveaus kan worden uitgevoerd. De proportionaliteitsregel kan dus worden toegepast op politiek-strategisch (of ius ad bellum) niveau, strategisch niveau, operationele niveaus en tactische niveaus. Omdat het soort militair voordeel dat op die verschillende niveaus wordt beoogd ook verschilt, kan het mogelijk zijn om meer precies te zijn bij het bepalen van de maatstaf die in een bepaalde situatie moet worden aangelegd.

Het is de vraag in hoeverre van militaire commandanten mag worden verwacht dat zij volledig kunnen overzien wat de invloed is van al deze verschillende proportionaliteitstoetsen op de uitvoering van de militaire operaties waar zij leiding aan geven. Dit vraagt om grondige training, de integratie van de toepasselijke normen in rules of engagement en de beschikbaarheid van deskundig juridisch advies.

In Hoofdstuk 9 wordt geconcludeerd dat binnen het HOR, proportionaliteit de belangrijke functie vervult van het interpreteren van de regels en beginsels van het HOR bij de toepassing daarvan in de praktijk. Daarnaast vervult proportionaliteit een cruciale functie door hiaten in het recht te vullen, via de Martens Clausule, in feitelijke situaties waar geen specifieke verdragsregel of regel van internationaal gewoonterecht beschikbaar is. Dit algemene beginsel van proportionaliteit in het HOR (dat een andere soort norm is dan de HOR regel van proportionaliteit inzake bijkomende schade aan burgers en burgerobjecten) is daarnaast ook de basis van een aantal specifieke regels van het HOR, zoals onder meer de regel inzake bijkomende schade en die aangaande voorzorgsmaatregelen. In deze studie wordt voorgesteld dat dit algemene beginsel van proportionaliteit van het HOR geldt als een onafhankelijke juridisch bindende norm binnen het HOR. Dit beginsel werkt in zekere mate door bij de toepassing van alle regels van het HOR (inclusief de regel van proportionaliteit binnen het HOR) door houvast te bieden bij de interpretatie van die regels en bij het vullen
van hiaten in de regels. Proportionaliteit is dus een beginsel van het HOR dat het gebruik van geweld tijdens gewapend conflict in zijn algemeenheid matigt in aanvulling op en bovenop de HOR regel van proportionaliteit. Dit matigende beginsel dient om de tweeledige doelstelling van het HOR te verwezenlijken, dus ter regulering van de methoden en middelen van oorlogvoering en door bescherming te bieden aan hen die niet, of niet meer, deelnemen aan het gewapend conflict. Het beginsel is gebaseerd op een evenwicht tussen de basisprincipes van humaniteit en militaire noodzaak. Proportionaliteit als algemeen beginsel werkt binnen het HOR soms op een vergelijkbare wijze als redelijkheid en gelijkheid op het niveau van onderliggende beginselen van de rechtsgebieden van het internationaal recht. Deze studie stelt voor, gelet op de potentie van beginselen als een aparte rechtsbron van het internationaal recht, dat het geldt ofwel als een beginsel, ofwel als regel van internationaal gewoonterecht. Hoewel het beginsel geen specifieke regel van internationaal recht opzij kan zetten, zoals de HOR regel van proportionaliteit, kan het wel helpen bij de interpretatie van die regels en om hiaten in het recht te vullen door voor te schrijven dat een redelijke balans moet worden gevonden in die situaties tussen de basisprincipes van militaire noodzaak en humaniteit.

