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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 Fellmeth¹ 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

1 Fellmeth 2012, pp. 136-141.

2 For more case-studies on the principle of proportionality, see for example Sassòli et al. *How does Law Protect in War*, available on the ICRC website: <https://casebook.icrc.org/casebook/doc/glossary/proportionality-glossary.htm>.

3 See Krupiy, p. 5, and Fellmeth 2012, p. 131.

4 Fellmeth 2012, pp. 131-133.

5 Sassòli 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

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 proportionality rule “leaves all but the most extreme and uncontested 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/stanag/aapoo6/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 Republic of Yugoslavia (ICTY OTP Kosovo report), available online: <http://www.icty.org/x/file/Press/natoo61300.pdf>.

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”.”²⁴

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.²⁵ 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.²⁶ 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)).²⁷ 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 Saemaetul. 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

24 Chilcot Report, para 41 on page 179.

25 See the ICC Prosecutor Report on Korea Incidents: Situation in the Republic of Korea, Article 5 Report (ICC Korea Report), <https://www.icc-cpi.int/iccdocs/otp/SAS-KOR-Article-5-Public-Report-ENG-05Jun2014.pdf>

26 ICC Korea Report, p. 3

27 ICC Korea Report, p. 12.

*Yeonpyeong 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 Yeonpyeong 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 Yönp’yöng 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 Yönp’yöng Island from two bases, Kaemöri, on the DPRK coast, and Mu Island, which are only about 12–13km from Yönp’yöng 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 Kaemöri and Mu Island; 60 shells hit Yönp’yöng 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 Yönp’yöng Island also malfunctioned and it took thirteen minutes to return fire. The KPA had deployed MLRS vehicles to Kaemöri 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 Kaemöri. The slow response enabled the KPA to fire another twenty shells from 3:12 to 3:29; all twenty hit Yönp’yöng 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 Kaemöri 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.

29 International Crisis Group, North Korea: The Risks of War in the Yellow Sea, Asia Report N°198 – 23 December 2010 (ICG report), accessed at <http://www.crisisgroup.org/en/regions/asia/north-east-asia/north-korea/198-north-korea-the-risks-of-war-in-the-yellow-sea.aspx>, p. 48.

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: “[a]lthough 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.”³³ 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).”³⁴

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.”³⁵ 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.”³⁶ 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:

considerable property damage”. See <http://english.yonhapnews.co.kr/national/2010/12/02/83/0301000000AEN20101202009100315F.HTML?2181af00>.

33 ICC Korea Report, pp. 24-25.

34 ICC Korea Report, p. 25.

35 ICC Korea Report, p. 21.

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. (...) [T]he 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)”³⁷

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,³⁸ 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.”³⁹ 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

37 ICC Korea Report, p. 22 (footnote omitted).

38 ICG Report p. 1.

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.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.”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.”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.”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

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40 ICC Korea Report, p. 23 (footnote omitted).

41 ICC Korea Report, p. 23.

42 ICC Korea Report, p. 24.

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

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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.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. In 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,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.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.⁴⁸ The Old Bridge was destroyed by a tank of the Bosnian Croat forces (HVO) that fired at it "all day long"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."⁵⁰ The Kamenica bridge was destroyed just days after the

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 Bartels 2013, pp. 285-286 (footnotes omitted).

46 Petrovic, p. 265.

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/>

48 ICTY Trial Chamber, Prlic et al., Judgement, Part III, para 1583.

49 ICTY Trial Chamber, Prlic et al., Judgement, Part III, para 1581.

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.⁵⁶ 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.⁵⁷

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.”⁵⁸ 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”⁵⁹, 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.”⁶⁰ 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”.⁶¹

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.⁶² 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.⁶³

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 room⁶⁴ 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.⁶⁵

12.3.2 The Attack on Milan Martić

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.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.”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.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.”⁶⁹

64 See also Lederman on the Just Security blog: <https://www.justsecurity.org/31281/legality-striking-isils-oil-facilities-cash-stockpiles/>.

65 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.”

66 See for example Blank 2012, Bartels 2013, and Ariav.

67 ICTY Trial Chamber, Gotovina et al., para 1910, p. 966-967.

68 Ariav, p. 343.

69 ICTY Trial Chamber, para 1910, p. 967.

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.⁷⁰ 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.⁷¹

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(2) 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."⁷² However, any reference to precautionary measures taken by the attackers is missing in the analysis of the ICTY.⁷³

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."⁷⁴ 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."⁷⁵ 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.⁷⁶ 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"⁷⁷ 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.⁷⁸

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.⁷⁹

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:

80 See also Shamash, p. 138.

81 ICTY OTP Kosovo report, p. 24.

82 ICTY OTP Kosovo report, p. 25. Amnesty International claims that 16 civilians lost their lives. See Amnesty International Report, “Collateral Damage or Unlawful Killings?”, p. 26.

