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### Proportionality in international humanitarian law

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# Chapter 14

## Chapter 14: Determining Excessiveness and a Plea for Tilting the Balance Towards Humanity

This chapter proceeds in Section 14.1 to further explore the term ‘excessive’ and dissects a number of factors that affect the assessment of military commanders whether expected collateral damage may be excessive. Section 14.2 introduces the probability of success of an attack as a third component of the IHL proportionality rule. Section 14.3 suggests a number of rationales for attaching more weight to the prevention of causing collateral civilian damage and casualties in the scale than is done traditionally, tilting the balance towards humanity. Section 14.4. discusses policy and operational factors that also may affect the assessment of excessiveness of collateral damage. Section 14.5 revisits the discussion about the level of authority making a proportionality assessment in the context of how this level affects the factors to be taken into account. The last two sections of this chapter address the question of whether there is a need to clarify or change the IHL proportionality rule and suggest one way ahead to acquire more guidance for commanders to apply the IHL proportionality rule.

### 14.1 Determining Excessiveness

Sivakumaran warns that “[t]he concept of excessive is such that any explanation, even that designed to elucidate the test, may have the effect of distorting rather than clarifying the meaning.”<sup>1</sup> Wright similarly concludes that “there is no overarching definition of ‘excessive’ because the variables in the proportionality standard are relative to each other.”<sup>2</sup> Nonetheless, the proportionality calculation must be conducted and notwithstanding the fact that shedding more light on the interpretation of the term excessive is a difficult task, it has to be done.

When an imprecise word contained in a legal text, such as the term ‘excessive’, must be interpreted, the first and most obvious way is to look at the normal use of the word.<sup>3</sup> According to one dictionary, ‘excessive’ means: “greater than what is normal or necessary” or “extreme”.<sup>4</sup> In other words, the term excessive is used to assess the relation between two or more factors. If that relation is in balance, it may be said that the situation is normal, and thus not-excessive. It is tempting to use the example of a scale in this respect. As long as the scale is in balance, none of the factors is excessive in relation to the other. In terms of collateral damage and military advantage, this means that as long as the balance tilts in the direction

1 Sivakumaran 2012, p. 351.

2 Wright, p. 853.

3 Article 31(1) of the Vienna Treaty on the Law of Treaties: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

4 Oxford Advanced Learners Dictionary, 1989, p. 416.

of where the collateral damage is expected to be less significant than the anticipated military advantage, the planned attack is not excessive, even until the situation is in balance. It may even be argued that even when the collateral damage is slightly larger than the military advantage, it is not-excessive because the misbalance is not 'extreme', nor is the collateral damage 'clearly' excessive compared to the anticipated military advantage. This ordinary literal understanding of the word 'excessive' in balancing military advantage and civilian casualties and damage then seems to tilt the scale in favour of military advantage, because it seems to suggest that even when the two factors are in balance, the collateral damage cannot be said to be excessive. The standard of 'excessiveness' rules out that the standard must be understood as 'clearly excessive'. As was explained above, this is the standard that applies for prosecutions under international criminal law, thus military commanders must apply a yardstick in IHL that is more protective for civilians and civilian objects than the standard that would constitute a violation under international criminal law. As a result, any claim that an attack is only disproportionate in situations where the ratio between the expected collateral damage and the anticipated military advantage is 'clearly' out of balance, is incorrect. However, there are a number of reasons suggesting that the interpretation of the term 'excessive' may not be as clear-cut as the ordinary literal meaning would suggest.

If an attack is likely to cause any collateral damage, the question comes up whether the military advantage sought by the attack is significant enough to justify the expected collateral damage. The resulting balancing act that is required must not be understood as a precise measurement between military advantage and civilian injury and loss. In doctrine, a number of writers attempted to clarify the term 'excessive.' Dinstein, for example, notes that 'excessive' means "that disproportionality is not in doubt".<sup>5</sup> This however resembles the test of 'clearly' excessive, and may therefore seem to permit military commanders too much leeway. According to Kalshoven and Zegveld, military commander are not expected to conduct "an all too subtle weighing process (...): the attacker is obliged to refrain from the attack only if the disproportion between the two sides in the equation 'becomes apparent'.<sup>6</sup> The possibilities are endless as far as the ratio between the expected damage and the expected military advantage is concerned. However, some basic assertions can be made.