Deel IV

In Deel IV wordt geanalyseerd hoe de HOR proportionaliteitsregel in de praktijk moet worden toegepast. Met dat doel wordt in Hoofdstuk 10 de praktische en juridische context van de HOR proportionaliteitsregel besproken. Eerst wordt het doelbestrijdingsproces beschreven bij wijze van introductie van de praktische context. Teneinde de juridische context van de HOR proportionaliteitsregel te bespreken, worden het verbod op niet-onderscheidende aanvallen en de plicht tot het nemen van voorzorgsmaatregelen geschetst. Volgens de definitie van een disproportionele aanval is dit een subcategorie van de bredere categorie van de niet-onderscheidende aanval. De plaats van de proportionaliteitsregel in deze context geeft de link tussen de HOR beginselen van onderscheid en proportionaliteit weer. De voorbeelden van niet-onderscheidende aanvallen die het HOR geeft, geven een aanwijzing welke aanvallen disproportioneel zijn en dit kan helpen bij het interpreteren van de standaard in de HOR proportionaliteitsregel van ‘buitensporig’. In zijn algemeenheid geldt dat militaire commandanten door het nemen van voorzorgsmaatregelen kunnen voorkomen dat hun voorgenomen aanvallen buitensporige bijkomende schade veroorzaken. De HOR proportionaliteitsregel is bij het codificeren ervan in 1977 bovendien vastgesteld in de context van de bepalingen over voorzorgsmaatregelen. De HOR proportionaliteitsregel is ook zelf een voorzorgsmaatregel, gericht op het beperken van bijkomende schade bij aanvallen.
Voorzorgsmaatregelen bij aanvallen zijn een belangrijk onderdeel van het doelbestrijdingsproces, waar zij in de verschillende fases van dat proces een rol spelen en bepalend zijn in de volgorde van de stappen waaruit dat proces bestaat. Concreet bestaan de voorzorgsmaatregelen uit een aantal samenhangende verplichtingen, die tezamen een uitgebreid raamwerk vormen. De militaire commandant moet de stappen in het proces doorlopen om zodoende burgers en burgerobjecten te beschermen tegen de gevolgen van vijandelijkheden. De HOR proportionaliteitsregel is slechts één van die stappen. Maar zelfs indien alle stappen zijn doorlopen, is de laatste stap het toepassen van de HOR proportionaliteitsregel voordat de geplande aanval kan worden uitgevoerd. Andersom kan het zo zijn dat een commandant na toepassing van de proportionaliteitsregel heeft geconstateerd dat aan die regel is voldaan, maar als hij niet alle redelijkerwijs mogelijke voorzorgsmaatregelen heeft genomen en burgerslachtoffers en schade aan burgerobjecten hadden kunnen worden voorkomen, is toch sprake van een schending van het HOR. In die zin zou men kunnen zeggen dat de proportionaliteitsregel een secundaire regel is, die pas moet worden toegepast als het onmogelijk blijkt om door middel van het nemen van voorzorgsmaatregelen het ontstaan van enige bijkomende schade te voorkomen.

In Hoofdstuk 11 is een uitgebreide analyse uitgevoerd van de verschillende onderdelen waaruit de HOR proportionaliteitsregel bestaat. Uit deze analyse blijkt dat discussie bestaat over de interpretatie van bijna al die onderdelen. Alleen daardoor kan de HOR proportionaliteitsregel niet worden gevat in een wiskundige formule. Wel is bij de toepassing ervan een grondige analyse benodigd van de componenten waaruit de regel bestaat, voor zover de omstandigheden van dat moment dit mogelijk maken. De situatie tijdens de strijd kan het onmogelijk maken meer informatie te verkrijgen over mogelijke burgerslachtoffers, of de verwachtingen van de commandant over het door hem verwachte militaire voordeel kunnen onjuist zijn. Desalniettemin moeten militaire commandanten beschikken over voldoende begrip van de onderdelen van de HOR proportionaliteitsregel, voordat zij deze onder de omstandigheden van dat moment kunnen toepassen.

De praktijkvoorbeelden die in Hoofdstuk 12 worden besproken, tonen aan dat commandanten op verschillende niveaus de HOR proportionaliteitstoets toepassen en op grond daarvan hun operatieplannen aanpassen en soms zelfs afzien van het uitvoeren van aanvallen, ook als het uitvoeren ervan hen door hogerhand was opgedragen. Toch blijft het lastig om daadwerkelijk uit die praktijk af te leiden hoe de HOR proportionaliteitstoets moet worden uitgelegd, vooral doordat beschrijvingen van het denkproces van militaire commandanten voorafgaand aan een aanval structureel ontbreken.