83 ICTY OTP Kosovo report, p. 26.

“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).”⁸⁴

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.⁸⁵

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.⁸⁶ 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.⁸⁷

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.

85 ICTY OTP Kosovo report, p. 26-27.

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 2002.⁸⁸ Salah Shehadeh was “one of [Hamas’] senior leaders and Head of its Operational Branch”⁸⁹ 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.”⁹⁰ 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 2011.⁹¹ 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.”⁹² 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.⁹³ The task of the SIC was to “examine the justification

88 <http://www.theguardian.com/world/2002/jul/23/israel>

89 Salah Shehadeh-Special Investigatory Commission, Findings, available online: https://mfa.gov.il/MFA/AboutIsrael/State/Law/Pages/Salah_Shehadeh-Special_Investigatory_Commission_27-Feb-2011.aspx (hereinafter: SIC Report), para 6.

90 See The Supreme Court in Jerusalem Sitting as the High Court of Justice, Petition 8794/03 submitted by Yoav Hass, Ruling on 23 December 2008, para 11, available at http://www.geneva-academy.ch/RULAC/pdf_state/HJC-decision-8794-03-1-.pdf

91 http://www.mfa.gov.il/mfa/aboutisrael/state/law/pages/salah_shehadeh-special_investigatory_commission_27-feb-2011.aspx, see also <http://www.jpost.com/National-News/Deaths-in-2002-Shehadeh-killing-came-from-faulty-intel> and <http://www.haaretz.com/israel-news/israel-s-2002-hit-of-hamas-leader-was-justified-despite-civilian-casualties-1.346067>. See also Weill, pp. 624-627.

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”⁹⁴

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.”⁹⁵ 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 intelligence information which was before the decision-makers.”⁹⁶

The conclusion of the SIC is that “[t]he decision-makers foresaw proportionate harm to uninvolved civilians.”⁹⁷ 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

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94 SIC Report, para 3.

95 SIC Report, para 10.

96 SIC Report, para 11-12.

97 SIC Report, para 14.

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.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, Niv⁹⁹ 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.”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.”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.”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

98 Cassese 2006, <http://ccrjustice.org/sites/default/files/assets/files/Professor%20Cassese%20declaration.pdf>

99 Niv, see <https://sites.google.com/site/almahl2010en/opeds/the-disproportion-in-the-shehadeh-commission-s-proportionality-test>.

100 See Niv.

101 See Niv.

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.¹⁰³ 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".¹⁰⁴

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"¹⁰⁵. 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"¹⁰⁶ 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

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.¹⁰⁷ 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.¹⁰⁸ 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.¹⁰⁹ 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.”¹¹⁰

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.

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107 Chilcot Report, para 57, on page 182.

108 Chilcot Report, para 59, on page 182.

109 Human Rights Watch reports that seventeen civilians died as a result of the attack. HRW, *Off Target*, p. 30.

110 HRW, *Off Target*, p. 32.

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.¹¹¹

The attack on the Kunduz fuel trucks was investigated by the United Nations Assistance Mission in Afghanistan (UNAMA), the German Parliament¹¹² and the NATO-led International Security Assistance Force (ISAF).¹¹³ 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.”¹¹⁴ Another commentator held that the case proved the “lack of definite criteria by which to evaluate the proportionality of an attack”¹¹⁵.

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

111 Exact numbers are unknown, however the estimates range between 40 and 140 individuals, including ‘many’ civilians. See Von Der Groeben, p. 473.

112 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>.

113 Henn, p. 623.

114 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=nexiUdlm568>

115 Andresen, p. 25.

sand bank.”¹¹⁶ 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.¹¹⁷

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.”¹¹⁸

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.¹¹⁹

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 and 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."¹²⁰ 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 arguments¹²¹:

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"¹²², 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 an 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.

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

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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'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'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.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.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 Bahglan 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

124 Zimmermann, p. 35: "...er kann es nicht mit hundertprozentiger Sicherheit sagen"

125 Zimmermann, p. 35: "Das Risiko, unbeteiligte Frauen und Kinder zu treffen, ist mir zu gross"

126 Zimmermann, p. 36: "Warum nicht, Herr Hauptmann? Sollen lieber wir sterben?"

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 Martić 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.