It is useful to introduce a scaled approach in order to assist military commanders in determining excessiveness. For example, the HPCR Manual Commentary proposes the use of the qualifiers 'marginal', 'substantial' and 'high'<sup>7</sup> Wright proposes the use of the words 'marginal', 'moderate' and 'substantial'.<sup>8</sup> It is however submitted that a scaled model of only three qualifiers does not do justice to the plurality of situations that will be encountered by military commanders in actual combat circumstances. Therefore, a more refined approach is advisable in order to provide any actual useful guidance for military commanders in order to

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5 Dinstein 2016, p. 155.

6 Kalshoven and Zegveld, p. 115.

7 HPCR Manual on air and missile warfare, Commentary, p. 92.

8 Wright, p. 852.

determine excessiveness in the IHL proportionality rule. The qualifiers that may be proposed are then (ranging from small to large): marginal, minor, medium, major, massive.

It will still prove to be difficult to categorise the two components of the IHL proportionality rule in one of the five qualifiers. What needs to be taken into account, however, is the fact that the factors could be calculated to a certain extent in objective terms before they are balanced in the assessment of excessiveness. Here, States may be able to develop objective guidelines for the assessment of the respective factors, taking into account those factors that count on each level of decision making. As Wright notes with regard to incidental civilian damage: “(...) national militaries may find it useful to establish objective guidelines concerning what amount of civilian death, injury, or destruction would generally be marginal, moderate, and substantial (e.g., anticipated civilian casualties is marginal, 2-4 is moderate, and 5+ is substantial).”<sup>9</sup> In fact, it seems that sophisticated militaries could connect the categorisation into the five qualifiers introduced above to the assessment they already make for determining when the authorisation for the execution of an attack needs to be referred up to the chain of command because of the expected number of civilians that is expected to be affected by the planned attack.

As far as the anticipated military advantage of a planned attack is concerned, again, many factors are relevant, such as the scale of the attack and whether there is a threat to the own forces. Here, context matters so much, that it is more difficult to establish a baseline that may be put into more objective guidelines in order to categorise the military advantage in the terms of the five qualifiers mentioned above. In the public domain, Guisández Gómez has suggested an approach to provide different types of military advantageous aspects of a planned attack with points, with different factors able to subtract or add up points.<sup>10</sup> The aspects taken into account include the importance of the target to the opposing forces; the importance of the target to the attacking side and the distance to the target. It is submitted that depending on which level of command the attack is taking place and the context of the planned attack, it may be possible to devise a methodology to attach value to the anticipated military advantage and subsequently qualify it in the terms of one of the five qualifiers identified above, on the different levels of decision making. This is however an effort that only more sophisticated militaries will be able to conduct in the planning phase of attacks, and which militaries would presumably not be willing to share in public sources. This method may however be completely useless when there is no time for elaborate planning and the tempo of the operation dictates a certain speed in making decisions. Also, because of the overriding importance of the unique circumstances of each planned attack, the resulting parameters must be understood as guiding, not as authorising. A common sense reality check will need to be accompanied with the guidance military commanders will be able to derive from the proposed five-step scaled analysis.

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9 Wright, note 192 on p. 848.

10 Guisández Gómez 2007, pp. 197-243 (in Spanish).

Permitted collateral damage is above the diagonal line		Military advantage				
		marginal	minor	medium	major	massive
Civilian damage	marginal					
	minor					
	medium					
	major					
	massive					

When framed in a matrix, a picture may become clear. There is a line somewhere in the middle where the anticipated military advantage and the expected collateral damage are in balance. The subjective and qualitative character of the IHL proportionality rule will normally not allow for determinations of the excessiveness of an attack that are exactly on that line. Rather, a zone, or area is more likely to exist, in which reasonable military commanders may differ in their opinions of whether the civilian damage expected from a planned attack is excessive. As long as the decisions remain within that zone, none of these commanders may be deemed to be violating the IHL proportionality rule.

It also needs to be pointed out, that the ratio between military advantage and collateral damage is not a straight line. There are some indicators already embodied in IHL, which indicate how the term excessiveness must be interpreted. These factors prove that there is no linear relation between the two factors to be balanced, because the law already provides for guidance in some situations.