Toch is het doel van dit onderzoek om richtlijnen voor het toepassen van de HOR proportionaliteitstoets te formuleren. Daarom wordt in Hoofdstuk 13 bezien hoe militair voordeel en bijkomende schade ten opzichte van elkaar kunnen worden afgewogen, of dat deze twee factoren wellicht onvergelijkbaar zijn. De conclusie hiervan is dat hoewel het moeilijk is, het recht een dergelijke afweging wel degelijk vereist. Bovendien wordt vastgesteld dat de proportionaliteitstoets deels bestaat uit kwantitatieve factoren, vooral als het gaat
om de beoordeling van bijkomende schade aan burgerobjecten en burgerslachtoffers. Echter, de afweging bestaat noodzakelijkerwijs ook uit een afweging van kwalitatieve factoren, omdat het verwachte militaire voordeel altijd ook bestaat uit factoren die niet in kwantitatieve termen zijn te uit te drukken. Dit bevestigt de eerdere conclusie dat de HOR proportionaliteitstoets niet kan worden gevangen in een wiskundige formule.

Er bestaan twee redenen om de voorkeur te geven aan een objectief toe te passen HOR proportionaliteitsregel in vergelijking met een subjectieve regel. Dit volgt zowel uit een actieve als uit een passieve benadering. De passieve benadering betekent dat met het oog op het voorkomen van buitensporige bijkomende civiele schade en slachtoffers, de bescherming van de burgerbevolking niet alleen zou moeten afhangen van de subjectieve benadering van de enkele militaire commandant die de proportionaliteitsafweging maakt. Het belang van die bescherming vraagt om objectieve parameters. De actieve benadering houdt in dat degene die de verantwoordelijkheid heeft aanvallen te plannen en uit te voeren, of daarover te beslissen, ook de plicht heeft de HOR proportionaliteitsregel toe te passen. Dit betekent dat deze persoon verantwoordelijk is voor de afweging als gevolg waarvan burgerslachtoffers kunnen vallen en burgerobjecten kunnen worden vernietigd. Bij een onjuiste afweging loopt deze persoon het risico hiervoor strafrechtelijk te worden vervolgd. Omdat de toepassing van een objectieve regel beter voorspelbare uitkomsten op zou leveren, zou een dergelijke regel een betere bescherming bieden tegen vervolging voor degenen die de regel in het heetst van de strijd moeten toepassen. Er zijn een aantal maatregelen te nemen die een objectieve toepassing van de HOR proportionaliteitsregel ten goede zouden komen. Deze maatregelen zijn deels procedureel van aard. Voorbeelden zijn het kennisniveau van de commandant; de beschikbaarheid van goed getrainde militair juristen; het bestaan van procedures voor het plannen en uitvoeren van aanvallen en de beschikbaarheid van systemen die commandanten kunnen helpen bij het kwantificeren en voorspellen van de verwachte effecten van een geplande aanval. Desalniettemin blijft de conclusie dat de HOR proportionaliteitsregel uiteindelijk een subjectieve standaard is, hoewel sommige onderdelen zo veel mogelijk kunnen, en moeten, worden geobjectiveerd tijdens het uitvoeren van een proportionaliteitsafweging.

In Hoofdstuk 13 wordt de term ‘redelijke militaire commandant’ aan een nadere analyse onderworpen in de context van de toepassing van de HOR proportionaliteitsregel. Deze term is weliswaar niet in de tekst van de HOR proportionaliteitsregel opgenomen, maar er lijkt overeenstemming over te bestaan dat ‘redelijkheid’ wel degelijk een belangrijk onderdeel is van de regel. In dit onderzoek is geconcludeerd dat deze factor afkomstig is van een breder toepasselijk internationaalrechtelijk beginsel van redelijkheid. Redelijkheid wordt gebruikt om een conflict tussen twee belangen van verschillende aard op te lossen, dus bij het maken van een kwalitatieve afweging. De HOR proportionaliteitstoets voldoet aan die beschrijving. De term ‘redelijke militaire commandant’ biedt op zichzelf geen nadere richtlijnen voor de toepassing, of het objectiveren van de HOR proportionaliteitsregel. De maatregelen ter objectivering kunnen wel worden gebruikt bij het beoordelen of de toepassing van de regel.
op het eerste gezicht redelijk was. Dit kan ook worden gezien als een verschijningsvorm van het algemeen HOR beginsel van proportionaliteit dat ernaar streeft een redelijke balans te vinden tussen menselijkheid en militaire noodzaak.

