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Chapter 13

Chapter 13: Assessing Proportionality

“Le principe de proportionnalité occupe donc un place enviable en droit international humanitaire et sous-tend l’ensemble du droit des conflict armés. On peut toutefois se demander si cette présence affirmée n’est pas précisément trop idéale pour être efficace! Ne serait-il pas paradoxal que l’une des branches du droit international où ce principe est le plus nettement affirmé soit également celle où sa mise en œuvre soit l’une des plus difficiles?”¹

13.1 Introduction

Having established the place of the proportionality assessment in the targeting process, as well as its place in the legal framework applicable to that process, the attention turned to the analysis of the components of which the IHL proportionality rule exists. In the previous chapter, a number of factual situations is analysed in order to illustrate how the IHL proportionality rule was, or was not, applied in practice.

This chapter aims to formulate guidance for conducting a proportionality assessment of a planned attack. This chapter therefore turns to a further analysis of how the IHL rule on proportionality must be applied. To this end, Section 13.2 discusses whether the factors of which the assessment consists, can be meaningfully balanced, or must be seen as inherently incomparable. Section 13.3 discusses the question of whether an objective application of the proportionality rule is possible and measures parties to a conflict may take to improve the objective application of the IHL proportionality rule are identified. Section 13.4 assesses whether the term ‘reasonable military commander’ must be understood to constitute the correct yardstick for applying the IHL proportionality rule. Section 13.5 builds on this by seeking to provide guidance for military commanders that may assist them in assessing proportionality by providing a preliminary analysis of the question of how the term ‘excessive’ must be understood.

13.2 Are the Components of the IHL Proportionality Rule Comparable?

Military operators and commanders have to take a large number of factors into account and determine the relative value of each factor as precise as is feasible, using all information that is reasonably available to them, before they can decide whether the planned attack is in accordance with the IHL proportionality rule. Some commentators have made the

¹ Philippe, p. 1187: [the principle of proportionality thus plays a central role in international humanitarian law and underpins the system of the law during armed conflict. Isn’t it paradoxical that in the branch of international law in which the principle is most clearly articulated, is also the branch of law where it is one of the most difficult principles to apply?] (translation by the author).

remark that the expected “concrete and direct military advantage” and the “incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof” are incomparable as unequal factors. Olasolo mentioned that the two factors of the proportionality calculation have “hardly anything in common.”² Fenrick notes, “[i]t is much easier to formulate the principle of proportionality in general terms than to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to a particular military objective.”³ Be that as it may, the IHL proportionality rule nonetheless requires the commander to perform an analysis of the underlying factors, to make an assessment of the two sides of the equation and finally to decide whether the expected collateral damage is excessive compared to the anticipated military gain. Furthermore, there is a legal obligation in the principle of proportionality, based on the obligation to protect civilians as much as possible, to assess the correct value of those components that can be objectively determined.⁴ Therefore, pointing to the fact that the factors are dissimilar, is at times correct but never very helpful.

It is clear that the proportionality assessment is not only comprised of quantitative factors, but qualitative factors also play a role. For example, the military advantage of killing three ordinary foot soldiers must be deemed to be much lower than an attack the expected military advantage of which is that the three most important commanders of a non-state armed group will be killed. Similarly for collateral damage, the destruction of one civilian building may be minor collateral damage if it is a normally abandoned shepherds-shed in a rural area, than if the building is a school that is normally used for educating the local youth, or an important museum. Therefore, incommensurate factors may perhaps only in exceptional cases be compared in a quantitative sense, but they certainly can in a qualitative sense. A mathematical assessment may be possible only in exceptional cases. For example, when a planned attack will destroy a military objective where one hundred enemy combatants are present and the attack is expected to cause the death of only two civilians. But usually, the expected military advantage and collateral damage remain dissimilar in nature, for example, when the expected destruction of vital civilian infrastructure needs to be compared to the destruction of a number of enemy tanks that block the advancement of the attacking forces. Comparing dissimilar factors is however not unique to IHL proportionality. As has been noted in Part III, different manifestations of the proportionality principle are found in many branches of international law, as well as in national law. In each different field, it is used to strike a certain balance. Mostly, the law requires to balance between rather different things. In fact, almost every proportionality equation that is found in international law is a matter of comparing unequal entities. It is therefore submitted that different factors can certainly be compared, it just depends on the question one is asking.

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2 Olasolo, p. 158.

3 Fenrick 2000, p. 58.

4 This obligation is based on article 51 (1) API, article 57 (1) API and article 57 (2) (ii) API.

Coming back to the IHL proportionality rule, it may be relevant to assess whether the quantitative and qualitative factors in the IHL equation result in an objective test of excessiveness. The next section analyses this issue.

13.3 The Search for an Objective IHL Proportionality Rule

This section clarifies whether balancing the quantitative and qualitative factors in the IHL proportionality equation result in an objective test of excessiveness, and if not, whether there would be a need to restrict the subjectivity of the application of the proportionality rule. Furthermore, this section addresses which measures may be taken to improve the objectivity of the proportionality rule. In essence, these measures do not relate to the rule itself, but to its application, and these measures may be expected to assist in putting the IHL proportionality rule into practice.

Many authors have commented on the subjectivity of the IHL proportionality rule.⁵ For example, Blix stated that the line between permissible and excessive collateral civilian damage “necessarily contains a large subjective element.”⁶ Similarly, Oeter noted that “[o]bjective standards for the appraisal and balancing of expected collateral damage and intended military advantage are virtually non-existent.”⁷ The experts who drafted the HPCR Manual on Air and missile warfare, however, view the IHL proportionality rule as “objective in that the expectations must be reasonable.”⁸

One could ask why one would want to search for an objective rule of proportionality and what it means for a rule to be ‘objective’. According to one dictionary, ‘objective’ means “not influenced by personal feelings or opinions; unbiased or fair.”⁹ The term ‘objective’ is used here as to mean that the outcome of an analysis is not only dependent on the personal ideas of the individual who conducts the proportionality assessment, but that the law speaks for itself, and anybody applying the rule would come to the same outcome in the same situation. One may argue that only if that is the case, the rule is clear enough to function as a legal rule, and sufficiently precise to be applied by the professionals who are trusted with the responsibility to decide on life or death of civilians who happen to be in the vicinity of military objectives. As such, an objective rule would exist if the balance would consist only of quantitative factors that may be measured against a set metric yardstick. An example of such a rule would be if it read that that an attack is always disproportionate if it is expected to kill five civilians more than it is expected to kill enemy soldiers. Thus, if the planned attack

5 Sloane labeled the standard of proportionality as a “singularly subjective and indeterminate legal standard”. See Sloane, pp. 301–302. See also Guisández Gómez, p. 358: “Because of the degree of subjectivity involved, this principle is considered as the Achilles’ heel of the law of war.”, Sassòli 2005, p. 204.