First, on the lower end of expected military advantage and collateral damage, the qualifier “concrete and direct” in the definition of the military advantage anticipated means that in case it is expected that a planned attack will result in marginal military advantage and also marginal collateral civilian damage is expected from the attack, it is likely that the planned attack must be labelled as causing excessive collateral damage. This is because when the military advantage is likely to marginal, it may also be expected to be insufficiently ‘concrete and direct’ compared to the marginal collateral damage, and the law does not contain an additional qualifier to the expected collateral damage. Thus, in cases of marginal expected military advantage that is not ‘concrete and direct’, where some limited collateral damage is expected to occur, the balance will usually tilt in favour of the collateral damage. This means that the attack must always be cancelled or postponed in cases where the expected military advantage is only marginal.

Second, on the higher end of expected military advantage and collateral damage, the law contains some indicators that dictate that certain ratios must be labelled as disproportionate attacks. These examples are in the prohibited indiscriminate attacks as defined above in Chapter 10. In particular, these attacks include those prohibited by article 51(4) sub c and

article 51(5) sub a API. It may be argued that these prohibitions are a result of the principle of distinction, not proportionality. However, in the authors view, the IHL proportionality rule is an extension of the IHL rules concerning distinction, and their application is not so fundamentally different that this would stand in the way of considering the IHL proportionality rule and the principle of distinction in conjunction. This is particularly true because the attacks referred to in article 51(4) sub c and article 51(5) sub a API are both in essence aimed (also) at military objectives.

The first of these indicators thus concerns attacks which employ a method or means of combat the effects of which cannot be limited as required by IHL, as prohibited by article 51(4) sub c API. These attacks are prohibited also under the proportionality rule because the expected collateral damage is likely to increase uncontrollably after the military advantage of the attack is expected to be reached. This may be understood to mean that in case it is expected that initially (right after the attack), the collateral damage is not (yet) excessive, but when it is foreseeable that the effects produced by the means or method of attack cannot be contained or limited as required by the proportionality rule, the collateral damage will eventually reach the point that the collateral damage becomes excessive in relation to the sought military advantage of the attack.

The second type of attack (those by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects) are prohibited under the proportionality rule because the practice of the second World War had shown that in these types of attacks the expected ratio of military advantage and collateral damage was in such imbalance, that these attacks would produce excessive collateral damage to the civilian population.<sup>11</sup> Thus, these types of attacks are prohibited both specifically by their respective specific prohibitions on indiscriminate attacks in API, as well as by the prohibition to launch disproportionate attacks under the IHL proportionality rule.

Furthermore, it has been submitted above that for the purpose of the proportionality calculation, while there is no difference in value to be attached to one civilian or another, this is not true for civilian objects. The law determines, for example, that cultural objects and objects that are indispensable for the survival of the civilian population enjoy special protection. With regard to civilians, although the law does not state this, one could argue that if the amount of media attention is taken as an indicator who enjoys broader protection, children and (pregnant) women and the elderly generally would enjoy special protection against attacks. It may be argued that as such, they should attribute extra weight to the civilian scale of the balance as compared to other civilians. By analogy to the law applicable

11 See ICRC Commentary to API: Sandoz et. al, p. 624, para 1968: “[t]he first type includes area bombardment, sometimes known as carpet bombing or saturation bombing. It is characteristic of such bombing that it destroys all life in a specific area and razes to the ground all buildings situated there. There were many examples of such bombing during the Second World War, and also during some more recent conflicts. Such types of attack have given rise to strong public criticism in many countries, and it is understandable that the drafters of the Protocol wished to mention it specifically, even though such attacks already fall under the general prohibition contained in paragraph 4.”

to civilian objects the same may be argued, depending on the factual situation, for other categories of persons that are ‘indispensable for the survival of the civilian population’, namely doctors, firemen and policemen, or even men of fighting age who may be the main source of income of a certain family. This is however as such not reflected in the law, but may be elaborated upon more in depth in policy considerations to which States commit themselves in their practice.

Ultimately, the test of excessiveness requires the military commander to (1) assess the two components of the proportionality assessment, (2) assign a value to both components, (3) compare these two values and (4) decide on the basis of that assessment whether the planned attack would produce excessive collateral damage in the prevailing circumstances, and to therefore launch, postpone or cancel the planned attack. The dominance of the prevailing circumstances at the moment the attack is planned make it impossible to formulate a one-size-fits-all formula the commander may use. Nonetheless, using a checklist to make sure all factors that need to be taken into account are part of the ultimate assessment may benefit military commanders who are in the midst of active hostilities. It would assist military commanders in considering all factors that are part of the IHL proportionality rule.