Uiteindelijk draait het geven van richtlijnen voor commandanten voor de toepassing van de HOR proportionaliteitsregel om de interpretatie van de term ‘buitensporig’. Het is duidelijk dat deze term betekent dat er altijd een verhouding bestaat tussen verschillende factoren: het betekent niet dat een absoluut maximum van verwachte bijkomende schade ('extensive') per definitie betekent dat die bijkomende schade buitensporig ('excessive') is: die beoordeling hangt altijd af van de mate waarin kan worden verwacht dat een bepaalde mate van concreet militair voordeel wordt behaald. Desalniettemin wordt in dit onderzoek gesteld dat het bestaan van een absolute mate van onontendoelbare bijkomende schade bij de toepassing van de HOR proportionaliteitsregel niet ondenkbaar is. Gelet op de verplichte voorzorgsmaatregel om voortdurend waakzaam te zijn ter bescherming van de burgerbevolking, is betoogd dat een verschil bestaat tussen de uitersten van beide zijdes van de HOR proportionaliteitsafweging. De buitengrens van de in beschouwing te nemen bijkomende schade aan de burgerobjecten en slachtoffers onder de burgerbevolking is gegeven door het verbod hen direct aan te vallen en het verbod op niet-onderscheidende aanvallen. Dit zijn absolute verboden. Een commandant heeft geen verplichting, maar altijd een keuze welk militair voordeel hij beoogt met zijn aanval, ongeacht hoeveel militair voordeel van die aanval kan worden verwacht. Er is dus aan de andere kant van het spectrum geen absoluut gebod om een aanval zodanig te plannen, dat het verwachte militaire voordeel zo groot is dat de verwachte bijkomende schade desastreus zou kunnen zijn, zonder dat deze buitensporig is. Aanvallen met een dergelijke impact overstijgen het niveau van de commandant en dergelijke besluiten kunnen gelet op die impact binnen het bereik van het ius ad bellum komen. Het kan daarom worden beargumenteerd dat de uiterste grens van niet-buitensporige bijkomende schade wordt bepaald binnen het HOR, terwijl de uiterste grens van het militaire voordeel daarbuiten valt. Daarom kan worden betoogd dat hoewel doorgaans de relatie tussen militair voordeel en bijkomende civiele schade moet worden beoordeeld ('excessive'), het mogelijk is dat in uitzonderingsgevallen, waar de bijkomende schade dermate groot is ('extensive') dat alleen al op basis van die schade het HOR deze aanval verbiedt, ongeacht het verwachte militaire voordeel ervan.

Voorts is vastgesteld dat de in het internationaal strafrecht toepasselijke standaard van duidelijk buitensporig niet overeenkomt met de in het HOR toepasselijke regel. Daardoor is de regel in het HOR meer beperkend voor de militaire commandant dan die in het internationaal strafrecht, en biedt deze dus meer bescherming voor de burgerbevolking.

Verder is de interpretatie van de term ‘buitensporig’ bekeken in gevallen waarin de twee factoren min of meer in balans zijn. Men zou kunnen betogen, dat indien dit het geval is, de gewone betekenis van de term buitensporig betekent dat de aanval mag plaatsvinden, zelfs als de verwachte bijkomende schade iets groter wordt geacht dan het verwachte militaire voordeel. Dit betekent dat de schaal van de HOR proportionaliteitsregel meer in de richting
van het militaire voordeel doorslaat, zonder dat er sprake is van een schending van de regel. Echter, er zijn een aantal redenen waarom de interpretatie van de regel minder eenduidig is dan lijkt te volgen uit de gewone betekenis van de term buitensporig. Daarbij lijkt het nuttig om allereerst een gelaagde benadering te kiezen: beide factoren zouden bij een proportionaliteitstoets kunnen worden ingedeeld in een van de vijf volgende categorieën: marginaal, klein, medium, groot, enorm groot. Het opnemen van deze factoren in een matrix kan helpen bij het in één oogopslag toepassen van de proportionaliteitstoets. Echter, gelet op het kwalitatieve (in tegenstelling tot kwantitatieve) karakter van sommige onderdelen van de factoren, en de unieke omstandigheden van iedere geplande aanval, moet deze matrix als richtinggevend worden gezien, niet als beslissend op zichzelf. De toepassing van de HOR proportionaliteitsregel op basis van de matrix moet altijd gepaard gaan met een beoordeling van de kwalitatieve aspecten van de factoren en het gebruik van het gezond verstand. Daarbij is betoogd dat het eerder gaat om een ‘zone van buitensporigheid’, of grijs gebied, dan een scherpe lijn, doordat kwalitatieve factoren in de afweging moeten worden betrokken.