6 Blix, p. 148.

7 Oeter 2013, p. 197.

8 HPCR Manual on air and missile warfare, Commentary, p. 97. See also Gardam 1993, p. 407.

9 Oxford Advanced Learners Dictionary, 1989, p. 849.

is expected to affect no civilian objects, but it is expected to kill ten civilians and only three enemy soldiers, and there is no other direct and concrete military advantage attached to killing the three soldiers, the planned attack is illegal in this example. Unfortunately, the IHL proportionality rule does not operate as objectively as the rule that was just introduced, primarily because there is no mathematically quantifiable yardstick applicable as in the fictive interpretation of the rule in the example. Depending on who the three enemy soldiers are, the value of killing these three soldiers could be non-excessive when compared to the expected collateral damage of killing ten civilians. Therefore, even if the IHL proportionality rule would include a mathematically quantifiable yardstick (which it does not), the rule would still not be fully objective because the personal ideas of the individual who conducts the proportionality assessment play a role in assessing the value of the factors that need to be balanced.

Nonetheless, it would be of great assistance to military commanders when as many factors as possible are assessed in as objective terms as possible, before the IHL proportionality assessment is conducted. The next section assesses why this is the case.

13.3.1 The Passive and Active Protection Rationales for an Objective Proportionality Rule

A first and obvious ground why the rule on proportionality should be objective, may be called the 'passive protection rationale'. This entails that the rule aims to protect the civilian population by prohibiting excessive casualties among civilians who refrain from taking a direct part in the hostilities. This protection of those who do not, or no longer, participate in the hostilities is one of the major underlying rationales of IHL in general, and the IHL proportionality rule in particular. It is submitted that in order to obtain that purpose, the protection of these civilians should not be dependent on the subjective perspective of the military commander, but on objective parameters.

A second reason why an objective rule must be preferred over a subjective rule, is that of the 'active protection rationale'. This means that with the responsibilities of the members of the armed forces to lawfully attack military objectives while also causing civilian casualties and destroying civilian objects, these professionals also run the risk of prosecution for a violation of IHL. The advantage of a more objective IHL proportionality rule is that it would provide military commanders with more clarity and guidance on how to implement the rule. Objective parameters would allow them to make decisions that are more predictable, and decrease their chances to end up being prosecuted for violating the proportionality rule. The active protection rationale thus requires the rule to be sufficiently objective for the members of armed force to be protected from prosecution, since the parameters of the rule are clear enough to be applied in a more or less predictable manner.¹⁰ In addition to the

10 See for example Olasolo, p. 162: "Logically, the more intense the pressure of the media and public opinion concerning the adequate application of the proportionality rule (and the more numerous the national and international investigations

active protection rationale for individuals, this applies similarly to States. Wright notes in this context that “[b]ecause an attack with excessive collateral damage engages both [S]tate and individual responsibility, there must be an objective quality to the assessment.”¹¹

As such, the proportionality rule enhances the protection of civilians in armed conflict and similarly assists the commanders to remain within the limits to warfare set by IHL. There is, however, another side to this coin. One may argue that if the States that codified the proportionality rule in Additional Protocol I would have wanted a more precise or objective rule, they would have come up with one. Professor Frits Kalshoven was one of the persons present during the drafting of the part of API in which the proportionality rule is laid down. He wrote: “weighing the expected collateral damage against the anticipated military advantage will never be a job for one’s pocket calculator.”¹² In doctrine, it is widely acknowledged that the proportionality principle is a very subjective rule.¹³ This would decrease the relevance of the active protection rationale and raises the question whether this rule is of any use to military commanders at all. It may - and has - however be argued that a subjective or imprecise rule provides the members of the military with more leeway and flexibility in targeting, than a very precise rule would. Given this latitude for military commanders, it seems difficult to successfully prosecute military commanders for violating the proportionality rule.¹⁴ There are indeed very few cases in which a violation of the IHL proportionality rule has been established. To shield their military commanders from prosecution for causing collateral damage except in the most clear cases may have been a desired outcome for the States that negotiated the IHL proportionality rule as it stands today.

It is submitted that in the circumstances where the IHL rule on proportionality must be applied, no rule can be formulated that covers every possible scenario in which an attack is planned. The question thus remains how objective the proportionality rule can be formulated in the first place. It is furthermore submitted that an objective rule does not necessarily mean that the outcome of the rule must be measurable in mathematical terms. Objectivity can also follow from relative factors. For example: the IHL proportionality rule can assist in finding when an expected outcome of an attack must be deemed to be more proportionate than another outcome would. Thus, a commander who assesses these two different outcomes, is able to decide which outcome is less and which is more excessive in terms of the balance between expected collateral damage and military advantage. Therefore, it follows that even if the components of the proportionality equation perhaps cannot be determined in a measurable way, they can still be compared and the rule is therefore useful.

and prosecutions of serious breaches of the proportionality rule), the greater the motivation for military commanders to take the expected incidental civilian damage into consideration in the targeting process and during the preparation and execution of attacks.”

¹¹ Wright, p. 840.

¹² Kalshoven 1992, p. 44.

¹³ See for example Dinstein 2008, p. 5: “The difficulty is that military advantage and civilian casualties are like the metaphorical apples and oranges: a comparison between them is an art, not science.”

¹⁴ Bartels 2013, pp. 271-315.

In order to be able to decide whether the collateral damage of an attack is inside the limits set by the IHL proportionality rule, it is necessary to assess the subjective or objective character of the different factors that need to be taken into account in the application of this rule, because it impacts on the subsequent question whether the IHL proportionality rule as a whole can be seen as either an objective or a subjective rule.

13.3.2 Are the Factors in the IHL Proportionality Rule Objective or Subjective?

The IHL proportionality rule is comprised of many different factors, as was analysed in depth in Chapter 11. As follows from the debates among academics, a number of the aspects of the proportionality analysis could profit from further clarification in order to improve the protection the civilian population may enjoy from this important rule as well as assist commanders in applying the rule. Unfortunately, the conclusion is that the exact legal meaning of many of these factors remains unsettled and subject to heated scholarly debate. Furthermore, the value attached to these factors in a proportionality assessment is dependent on the actual circumstances and context of the planned attack.

First, there is the fact that only military objectives may be attacked. Although IHL provides for a definition of a military objective, that definition itself consists of a number of subjective factors.¹⁵ Secondly, once a military objective has been identified, the next question in the context of the IHL proportionality rule is what the ‘concrete and direct military advantage’ is that would follow from attacking that military objective. In order to justify the loss of life and limb of civilians and damage to their belongings, the military advantage that justifies that loss must be sufficiently (1) concrete, (2) direct and (3) military, which is a more elaborate test than that which is necessary to identify a military objective. The question whether the military advantage may be expected to be ‘concrete and direct’ depends on many factors, such as the information available to the attacking commander and the importance of the target in the overall campaign. Thus, even if the military advantage may be determined easily in a quantitative sense (such as the number of enemies expected to be killed or injured or the expected number of enemy tanks destroyed), the military advantage that these effects have on the operation still depends on other factors, such as the proximity to the zone of hostilities and the danger they pose to own troops. The concrete and direct anticipated military advantage that will result from a planned attack will therefore be too dependent on its context to characterise it as completely objective. A qualitative analysis is always required to compare different outcomes that are expected from different possible modes of attack and as a result the military advantage expected from an attack will always remain a subjective factor.

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15 For example, whether an object is a legitimate military objective based on its location, like a bridge or a certain hill, depends primarily on the question of whether given the circumstances ruling at the time, that object plays a role in the hostilities. Only when that role would render a military advantage, the object in question may be targeted.