It is submitted, however, that the IHL proportionality rule is not as simple as the model of a scale would suggest and as the ordinary literal understanding of the word excessive seems to indicate. Indeed, it seems that there is another factor that impacts on the determination of excessiveness, and that is the *probability* that the anticipated collateral damage, respectively the military advantage will indeed materialise as expected. Furthermore, it is submitted that the perceived understanding of the word excessive, attaching more weight to the expected military advantage than to civilian damage, must be adjusted in the other direction. These two proposals of adjustments of the ordinary literal interpretation of the word ‘excessive’ will be further expounded in the following two sections.

#### 14.2 Probability of Success as a Factor Determining Excessiveness

It is submitted that the IHL proportionality rule requires military decision makers not only to balance the value of military advantage and civilian damage, but also, as a third factor, the probability of success. This factor concerns the estimation of how likely it is that the operation will in fact go as planned, i.e. that the expected military advantage will in fact materialise and the probability that the collateral damage will not exceed what is expected in advance.<sup>12</sup> This factor deals with a different aspect than foreseeability, which concerns the

12 This factor is referred to as ‘likelihood’ in a background paper prepared by Chatham House for an expert roundtable held at Chatham House on 9 March 2018, as part of the Chatham House project on ‘Proportionality in the conduct of hostilities: the incidental harm side of the assessment’. This author is part of that project, the background paper is on file with the author. See also the final Report: Gillard 2018, pp.17-18 and 20. This study draws a different conclusion than the Chatham House Report does: the Chatham House Report concludes that likelihood must be addressed when assigning weight to the two factors in the IHL proportionality rule.

effects of a planned attack that are expected and the question of causality, which concerns the expectation that a certain effect will result from the planned attack.

Taking this factor into account may prevent operations to be conducted from which a high value of military gain is expected, and a similarly high (but not excessive) expected value of collateral damage is anticipated, but with only a small probability that the operation will materialise as planned. The operations that come to mind in this respect are those attacks by the US in 2003 that sought to kill Saddam Hussein, but that ended up only killing large scores of civilians.<sup>13</sup> Although it must be accepted that at the time, it was very military advantageous to kill Saddam Hussein, the probability of the attacks actually hitting Saddam Hussein was also very small, if not merely speculative, because the attackers were aware that they were relying on very unreliable information. A similar example is that described in Section 12.3.5, the attack on General ‘Chemical’ Ali Hasan Al-Majid as well as the attack on Milan Martić as discussed in Section 12.3.2.

It is submitted that adding the factor of probability of success leads to a more refined IHL proportionality assessment, because it may assist in tipping the balance between excessive and non-excessive in close cases. It is however difficult to find a yardstick that defines the probability of success of a planned attack. As noted in Chapter 13, expectations of the success of the planned attack are subjective by definition, yet an expectation may become more objective when there is sufficient information available on the nature of the target and the amount of civilian objects and civilians that are surrounding the target. This is furthermore a matter of conducting thorough precautionary measures in the planning phase. The availability of surveillance assets and other information sources are therefore important in order to be able to obtain a clear picture of the target and the presence of civilians and civilian objects. Of course, military planners and commanders will prefer reliable equipment and information, because if “there are difficulties in anticipating the consequences, that is not of any use to military planners.”<sup>14</sup> The Commentary to the HPCR manual suggests that “[e]xpected’ collateral damage and ‘anticipated’ military advantage, for these purposes, mean that that outcome is probable, i.e. more likely than not.”<sup>15</sup> It seems that such an ‘at least fifty-fifty’ approach is unsatisfactory, because it significantly erodes both the protection of the civilian population as well as the effectiveness of the military effort. Lacking a better term in which probability of success can be measured, as well as taking into account that the IHL proportionality assessment by its nature is a matter of prediction rather than an exact science, it is submitted that military commanders and planners must be ‘pretty sure’ or ‘very confident’ that the planned operation will have the effects it is expected to have in terms of both components of the IHL proportionality assessment. This may be expressed in a percentage, but it seems more practicable to assess this in terms of a degree of confidence

13 As was claimed by Mr. Garlasco (Former chief of US High-value targeting) during an interview on 60 Minutes, a “couple of hundred” civilians were killed during 50 airstrikes aimed at killing Saddam Hussein and other high-value targets, whereas none of the targets were actually hit. See [https://en.wikipedia.org/wiki/Marc\\_Garlasco](https://en.wikipedia.org/wiki/Marc_Garlasco)

14 Garraway 2005, p. 3.

15 HPCR Manual on air and missile warfare, Commentary, pp. 91-92.

a reasonable military commander may have to expect a certain effect. Therefore, in the event a military commander is not sufficiently confident and sure that an attack will have the planned effects, the planned attack is simply very risky. In these situations, it is submitted that commanders must accept levels of collateral damage that are far beneath what would be non-excessive in an operation that has a very high probability of success. Of course, it remains a forward-looking assessment, but that does not justify gambling with certain high civilian casualties and damage against a very small probability of attaining a military advantage. To attack a military objective with a very low probability of success is furthermore contrary to the required level of expected military advantage that must be assessed in the IHL proportionality assessment, which is required to be ‘concrete and direct’.