Het HOR bevat zelf een aantal aanwijzingen hoe de grens tussen buitensporige en toelaatbare bijkomende schade moet worden getrokken. Die grens is geen volledig rechte lijn. Ten eerste, bij een lage mate van verwacht militair voordeel en bijkomende schade, geeft de aanduiding ‘tastbaar en rechtstreeks’ militair voordeel aan dat indien het verwachte effect van de geplande aanval voor beide factoren marginaal is, die marginale bijkomende schade waarschijnlijk buitensporig is. Dit is omdat voor de bijkomende schade niet de aanvullende vereisten van ‘tastbaar en rechtstreeks’ gelden. Ten tweede, aan de andere kant van het spectrum, als het militaire voordeel en de bijkomende schade van een geplande aanval naar verwachting enorm groot zullen zijn, kan uit de voorbeelden bij het verbod op niet-onderscheidende aanvallen worden afgeleid dat in veel van deze situaties de bijkomende schade als buitensporig moet worden beoordeeld.

Deze studie betoogt in Hoofdstuk 14 dat de toepassing van de HOR proportionaliteitsregel niet zo relatief eenvoudig is als het afwegen van twee factoren op een tweezijdige weegschaal en zoals zou volgen uit de gewone betekenis van de term ‘buitensporig’. Een derde factor speelt immers een cruciale rol bij het vaststellen of een geplande aanval legitiem is, namelijk de mate waarin kan worden verwacht dat het verwachte militaire voordeel en bijkomende schade daadwerkelijk zullen optreden zoals kan worden ingeschat. Dit speelt vooral in gevallen waarin het verwachte militaire voordeel groot is, maar de kans laag is dat dit militaire voordeel ook daadwerkelijk met de geplande aanval wordt bereikt. Omdat deze kans op zichzelf niets afdoet aan de kwalitatieve omvang van de verwachte bijkomende schade of het militaire voordeel, betoogt deze studie dat het een separate derde factor betreft. Het resultaat is dan een driedimensionale proportionaliteitstoets. Bij een geplande aanval worden dus in overweging genomen: (1) het tastbare en rechtstreekse militaire voordeel; (2) het bijkomend verlies van mensenlevens onder de burgerbevolking, verwonding van
burgers, schade aan burgerobjecten of een combinatie daarvan en (3) de kans dat de factoren (1) en (2) zich daadwerkelijk voordoen als verwacht.

In dit onderzoek is betoogd dat de interpretatie van de gewone betekenis van de term buitensporig, waarbij meer gewicht wordt toegekend aan de factor van het militaire voordeel ten opzichte van de factor van de bijkomende schade, moet worden aangepast in de andere richting. Voorgesteld wordt deze interpretatie meer in de richting van de bescherming van de burgerbevolking te interpreteren. Deze interpretatie geeft een richtlijn voor militaire commandanten bij geplande aanvallen waarin het verschil tussen de twee factoren klein is, oftewel in de situatie waarin de bijkomende schade niet duidelijk buitensporig is ten opzichte van het verwachte militaire voordeel. Dit omvat ook de hypothetische situatie waarin wordt geoordeeld dat de situatie in balans is. De redenen voor deze voorgestelde interpretatie zijn: (1) het doel van de HOR proportionaliteitsregel; (2) het feit dat alleen de factor van het militaire voordeel is beperkt tot dat voordeel dat ‘tastbaar en rechtsreeks’ is; (3) de regel inzake voorzorgsmaatregelen bij alle operaties om voortdurend te waken dat de burgerbevolking, de burgers en de burgerbevolking worden ontzien; (4) de werking van de beginselen van het HOR, uit hoofde van de Martens Clausule; (5) het feit dat het risico dat iets fout gaat tijdens een aanval op de burgerbevolking wordt afgewendt, bijvoorbeeld bij een foutieve inschatting van de situatie ter plaatse door de commandant, het feit dat de gebruikte informatie en inlichtingen onjuist blijken of verkeerd zijn geïnterpreteerd, storingen van wapensystemen en andere factoren die niet kunnen worden beheerst, zoals de invloed van het weer; en tenslotte (6) een algemeen beginsel van proportionaliteit.