The factors that play a role on the other side of the balance include the expected injury or death to civilians and damage to civilian objects. The protection of civilians depends on the question of whether the civilians refrain from participating directly in the hostilities. This too is a difficult question, depending on a number of subjective parameters. But for the purpose of assessing the proportionality of a planned attack, it is crucial to establish the civilian status and protection of persons who are expected to be affected by the planned attack. After all, that decides on which side of the proportionality equation these individuals must be counted. For civilian objects, the difficulty is that any civilian object can, and often is, also used for military purposes. That means that it can be unclear whether the destruction of an object must count as collateral damage or as part of the military advantage that follows from an attack. Nonetheless, for technologically advanced militaries, it will be possible to actually place a quantitative number to the civilians that are expected to be affected by a planned attack, using sophisticated CDE methodology. In addition, it will in some cases be possible to put a monetary value on the expected damage to civilian objects. Therefore, it is submitted that it is possible, at least in theory, to find an objective value for the expected civilian damage.

Nonetheless, when the foreseeability of reverberating effects on the collateral damage for civilians must be assessed, the analysis turns into a qualitative analysis, which will consequently be assessed differently by different military commanders.¹⁶ Therefore, the expected collateral damage for larger operations may be expected to have a subjective character. This is the result of the fact that the temporal aspect of both the anticipated military advantageous outcome of the attack and the civilian damage that it is expected to cause, are undefined. Although it is a given that the anticipated military advantage must be 'direct', it is questionable whether effects from the attack that will become military advantageous in a later stage of the operation, may also be given weight in the equation. The test whether the effects are foreseeable is only satisfactory up to a certain point in this respect. Direct effects of wounds may certainly be counted as collateral damage, but the question may be asked whether effects on the health (including mental harm) of the civilian population that may only be expected to materialise a number of years later, must also be taken into account as being foreseeable. In this respect, one may also think of an attack using weapons that could cause serious diseases after a certain period, or attacking water facilities that will perhaps not directly lead to serious consequences for the civilian population, but that only after a longer period because of the decrease of the hygienic situation, depending on how the conflict develops.

16 See ICRC Commentary on AP I, Sandoz et al. para. 2208: "this system [talking of 57(2)(a)(iii)] is based to some extent on a subjective evaluation"; Bothe et al., para 2.6.2 on Art. 51: "the judgment must be subjective", Wright, p. 839, Oeter 2013, p. 197.

Henderson¹⁷ and Wright claim that the IHL proportionality test of excessiveness is ‘hybrid’, because it is an objective (‘reasonable’) assessment of the subjective factors of military advantage and civilian damage.¹⁸ The subjective element of the proportionality assessment, according to Henderson and Wright, is thus the evaluation in good faith of the factors military advantage and civilian damage. The objective part follows, from the “resulting balancing [to be] objectively reasonable in ensuring that the civilian deaths, injury, or property destruction are not excessive.”¹⁹ In most scenarios, the value of both the expected military advantage and the expected collateral damage is not clear-cut and must be characterised as least as partly subjective.

It is thus submitted that the IHL proportionality assessment remains a partly subjective standard, although in some instances, parts of the components of the IHL proportionality assessment may be valued objectively. Taken in its totality, the IHL proportionality is thus both subjective and objective, and thus a hybrid assessment. However, the objectivity may be determined to a certain extent by labelling the standard as “objective but qualified”²⁰ Then it seems that the question of whether an objective proportionality assessment can be accomplished is moot, in spite of the preference for an objective test for reasons of the passive and active protection rationale. Instead, it is submitted that every attempt to phrase the IHL proportionality assessment in purely objective terms at some point ends up in the assertion that it must be made *reasonably*. Nonetheless, the qualification of those that need to conduct the proportionality assessment as a reasonable military commander, must be made as objective as possible. Therefore, the next section assesses in which ways the objectivity of the IHL proportionality assessment can be enhanced.

13.3.4 Measures to Limit the Subjective Application of the IHL Proportionality Rule

It is submitted that even if it would be impossible to achieve a fully objective proportionality rule in IHL, there is nonetheless a number of measures that may be taken to further objectify the IHL proportionality rule. These measures are to a certain extent procedural in nature.

The first procedural measure that can be taken to enhance the trust that can be given to the military commander, is through maximising the efforts in providing them with proper training in IHL in general. A thorough knowledge of the interpretation of the factors that need to be taken into account in the proportionality analysis, as discussed in Chapter 11, will increase the objectivity of the proportionality assessment of an actual attack during armed

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17 There are both subjective and objective elements in the proportionality calculation, but “the assessment is not capable of precise analysis or determination by a mathematical equation.” See Henderson, p. 222.

18 Wright, p. 846 and Henderson, p. 223.

19 Wright, p. 847.

20 See Henderson and Reece, p. 6: “As the proportionality decision requires an assessment, it is imperative to understand whether the assessment is subjective (e.g. “where a person believes”), objective but unqualified (e.g. “where a person reasonably believes”), or objective but qualified (e.g. where a doctor reasonably believes)”.

conflict. It must however be acknowledged that setting high standards for the training of military commanders is not the whole story, because some targeting decisions are often made on a much lower level. Therefore, group-commanders and even foot-soldiers must also, as a minimum, be trained in the principles and basic rules of IHL.

Connected to the measure of improving the knowledge on how the factors of the proportionality assessment must be understood, is conducting training in peacetime through different exercise scenarios during which proportionality assessments must be made. The experience that results from these proportionality assessments made in a training environment is likely to increase the ‘reasonableness’ of a proportionality analysis that needs to be conducted during actual armed conflict. This is the result of an enhanced familiarity with the process of balancing the different components and of discussions with other military commanders and staff officers that is possible in the context of military exercises. Thus, the outcomes of proportionality assessments will become more predictable – and thus more objective.

Furthermore, armed forces may achieve a higher degree of objectivity in the application of the proportionality principle by institutionalising their targeting procedures, such as those that have been analysed in Chapter 10. The purpose of these procedures is to ensure that the targeting process takes all relevant factors into account and includes a genuine effort of minimising collateral damage by taking precautionary measures and to ensure that the proportionality of the attack is assessed before the decision is taken to launch, postpone or cancel a planned attack.

Fourth, the objectivity of the process may be enhanced by ensuring that the military commander has access to well-trained (military) legal advisers.²¹ It is crucial that these legal advisers are aware of the effects of the means and methods that the military commander has at his disposal to execute the attack. It is the job of the legal adviser to provide the military commander with advice on the options the commander has to launch a planned attack or attain a sought military gain within the limits set by the rules of IHL. Wright has argued that in this role, military lawyers are often “the first-line defenders of human rights in combat environments.”²²

Fifth, a more objective IHL proportionality rule can be strived for by using procedures, software and equipment that maximise the correct assessment in advance of the likely effects of certain weapons and certain modes of attack that may be used. In Chapter 10, a description of systems like the Collateral Damage Estimate Methodology was provided. It has been argued that following a check-list may be of assistance here. These types of checklists do exist, and mostly follow the IHL rules as explained in Chapter 10. Many of the procedures the military used for targeting purposes are classified, however, some are available in the

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21 As required by article 82 API.

