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### Proportionality in international humanitarian law

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# Chapter 7

## Chapter 7: Other Standards of Moderation in International Humanitarian Law

### 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,”<sup>1</sup> implies a certain moderation, and requires a balance between what a combatant might *want* to do, and what he is *allowed* to do.<sup>2</sup> 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].”<sup>3</sup>

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

1 Article 35 (1) API.

2 According to Blank and Guiora: “Proportionality’s fundamental premise is that the means and methods of attacking the enemy are not unlimited.” See Blank and Guiora, p. 56.

3 Henderson and Cavanagh, p. 89, referring to the discussion on military necessity in the *Hostages Trial*, p. 646.

prohibition on the use of means of warfare that cause serious injury or unnecessary suffering.<sup>4</sup> 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.<sup>5</sup> 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 “[a]lthough 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.”<sup>6</sup>

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”<sup>7</sup> 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.”<sup>8</sup> 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.”<sup>9</sup>

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?”<sup>10</sup> 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.”<sup>11</sup> 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.

11 Parks 1990, p. 170.

forces as possible. Rather, as was already stipulated in the preamble of the 1868 St Petersburg Declaration,<sup>12</sup> 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.<sup>13</sup>

### 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.<sup>14</sup> 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.

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.<sup>15</sup> 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’.<sup>16</sup> 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.<sup>17</sup> 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.”<sup>18</sup> 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

15 See for example: R.J. Schmitt 1991, <http://www.nytimes.com/1991/09/15/world/us-army-buried-iraqi-soldiers-alive-in-gulf-war.html>, and Sloyan 2003, <http://www.theguardian.com/world/2003/feb/14/iraq.features111>.

16 See BBC News: [http://news.bbc.co.uk/2/shared/spl/hi/middle\\_east/02/iraq\\_events/html/ground\\_war.stm](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.<sup>19</sup>

### 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.<sup>20</sup> 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.<sup>21</sup> 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.”<sup>22</sup> 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.”<sup>23</sup>

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.<sup>24</sup> They were prohibited because there was sufficient information on

19 Olasolo, p. 163.

20 According to the ICJ in the Nuclear Weapons Advisory Opinion, ‘unnecessary suffering’ means “a harm greater than that unavoidable to achieve legitimate military objectives”. Nuclear Weapons Advisory Opinion, p. 226: para 78, p. 257.

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.”<sup>25</sup>

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.”<sup>26</sup> 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.<sup>27</sup> 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.”<sup>28</sup>

Clearly, this rule refers to the restrictive military necessity principle<sup>29</sup> that is deeply rooted in the rules of IHL, and that was already enshrined in the Lieber Code of 1863.<sup>30</sup> 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

25 Doswald-Beck 1996, p. 273.

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.”



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.”<sup>31</sup> 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.<sup>32</sup>

#### 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.<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup> 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,”<sup>37</sup> it must be remembered that the restrictions on the means and methods of warfare that apply to land warfare, apply equally to naval warfare.<sup>38</sup> 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

31 Hostage Case of the American Military Tribunal in Nuremberg in 1948, USA v. List et. al, 11 NMT 757, 1230-1253.

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.

37 Parks 1990, p. 22, note 87.

38 See also Heintschel von Heinegg 2013, p. 479-480.

means of naval warfare which are indiscriminate.<sup>39</sup> 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:

- a. it has the sole purpose of starving the civilian population or denying it other objects essential to its survival;
- 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.<sup>40</sup>

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.<sup>41</sup>

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.”<sup>42</sup>

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”.<sup>43</sup> 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’.<sup>44</sup> 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).<sup>45</sup>

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.

40 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea, paragraph 102.

41 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea, paragraph 103-104.

42 Buchan, p. 271.

43 On the legality of the naval blockade of Gaza: see Sanger, p. 397-446.

44 For the Palmer Report, see <http://graphics8.nytimes.com/packages/pdf/world/Palmer-Committee-Final-report.pdf>. See also Buchan, p. 270-273.

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.”<sup>46</sup> Aerial blockades are subject to the same proportionality equation as naval blockades.<sup>47</sup>

## 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.<sup>48</sup> 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.<sup>49</sup>

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.<sup>50</sup>

Second, in order for belligerent reprisals to be legal, they need to meet five requirements,<sup>51</sup> including the requirement that reprisals need to be proportional to the initial violation of IHL or the aim it pursues.<sup>52</sup> 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

46 HPCR Manual on air and missile warfare, rule 147.

47 HPCR Manual on air and missile warfare, rules 157-159.

48 Kalshoven and Zegveld 2011, p. 156.

49 For an overview of this debate, see Bilkova, p. 31-65.

50 See article 51 (6) API.

51 See generally Bilkova, pp. 34-35: (1) there has been a previous violation of IHL to which the reprisal is a response; (2) other measures to stop the violation of IHL have remained unsuccessful and the reprisal is thus a measure of last resort; (3) the reprisals need to be in conformity with the constraints of humanity and morality; (4) the reprisals need to be proportional to the initial violation of IHL or the aim it pursues and (5) the decision to use the reprisal must be taken by a high level of military or civilian authority of the State. See also the Kupreskic Trial Chamber Judgement, paragraph 535: “[reprisals] may be taken only after a decision to this effect has been made at the highest political or military level; in other words they may not be decided by local commanders”

52 See Dinstein 2004, p. 221, Greenwood 1989b, p. 39-48, Mitchell, p. 158-161, Bilkova, p. 34-35, Darcy, pp. 189-196.

discontinued.”<sup>53</sup> 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.<sup>54</sup> On the other hand, the violence of the reprisal does not need to be exactly identical.<sup>55</sup> 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.”<sup>56</sup> 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.<sup>57</sup>

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.<sup>58</sup> 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.”<sup>59</sup> 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.”<sup>60</sup> As a result, the proportionality calculation for belligerent reprisals remains always an assessment “on a very crude scale.”<sup>61</sup>

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.

57 Greenwood 1989a, p. 282.

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 Kalshoven 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.<sup>62</sup> An occupying power is authorised to take measures that enhance its security, such as detaining persons who pose a threat to them<sup>63</sup> or changing the law.<sup>64</sup> 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.<sup>65</sup> 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."<sup>66</sup> 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."<sup>67</sup>

The relevance of the source of the exception becomes clear when the example of the Israeli security fence is assessed.<sup>68</sup> The Supreme Court of Israel dealt with a number of petitions on concrete demarcations on the ground of the security fence.<sup>69</sup> The Court deemed

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 Dinstein 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.<sup>70</sup> 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.<sup>71</sup> 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.”<sup>72</sup>

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”<sup>73</sup> 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.

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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.