Ook besteedt het onderzoek aandacht aan de vraag hoe het niveau van besluitvorming invloed heeft op de interpretatie van de factoren waaruit de HOR proportionaliteitsstoets bestaat. Zo wordt een mogelijke storing aan een wapensysteem over het algemeen niet in beschouwing genomen op het tactisch niveau van een enkele aanval, maar de invloed van een voorzienbaar en bekend storingspercentage mag bij een grootscheepse en gecoördineerde aanval niet worden genegeerd. Over het algemeen beschikken strijdkrachten over ervaring met en informatie over de mate waarin storingen optreden bij hun wapensystemen, doordat zij hiermee hebben geoefend, door testen of door informatie die door de fabrikant van die wapensystemen is verstrekt. Daarom moeten dergelijke voorzienbare factoren worden meegenomen in de proportionaliteitsstoets van een aanval in zijn geheel, dus meestal op het operationeel of strategisch niveau van besluitvorming. Ieder niveau van besluitvorming heeft dus zijn eigen factoren die in beschouwing moeten worden genomen in de proportionaliteitsstoets. Dat de juiste factoren op het overeenkomstige niveau van besluitvorming in aanmerking moeten worden genomen, moet worden geïntegreerd in de procedures, instructies en de oefeningen van militaire commandanten.

In Sectie 14.6 van het onderzoek is een bespreking opgenomen over het bestaan van een noodzaak om te komen tot een meer nauwkeurige formulering van de HOR proportionaliteitsregel. Als startpunt voor een mogelijke toekomstige discussie over een andere of meer nauwkeurige formulering van de HOR proportionaliteitsregel is een
mogelijke alternatieve formulering voorgesteld, waarbij in dit onderzoek besproken factoren zijn opgenomen. Tenslotte stelt dit onderzoek voor nader empirisch onderzoek uit te voeren teneinde inzicht te verwerven in de vraag in hoeverre militaire commandanten tot andere besluiten zouden komen als zij zich bij het toepassen van de HOR proportionaliteitsstoets zouden baseren op deze gesuggereerde formulering van de regel.

De uiteindelijke conclusie van dit onderzoek is dat proportionaliteit moet worden begrepen als een algemeen beginsel dat doorwerkt in de interpretatie en toepassing van alle regels van het HOR, en ook als een belangrijke regel van het HOR. Bij de toepassing van de HOR proportionaliteitsregel moet worden geaccepteerd dat het een inherent onnauwkeurige en flexibele maatstaf is die desalniettemin een rol speelt als laatste ring van bescherming voor de burgerbevolking en een juridische verplichting vormt voor militaire commandanten om die bescherming serieus mee te wegen. Deze studie stelt echter voor bij de afweging van de factoren meer gewicht te hechten aan de bescherming van de burgerbevolking in situaties waarin het niet duidelijk is of de bijkomende schade buitensporig is. Daarvoor is een andere interpretatie van de term buitensporig nodig dan de gewone betekenis van die term suggereert. Het herformuleren van de huidige regel zou voordelen kunnen hebben, maar er bestaat geen zekerheid dat Staten bereid zijn de regel zodanig aan te passen dat een grotere bescherming van de burgerbevolking ontstaat. Het toepassen van een algemeen beginsel van proportionaliteit binnen het HOR kan worden beschouwd als één van de factoren die pleit voor een aanpassing of interpretatie van de regel in die richting. Dit betekent dat de toepassing van de HOR proportionaliteitsregel wordt beïnvloed door een algemeen beginsel van proportionaliteit binnen het HOR, van waaruit die regel is ontstaan. In zekere zin kan dit worden gezien als een terugkeer naar de basis van proportionaliteit in de ethiek, waarbij proportionaliteit wordt begrepen als een algemene richtlijn voor militaire commandanten, toepasselijk op alle militaire operaties (inclusief aanvallen) tijdens gewapend conflict, omdat het uiteindelijk excessen voorkomt en dus bijdraagt aan het kweken van duurzame vrede na het gewapend conflict.