22 Wright, p. 821. See also generally Newton 2007, and more specifically the ‘Populated Area Targeting Record’ on p. 894.

open domain. An example is the collateral damage sheet or form for Air Force support in urban operations.²³

Sixth, although the IHL proportionality rule is to be applied before an attack, evaluating an attack after it has happened can also be useful for enhancing the objectivity of future attacks. These evaluations could include a permanent procedure of conducting a thorough battle damage assessment after an attack (BDAs).²⁴ It must be noted that BDAs would first and foremost serve to analyse whether the sought military advantage has been attained, or whether an additional attack is necessary. Arguably, however, the knowledge that an attack will be investigated in cases where collateral damage has occurred, will be an incentive for military commanders to assure that they plan attacks in a manner that the outcome will be proportionate. Moreover, the military commander may as a result adopt the practice to better document the considerations that were at the basis of the decision to launch the attack. Obviously, investigating an attack after it has occurred entails that the ex-post investigators have the difficult task to seek to acquire the value of the factors relevant for the proportionality assessment as they were perceived by the military commander ex-ante. Furthermore, presumably, the parties to an armed conflict may not be too enthusiastic about accepting a duty upon their forces to conduct these types of investigations. This applies particularly for less-sophisticated armed forces, and in cases where conducting an ex-post investigation is not feasible.

Another measure is that parties to an armed conflict must conduct in-depth studies into the effects certain weapons have under certain circumstances, through intensive testing of these weapons. This obligation already exists to a certain extent, since States that are parties to API are bound by article 36 API, that proscribes these States to review the legality of new weapons systems. When it is clear what damage will be done by a certain mode of attack using a certain weapon, it is also possible to conduct a more precise collateral damage estimation (CDE), as discussed in Chapter 10. Presumably, this will enhance both the knowledge of the commander about the anticipated military advantage of the attack and the magnitude of the expected civilian collateral damage. When these factors can be determined up to a very detailed level, a more precise – and arguably more objective – proportionality analysis can subsequently be conducted.

23 According to US military doctrine, Battle Damage Assessment (BDA) is part of the Combat Assessment procedure. It aims to “to compare post-execution results with the projected results generated during target development.” See United States, Joint Chiefs of Staff, Joint Publication 3-60, Joint Targeting (13 April 2007), Appendix C, page C-4. Available online: https://www.aclu.org/files/dronefoia/dod/drone_dod_jp3_60.pdf

24 There have been a number of writers who suggested that it should be imperative to permanently assign units the task to conduct ex-post investigations of all attacks that resulted in collateral damage. See for example Reynolds, p. 104-106, who suggests that ‘collateral damage response teams’ should be deployed. Also, Cohen suggests that the proportionality rule should be supplemented by the duty to conduct an ex post review if civilian deaths have resulted. See Cohen 2009, p. 38. This resembles the international human rights law duty to investigate, see generally Margalit.

Other measures that could be taken to strive for a maximum degree of objectivity of the proportionality assessment include efforts to maximise the quality of the sources of intelligence for commanders, and measures that aim at ensuring the mental and physical state of commanders at the point in time they need to decide on the proportionality of a planned attack. In practice, however, these decisions often need to be made under time-pressure in the stressful and chaotic circumstances of hostilities.

Some procedures that are in place in more sophisticated militaries restrain the execution of attacks much more than the proportionality rule could ever do in practice. These procedures are the result of policy, rather than law, and may be put down in certain rules of engagement. A specific example is the requirement that in cases where a certain higher number of collateral casualties is expected, the decision must be taken up the chain of command. Corn describes these measures as ‘civilian casualty benchmarks’. He notes: “higher levels of command establish limits on the maximum number of anticipated civilian casualties a subordinate commander may permissibly risk through a targeting judgment.”²⁵ In these cases where the collateral damage is expected to surpass a certain threshold of magnitude, the decision to launch the attack needs to be taken by a commander in a more senior position. The potential restraining factor contained in this, is that the commander referring the decision up to higher levels of command will consider the planned attack with more precision, and the targeteer will draft the target folder with more care. The reason for this is that the subordinate military officers may be expected to refrain from wasting the valuable time of their superiors with targeting requests of poor quality. Also, in these cases, the decision is made by a more experienced commander who is less emotionally involved with the planned attack, feels less sense of urgency, and has a broader view of how the tactical operation fits into the bigger picture. Furthermore, higher commanders may be assumed to have a larger number of more experienced staff officers and specialists at their disposal, who are able to further refine the analysis of the components of the proportionality assessment of the planned attack. Thus, a more objective outcome of the proportionality assessment may be expected.²⁶ Furthermore, there is another “highly significant benefit of reserving proportionality judgments to higher levels of command, because as the judgment is progressively elevated, the commander entrusted with the judgment will be able to consider a broader range of alternative targeting options.”²⁷

The following section addresses the concept of the ‘reasonable military commander’. After a discussion of the question of whether the ‘reasonable military commander’ constitutes an objective element of the proportionality assessment, the issue is addressed whether the ‘reasonable military commander’ must be seen as the applicable legal standard providing the yardstick for assessing the components of the IHL proportionality rule.

25 Corn 2014, p. 461.

26 Corn calls these types of procedures “a procedural tool to enhance the ultimate substantive proportionality judgment”. See Corn 2014, p. 462.

27 Corn 2014, pp. 463-464.

13.4 The ‘Reasonable Military Commander’

It is concluded above that the military commander, no matter on what level of decision making this military commander is placed, is responsible for the IHL proportionality assessment.²⁸ The question of whether military commanders may be trusted with such a daunting task is therefore not relevant, because it is a truism that anybody who plans, decides upon or executes an attack is responsible for conducting this assessment. But that does not mean that there are no limits to how the responsible military commander must apply the IHL proportionality rule. One of the most important of these limits is reasonableness.

It needs to be reminded in assessing the concept of the reasonable military commander, that this concept has been introduced by the jurisprudence of international criminal tribunals. In that context, the tribunals need to apply, *ex post*, a different yardstick of proportionality than the military decision maker needs to in planning and deciding on future attacks. At first sight, it thus seems to be a valid question whether this concept of the reasonable military commander could potentially add substance to the legal obligations of commanders that are to apply the IHL proportionality rule in practice. However, to reverse the issue: if it is not the reasonable military commander, then how can the person responsible for conducting the IHL proportionality assessment be referred to? Furthermore, as Henderson and Reece note, there are good reasons to use the term reasonable military commander, because “this standard has the advantage of having gained acceptance among practicing lawyers, academics, NGOs and militaries.”²⁹

This section assesses first to what extent the concept of the ‘reasonable military commander’ provides an objective yardstick for assessing excessiveness. Subsequently, remaining subjective factors are identified. Finally, the question is addressed of whether the concept of the ‘reasonable military commander’ constitutes a meaningful yardstick for assessing excessiveness in applying the IHL proportionality rule.

13.4.1 The Objectivity of the Concept of the ‘Reasonable Military Commander’

The concept of the ‘reasonable military commander’ was suggested by the office of the Prosecutor in the ICTY OTP Kosovo Report of 2000. It held that “[a]lthough there will be room for argument in close cases, there will be many cases where *reasonable military commanders* will agree that injury to non-combatants or the damage to civilian objects was

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28 It must be noted that the individual conducting the IHL proportionality assessment is not necessarily a commander in the usual sense of the word, in the sense of being responsible for subordinates in the military chain of command. Nonetheless, the term military commander is used to refer to the person who is responsible for conducting the IHL proportionality assessment.

29 Henderson and Reece, p. 21. See also: Israel Ministry of Foreign Affairs, The 2014 Gaza Conflict (7 July-26 August 2014): Factual and Legal Aspects, Report, May 2015, para 317, p. 181.

clearly disproportionate to the military advantage gained.”³⁰ The ICTY Trial Chamber echoed the relevance of the reasonable commander in addressing the IHL proportionality rule in the *Galic* Case. The Trial Chamber held that “[i]n determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.”³¹ The Trial Chamber thus does not require the person *as such* to be reasonable in the assessment of excessiveness, but whether the military commander is *reasonably well-informed* and whether the available information is *reasonably used*. It may be suggested that these two issues are embedded in the standard concerning causality and foreseeability of the effects of the planned attack and the precautionary obligations rather than in the assessment of whether the persons conducting the assessment of the two sides of the proportionality analysis are reasonable themselves.

According to one dictionary, the term ‘reasonable’ means in this context “in accordance with reason, not absurd.” The term ‘reason’ in that latter context must be understood as “what is right or practical or possible; common sense or judgement”.³² A preparatory background document for an ICRC Expert meeting held in Quebec in June 2016 notes a number of further descriptions found in military manuals describing the terms ‘reasonable’ in connection with a military commander carrying out IHL proportionality assessments. These descriptions basically boil down to the conclusion that the ‘reasonable’ military commander is expected to act in ‘good faith’, ‘rationally’, ‘honestly’ and even ‘objectively’.³³ These different words to describe how military commanders must make proportionality assessments, it is submitted, do not amount to a materially different yardstick. Rather it may be assumed that military commanders conduct their proportionality assessments reasonably. This is because the training and experience of military professionals is aimed at respecting the principles and basic rules of IHL, among which is the IHL proportionality rule. The respect for this is “a matter of sound military judgement [and the IHL proportionality rule serves] not so much to limit military effectiveness as to provide legal reinforcement for professional military values.”³⁴ Thus, it is submitted, the adjective ‘reasonable’ in the term reasonable military commander may be understood to be satisfied when the subjective features of military commanders have been sufficiently limited. It has been submitted above in Section 13.3.4 that the subjective features of military commanders can be limited to a certain extent by assuring that a number of procedural measures have been taken.

30 ICTY OTP Kosovo report, p. 19 (emphasis added).

31 ICTY, *Prosecutor v. Stanislav Galic*, Trial Chamber, Judgement, 30 November 2003, para 58.

32 Oxford Advanced Learners Dictionary, p. 1046.

33 ICRC Background Document, p. 21-22, on file with the author. See also ICRC, the Report of the International Expert Meeting 22-23 June 2016, Quebec, *The Principle of Proportionality in the Rules Governing the Conduct of Hostilities under International Humanitarian Law*, drafted by Laurent Gisel, published in 2018, pp. 57-62.

34 Carnahan, p. 868.

The objectivity of the reasonable military commander may be argued to increase when all the measures that enhance their objectivity have been taken into account. In more concrete terms, this means that the reasonableness is enhanced as long as, for example, it can be proven that the commanders have been well-trained, particularly in IHL. In addition, it can be determined whether the subordinate staff-officers, targeteers, group-commanders and foot-soldiers have also been trained in the principles and basic rules of IHL. This could relatively easily be ascertained by requiring a minimum amount of training hours, or by imposing the members of the military to pass an exam on their respective level of required knowledge. It is furthermore the duty of the leadership of armed forces to ensure that a sufficient level of knowledge and training exists within the different components of the armed forces, including forces consisting of conscripts or reserves. In addition, it can be objectively established whether the military commander has access to well-trained legal (military) advisers. This too, would constitute an objective element in the total calculation. Furthermore, a minimum number of years of military experience in targeting decisions can be required from military commanders. With regard to specific attacks, it can be assured by using checklists whether military commanders have had sufficient access to the information that assists them in determining whether the expected civilian casualties may be excessive.³⁵ If available, this applies equally for the question whether auxiliary means such as CDE methodology have been used to assess the damage planned attacks may cause and predict the expected collateral damage. These systems are often able to provide reliable expectations on the damage the use of certain munitions or fuses may cause, thus enabling commanders to assess the expected collateral damage as accurate as possible. These types of decision support tools, including computer programs that provide calculations for different options for decision makers, are obviously not available in all circumstances and to every level of decision making.

13.4.2 Remaining Subjective Factors for ‘Reasonable Military Commanders’

Even when all procedural measures have been taken, subjective factors remain that influence the outcome of the proportionality analysis. Some of these remaining subjective factors seem inherent to the judgment of human beings. For example, when the decision makers and their staff have already put considerable effort in determining the factors of a planned attack, it may perhaps be understandable that they develop the preference to go ahead with the attack. This psychological effect may arguably entail that slightly more emphasis is put on the importance of the military advantage sought by the attack than is put on preventing harm to occur to the civilian population.

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35 Checklists may assist in following the right sequence of assessment that lead to the commander being able to make an informed decision and in making sure that no factors are accidentally left out of the assessment because the military commander forgot to take it into account. Obviously, no matrix or checklist could be all-compassing, because there are indefinite factors, with different levels of certainty and expectations.

Another subjective element that remains is the assessment military commanders will make of the value of human life. The ICTY OTP Prosecutor Report notes that with regard to the excessiveness of a planned attack that the answer different military commanders will give “will differ depending on the background and values of the decision-maker.”³⁶ Some commentators have expressed their general scepticism towards military commanders, because they expect that “the military will naturally tend to overstate the importance of the military advantage part of the equation.”³⁷ This statement is not new. The commentary to the 1956 Red Cross Draft Rules includes a statement warning that the importance of the expected military advantage should not be overstated. Instead, it must be assessed in the light of experience, which often shows how much the obtained result is inferior to the one that was anticipated.³⁸ During the deliberations that lead to the adoption of the 1977 Additional Protocols, a Swedish representative is reported to have stated that “a man responsible for an attack against a military object, will sometimes say himself that the suffering that may be caused - as far as he can judge - to the civilian population is not disproportionate to the military advantage he gains by destroying the object, but the people who will suffer by the attack will find the suffering too grave and the military advantage less important. *Who is right?*”³⁹ According to one author, this tendency particularly exists when one of the parties is militarily superior.⁴⁰ During Operation Allied Force it was reported with regret by one author that “the extensive process of target review combined with a preoccupation to avoid collateral damage resulted in cancelled targets, delayed engagements, failure to produce enough targets to adequately mass, and limited strikes producing inconsequential effects.”⁴¹ The missing factor here seems to be the human factor. Instead of the apparent disappointment of the author that there may have been missed opportunities, there must also have been civilian lives saved. Nonetheless, it may be that political pressure to engage a larger number of targets, or operational considerations to apply ‘overwhelming’ force during an overall attack may lead to commanders dedicating less attention to their obligation to minimise civilian casualties and damage, leading to an approach in which the civilian side of the proportionality assessment is undervalued.

36 ICTY OTP Kosovo report, para 50.

37 Sassòli and Cameron, p. 64.

38 International Review of the Red Cross, 1956, p. 702: “L’avantage militaire ne doit pas se voir attribuer une valeur excessive; il doit, au contraire, être apprécié à la lumière de l’expérience, qui montre souvent combien le résultat obtenu est inférieur à celui qui avait été escompté”

39 Mr. I. Mueller, see Final Record concerning the Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War, p. 68. See https://www.loc.gov/frd/Military_Law/pdf/RC_Final-record-rules-limitation.pdf

40 McPherson, p. 94: “Our tendency when we are in a position of considerable advantage will be to identify with the possible benefits to ourselves and others for whom we have special concern and to dissociate from the costs to persons likely to bear the burdens of use of force.”

41 Reynolds, p. 87.

A further complication for finding an objective standard of reasonableness may be that commanders from different cultures may attach different values to the components of the IHL proportionality rule.⁴² It seems furthermore to be a common feature of mankind to be, or become, more or less indifferent to the suffering of the adversary. Yet, the IHL proportionality rule serves to protect all civilians equally. For that reason, a number of writers has suggested that this perception may be prevented by including in the proportionality equation, a 'reversed assumption' whether the commander would consider the attack lawful if the expected collateral damage would consist of civilians of his own side. Gomez writes that the subjective character of the IHL proportionality rule is "the Achilles' heel of the law of war. The rule could perhaps be seen in more practical terms if it stated that an aerial attack expected to cause civilian casualties would be acceptable should it have the same degree of approval as a similar action taking place over a part of the country's own territory under enemy occupation, in which case the civilian casualties would be compatriots."⁴³ In this rather simple way, the danger may be avoided that the lives of civilians of the adversary are seen as less valuable than the lives of 'own' civilians would be.⁴⁴ This, it is submitted, may be a tool for military commanders to apply in order to enhance the quality of their decisions.

In the end, it must be stressed that making decisions with regard to the IHL proportionality assessment must be done by military commanders, but the outcome of such assessments must not only be acceptable in *military* terms. After all, the military is part of the civil society as a whole and must not only take military considerations into account when assessing the excessiveness of expected collateral damage. As Bothe put it: "[i]n democratic systems, the values pursued by the military and those society at large cannot be far apart. The value system on the basis of which the military is operating has to conform to that of the civil society, not *vice versa*."⁴⁵

13.4.3 Sub-Conclusion

Military commanders are responsible for the application of the IHL proportionality rule in practice, but their margin of appreciation is not unlimited. It is suggested that the IHL proportionality calculation is a subjective standard, although some of its components can and must be objectivised as far as possible in the process of the proportionality calculation. Nonetheless, "[e]ven when the comparison is between the number of military casualties

42 Reynolds, p. 71: "[t]he value of life ranges among individuals and cultures, making a value determination of civilian casualties compared to a military objective highly variable. (...) A military commander from a depressed, under-developed state with little access to the resources necessary to make the most prudent command decisions cannot be held to the same standard of reasonableness as commanders from highly advanced military states with extensive resources, information, technology, and high situational awareness of the battle space."

43 Guisández Gómez 1998, p. 358.

44 See also Krüger-Sprengel, p. 192-193 and Henderson, p. 229.

45 Bothe 2001, p. 535.

and civilian casualties, the comparison is still not between human lives and human lives⁴⁶ because the military advantage of killing different people varies. There is no other option than to “rely on judgement, although it must be judgement influenced by a reasonable understanding of what will be generally acceptable and understood in humanitarian terms.”⁴⁷ Military commanders must act in good faith, but “persons acting in good faith may make mistakes.”⁴⁸ Kalshoven and Zegveld note that it is decisive “whether a normally alert attacker who is reasonably well-informed and who, moreover, makes reasonable use of the available information, could have expected the excessive damage among the civilian population.”⁴⁹ However, different military commanders may come to different conclusions when faced with identical circumstances.⁵⁰ This alone suggests that there is no objective yardstick in the phrase ‘reasonable military commander’ other than that the rule is violated in cases where the relationship between the two is such that it was unreasonable for military commanders to have proceeded with the attack.

The references to reasonableness that were made above, are not included in the text of the IHL proportionality rule. Nonetheless, there seems agreement that reasonableness is a key factor in the application of the IHL proportionality rule. This should not come as a surprise, as it was already submitted above in Section 4.3 that “in all (...) fields of international law, it is necessary that the law be applied reasonably.”⁵¹ Furthermore, it was concluded that reasonableness is used for a clash between unequal interests, which requires a more qualitative assessment. It is submitted that the IHL proportionality rule fits that description. It is therefore submitted that the ‘reasonable military commander’ is not a separate component of the IHL proportionality rule, but instead the manifestation of the general principle of international law of reasonableness. The term reasonable military commander, it is submitted, does not provide guidance for implementing the IHL proportionality rule additional to that of the general principles of international law. Moreover, the phrase ‘reasonable military commander’ does not in itself enhance the objectivity of the IHL proportionality rule. However, it is submitted that the measures mentioned above will be of assistance in establishing an *a priori* expectation that military commanders have not acted unreasonably in their assessment of the excessiveness of a planned attack. Procedural measures alone are however insufficient to determine *a priori* the reasonableness of commanders in their targeting decisions, because there is also a material component.⁵² In the field of IHL, as a branch of international law, it is the general principle of reasonableness that provides this obligation for States to ensure that their agents (the reasonable military commander) conduct the IHL proportionality assessment reasonably.

46 Henderson, p. 223.

47 Haines, p. 9.

48 Fenrick 2000, p. 77.

49 Kalshoven and Zegveld, p. 115.

50 See also Henderson, p. 221-224.

51 Barcelona Traction Case, ICJ Reports 1970, paragraph 93.

52 See Section 4.3.

In sum, the concept of the ‘reasonable military commander’ is “the standard against which [the proportionality] decision is to be evaluated is that of a person with all the experience, training, and understanding of military operations which is vested in a ‘reasonable military commander’”⁵³ It can therefore be understood to mean that in the context of the application of the IHL proportionality rule, military commanders need to make a thorough assessment in good faith of all the different components of the rule as well as the circumstances ruling at the time, and take a reasonable decision to launch, postpone or cancel an attack because of their obligation under the IHL proportionality rule.

13.5 What is ‘Excessive’?

Even though it has been established above that the definition of the components of the proportionality equation is subject to extensive debate, to determinate the ratio between the two major components is “the most difficult of all.”⁵⁴ As an example, referring to the same attack, Amnesty International and the ICTY OTP reach a very different conclusion on the question whether the NATO attack on a Serbian television station was proportionate.⁵⁵

If it would be accepted that the ‘reasonable military commander’ does not provide definitive guidance for establishing the excessiveness of a planned attack, further analysis of the term ‘excessive’ is required. The interpretation of this term determines the difference between a lawful attack and an unlawful attack in the IHL proportionality rule. The draft that was drawn up by the ICRC contained the word ‘proportionate’, but after the draft article was discussed in the drafting committee, Frits Kalshoven claims to have proposed to use the word ‘excessive’, which was subsequently accepted.⁵⁶

It is useful to stress that when an attack is planned of which it is expected that a large number of civilian casualties and massive damage to civilian objects will occur, this extensive civilian damage does not necessarily lead to a violation of the IHL proportionality rule. Yet, it is worth exploring the fine line between extensive and excessive collateral damage. This is the subject of Section 13.5.1. Subsequently, the attention turns to the question of whether the standard of excessiveness is drawn in terms of ‘excessiveness’ or ‘clear excessiveness’ (Section 13.5.2). Finally, Section 13.5.3 aims to analyse the test of excessiveness as required by the application of the IHL proportionality rule.

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53 Henderson and Reece, p. 11.

54 Kalshoven & Zegveld, p. 109.

55 See Amnesty International, “Collateral damage or Unlawful Killing? Violations of the Laws of War by NATO during Operation Allied Force”, p. 49: “(...)NATO deliberately attacked a civilian object, killing 16 civilians, for the purpose of disrupting Serbian television broadcasts in the middle of the night for approximately three hours. It is hard to see how this can be consistent with the rule of proportionality.” and the ICTY OTP Kosovo report, para 71. See also Henderson, p. 221. And see previous chapter, Section 12.3.3.

56 As indicated by Frits Kalshoven during a presentation of this author on ‘Controversial issues surrounding the principle of proportionality in international humanitarian law’ at a research meeting of the Kalshoven-Gieskes Forum on International Humanitarian Law at Leiden Law School on 27 November 2012.

13.5.1 Extensive or Excessive?

It seems fair to say on the basis of the various arguments made above that even an attack that is expected to cause ‘extensive’, or ‘massive’ collateral damage may be lawful, provided that an even more significant military advantage is expected to be the result of that attack. Rogers concludes that ‘extensive’ collateral damage is irrelevant, since “the more important the military objective, the greater the incidental losses before it could be said that the rule of proportionality had been violated.”⁵⁷ Geiss agrees that IHL “does not prescribe any absolute limit in relation to collateral damage.”⁵⁸ Thus, a very considerable military advantage could potentially justify significant civilian damages and even casualties, i.e. extensive as opposed to excessive collateral damage. Also, the scope of an attack needs to be taken into account to assess the extensiveness of collateral damage: “proportionality is not assessed by looking at the total amount of collateral damage at the end of an armed conflict and then determining whether that collateral damage is excessive when compared against the goals of the armed conflict.”⁵⁹

Yet, obviously, attacks that cause a large quantity of collateral damage are among the first suspects of attacks where the IHL proportionality rule may have been disregarded. Also, the question may be raised of whether the sheer magnitude (extensiveness) of expected collateral damage could be the utter boundary of the test of excessiveness, even when the expected military advantage is expected to be immense. In other words: may the expected vast *extensiveness* of an attack render an attack that is not excessive nonetheless illegal?⁶⁰

The ICRC Commentary to API states on this topic that “[t]he idea has also been put forward that even if they are very high, civilian losses and damages may be justified if the military advantage at stake is of great importance. This idea is contrary to the fundamental rules of the Protocol - in particular it conflicts with Article 48 ‘(Basic rule)’ and with paragraphs 1 and 2 of the present Article 51. The Protocol does not provide any justification for attacks which cause extensive civilian losses and damages. Incidental losses and damages should never be extensive.” This statement has however been criticised.⁶¹

According to Kalshoven, “[t]he principle of proportionality was introduced as a last line of defense [to protect the civilian population]. Must we now recognize yet another, ultimate upper limit beyond which collateral damage that is not excessive in view of the absolutely imperative military necessity of the attack, will by its terrible scale become unacceptable nonetheless?”⁶² Kalshoven answers his own question negatively, however, it may be worth to explore the argument slightly further.

57 Rogers 2012, p. 25-26.

58 Geiss 2010, p. 127.

59 Henderson, p. 201, referring also to Laursen, pp. 795-796 and Dinstein 2004, p. 123. Henderson also mentions Sassòli as another supporter of this view.

60 Kalshoven 1992, p. 44.

61 See for example Henderson, p. 224, Watkin 2007, p. 29.

62 Kalshoven 1992, p. 44.

The question may be asked whether lawful extensive damage to the civilian population is in line with the historical idea of IHL, which is to provide a humanitarian baseline for the accepted fact that the warring parties must be able to conduct their operations. It seems unlikely that the rules of IHL were crafted to allow for extensive civilian damage for reasons of military advantage in the planning phase of an operation, because IHL seeks to prevent massive civilian casualties through a large number of protective rules. It may be argued that all those protective rules, such as the principle of distinction and the prohibition to conduct indiscriminate attacks, are rendered irrelevant when operations are planned with such a high military advantage that extensive civilian damage may be lawful. This is of particular relevance for the use of certain types of weapons. It must be realized that the principle of proportionality only became an accepted part of the codified rules of IHL in 1977. At that time, the nuclear era was 20 years old and the magnitude of the civilian damage and casualties to be expected from the use of nuclear weapons and the devastating effects of the bombings on German cities during the Second World War were clear. The rule of proportionality may therefore have been one of the underlying reasons why the International Court of Justice concluded in their Advisory Opinion that the use of nuclear weapons could be lawful in some cases. This is the claim that any operation is legal, no matter how reckless and potentially devastating for the civilian population, provided it is military sufficiently advantageous. Clearly extensive collateral damage and the use of illegal means or methods of warfare could thus potentially be justified, because the stakes are so high. This is exactly the argument that the International Court of Justice has used in its appraisal of the legality of Nuclear Weapons, and the suggestion put forward by Michael Walzer that it is justified to violate the rules of IHL in case of “Supreme Emergency.”⁶³

It is true that the IHL rule of proportionality does not allow the incidental damage that is expected from an attack to be viewed in isolation.⁶⁴ However, it is submitted, there is a difference between the civilian side and the military advantage side, when both are stretched to their extremes. The outer limit of the humanitarian part of the proportionality equation is the prohibition to attack civilians and launch indiscriminate attacks. These are absolute legal obligations. The outer limit of the military advantage, at least for a large scale planned attack, leaves ultimately still a choice to the attacker. There is no absolute legal obligation to launch an attack, no matter how advantageous it may be. The ultimate incentive to conduct an attack that would cause extensive civilian casualties, which could be acceptable because of the massive military advantage that is expected from it, is found in *ius ad bellum*, not in IHL. It may therefore be argued that the limit for the humanitarian side of the IHL proportionality equation is contained within the law, whereas the limit for military advantage is not. This could, in extreme cases, be taken as the legal rationale why attacks that may cause extensive collateral damage could be illegal, even though there is a massive military advantage to be gained. Judge Higgins seems to acknowledge this situation where she writes that “[i]t must

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63 Walzer 1977, p. 251-268.

64 Henderson, p. 224-225.

be that, in order to meet the legal requirement that a military target may not be attacked if collateral civilian casualties would be excessive in relation to the military advantage, the “military advantage” must indeed be one related to the very survival of a State or the avoidance of infliction (whether by nuclear or other weapons of mass destruction) of vast and severe suffering on its own population; *and that no other method of eliminating this military target be available.*⁶⁵ It is submitted that the approach to massive military advantage, only in cases where there is no choice at all to attain a certain enormous military advantage, that extensive civilian damage that is non-excessive, may be justified by the IHL proportionality rule. In all other cases, where extensive collateral damage occurs, the planned attack should be cancelled. The legal basis for this rule would be article 57 (1) API, that contains the obligation to take constant care of the civilian population. Of course, the next question is when expected civilian damage may be labelled as ‘extensive’. However, for this, it may be possible for States to address this question in consultations, leading to expectations of operations that will cause more than a certain number of civilian casualties, as ‘extensive’, and thus contrary to the rules of IHL at first sight.

To be clear: practical examples of the situation that has just been described may be found only on strategic levels and in the situations to which the ICJ referred in its Nuclear Weapons Advisory Opinion: when the survival of the State is at stake. In the vast majority of situations, there is no situation where such a huge military advantage could be attained that the extensiveness of civilian casualties would stand in the way of a planned attack. However, the possibility that the extensiveness of an attack stands in the way of its lawfulness under the IHL proportionality rule, it is submitted, should not be dismissed categorically. Nonetheless, the applicable standard of the IHL proportionality rule is ‘excessive’.

13.5.2 Excessive or Clearly Excessive?

The next issue to be determined is the question of what the exact standard is, because the standard of ‘excessive’ as included in the treaty text of Additional Protocol I differs slightly from the standard of ‘clearly excessive’ that is included in article 8(2)(b)(iv) of the Rome Statute, adopted in 1998. The ‘clearly excessive’ standard was copied in the Report of the ICTY Prosecutor on Kosovo of 2000, referring to the attack of 23 April 1999 on the Serbian Radio and TV Station in Belgrade.⁶⁶ It is striking to note however that in one of the first cases before a criminal tribunal, that of Galic, the ICTY Trial Chamber did not refer to the clearly excessive standard in its explanation of the rule,⁶⁷ however it does note with regard to a specific attack on a football match that “although the number of soldiers present at the game was significant, an attack on a crowd of approximately 200 people, including numerous children, was *clearly*

65 Nuclear Weapons Advisory Opinion, Dissenting Opinion of Judge Higgins, para 21, p. 588 (emphasis added).

66 ICTY OTP Kosovo report, p. 26.

67 ICTY Trial Chamber, Galic, para 58.

excessive in relation to the direct and concrete military advantage anticipated.⁶⁸ This of course does not prove anything, because when the collateral damage is ‘clearly excessive’, it is by definition also ‘excessive’.

Rogers is of the opinion that the formulation in the Rome Statute, that includes the adjective ‘clearly’ is “[p]erhaps the closest one can get to an acceptable formulation of the customary law principle of proportionality.”⁶⁹ It must be noted that he seems to primarily have phrased this conclusion when it concerns questions of individual criminal responsibility, and it is for a tribunal to consider that the collateral damage “must be ‘clearly’ excessive before criminal liability can be established.”⁷⁰ Dinstein has suggested that the meaning of the word ‘clearly’ was already implicitly included in the proportionality test, and that it was merely made explicit by the formulation used in the Rome Statute⁷¹ and that the benefit of the insertion of the adjective is “unclear.”⁷² Boothby however notes that that the text of API does “not necessarily imply this ‘clearly disproportionate’ element, although its practical application probably does.”⁷³

The difference in wording, it is submitted, should not be interpreted to be of importance for military commanders planning an attack.⁷⁴ It is their obligation to cancel or postpone an attack if they believe it will cause excessive civilian damage. Military commanders will normally be well aware that whenever an attack is expected to be ‘clearly’ excessive, they need to consider an alternative. These are the easy cases for military commanders, where the intended operative mode for IHL becomes apparent: it plays its role as a preventive framework guiding military commanders. The fact that the adjective ‘clearly’ is now included in the Rome Statute “must be understood as not to change the existing law.”⁷⁵ For international criminal law, on the other hand, the inclusion in the Rome Statute means that for international criminal responsibility to arise, the word ‘clearly’ must be seen as an additional requirement for a disproportionate attack to constitute a war crime under the Rome Statute.⁷⁶ The fact that the formulation in the Rome Statute contains the word ‘clearly’ in the definition is not surprising, given the fact that the adjective is added for criminal law purposes. It means that an attack that is not ‘clearly’ disproportionate (but nonetheless disproportionate), is not a war crime under the Rome Statute. This means that when a commander has conducted a

68 ICTY Trial Chamber, Galic, para 387 (emphasis added).

69 Rogers 2008, p. 208.

70 Rogers 2008, p. 210.

71 Dinstein 2004, p. 120, but in the 2016 version of his handbook on the Conduct of hostilities under the law of international armed conflict, he calls the “value added of the adverb ‘clearly’ *obscure*. (emphasis added). See Dinstein 2016, note 869 on p. 153. See also Watkin 2007, p. 8.

72 Dinstein 2012, p. 269.

73 Boothby, p. 97.

74 See however Boothby, p. 97: “[w]hile accepting that the Rome Statute fulfills its own purpose in international criminal law and that its interpretation is not determinative of the meaning to be given to the API provision, the former text should, nevertheless be borne in mind when we consider the proportionality principle, not least because it represents the most recent internationally adopted text on the subject”

75 Dörmann 2003a, p. 169.

76 McCormack and Mtharu, p. 196.

fair proportionality calculation, after which he concluded that the planned attack would be disproportionate, he needs to cancel or postpone it. If he proceeds with it nonetheless because he believes it is not ‘clearly’ disproportionate, he has violated the rules of IHL, but he is off the hook where it regards his individual criminal liability under international criminal law. This is understandable because it is difficult, if not impossible, for a judge to assess *ex post* the exact circumstances as they appeared to military commanders at the time these had to make proportionality decisions. In fact, that is already hard enough for military commanders themselves, and the IHL proportionality rule thus seems to leave room for situations in which there may be a disproportionate attack that may be blamed on the commander, and on his State of origin, but that does not give rise to individual criminal liability.

Thus, the application of the IHL proportionality rule requires that even when a planned attack is not expected to be ‘clearly’ excessive, but excessive nonetheless, it needs to be cancelled or postponed.

13.6 Conclusion

It is submitted in this chapter that there are a number of objective factors in the proportionality equation, but that it is ultimately a subjective assessment. A number of measures should be taken in order to further objectify the IHL proportionality assessment by military commanders. The remaining subjective components of the calculation must be assessed in good faith and the assessment with regard to the excessiveness of incidental civilian death, injury or damage must be conducted in a reasonable manner, on all levels of command. That does not mean that the ‘reasonable military commander’ provides an objective yardstick. The possibility of a reasonable proportionality calculation conducted in good faith does exist, it is submitted, although much work needs to be done before consensus exists on the interpretation of the different components and thus a more clear-cut application of the IHL rule of proportionality becomes possible. In addition, the yardstick of excessive must not be confused with the term ‘extensive’, or with the yardstick of ‘clearly’ excessive.

The aim of this chapter, which is to formulate guidance for conducting a proportionality assessment of a planned attack, is perhaps only attained to a limited extent. It is concluded that ultimately, the IHL proportionality rule must be accepted as it is: an inherently imprecise and flexible yardstick that nonetheless does play its role as the last line of protection for the civilian population, and an obligation for reasonable military commanders to take that protection seriously into account by refraining from attacks that may cause excessive collateral damage. The ultimate question therefore is how the term excessive must be interpreted in light of all factors impacting on the IHL proportionality rule. This is the subject of the next chapter.