An example may assist in explaining the factor of probability of success of an attack. Suppose an attack is planned on a high-ranking military commander of the opposing forces. The attack, if it succeeds, will clearly provide a major military advantage. The expected collateral damage is calculated to be medium. Normally, the proportionality rule could be argued to not stand in the way of this attack, because the medium expected civilian damage is not excessive in relation to the major military advantage anticipated from the attack. If the probability of success of the operation is however only very small, this does, it is submitted, put the civilian population in harm’s way to such an extent, that the IHL proportionality assessment must be deemed to be excessive. The result is a three dimensional assessment of excessiveness, taking into account (1) the military advantage anticipated from the planned attack; (2) the expected collateral damage and (3) the probability that the results of (1) and (2) will materialise as expected.

### 14.3 Tilting the Balance of Excessiveness Towards Humanity

According to some authors, the application of the principle of proportionality is not a question of “balancing” but rather a “test of excessiveness.”<sup>16</sup> Schmitt explains that in his view, it is not a matter of determining whether the concrete and direct military advantage would ‘outweigh’ resulting collateral damage and incidental injury, as in a scale “with the slightest difference tipping the balance.”<sup>17</sup> The test of excessiveness would in his view only ban attacks “in which there is no proportionality at all between the ends sought and the expected harm to civilians and civilian objects. (...) Focusing on excessiveness avoids the legal fiction that collateral damage, incidental injury, and military advantage can be precisely measured. Ultimately, the issue is reasonableness in light of the circumstances prevailing at the time.”<sup>18</sup> It is however submitted that the analogy of the balancing between two different values is the most useful model to use. That model does however not explain what happens when

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16 Schmitt 2006a, p. 293 and Boothby, p. 97.

17 Schmitt 2006a, p. 293

18 Schmitt 2006a, p. 293.

the scale is more or less in balance. Wright notes that “[w]hile the proportionality standard provides constructive ambiguity, the scale should always be tilted in favour of furthering the protection of the civilian population.”<sup>19</sup> Taking all considerations into account, it is submitted that the consideration of protecting the civilian population must take precedence over considerations of military advantage in close cases, or when there is a balance between the two components of the IHL proportionality assessment.<sup>20</sup>

As noted above, the interpretation of the word ‘excessive’ in its ordinary literal understanding, attaches more weight to the expected military advantage than to civilian damage. There are a number of indications that point in the direction that the correct interpretation of the term ‘excessive’ does not render the military commander to interpret the IHL proportionality rule such that an attack is proportionate as long as the expected collateral damage does not exceed the expected military advantage too much. This may be of assistance for military commanders in close cases, or in other words, in those situations where the expected civilian damage and casualties is beneath the standard of ‘clearly excessive’, when compared to the expected military advantage. This also includes the hypothetical situation that a military commander would conclude that the ratio is in balance. In that case, two different interpretations of the rule on proportionality are possible: one is to conclude that since there is a balance, the planned attack apparently does not produce ‘excessive’ damage. The other interpretation, that is suggested as the preferred option, is that when in balance, there is not more military advantage than there is expected collateral damage, and therefore the planned attack must be postponed or cancelled.

The rationales for the latter interpretation, it is submitted, are (1) the purpose of the proportionality rule; (2) the fact that the component of military advantage is qualified in the IHL proportionality rule with the additional qualifiers ‘concrete and direct’; (3) the precautionary rule to take ‘constant care’ of article 57(1) API; (4) the application of principles through the application of the Martens Clause and (5) the allocation of risk on the civilian population for the militaries’ mistakes, faulty intelligence, malfunction of weapons systems or misreading and misunderstanding of information and other factors that cannot be controlled, such as the influence of weather.<sup>21</sup>

The first rationale is connected to the purpose of the proportionality rule. It is submitted that given the fact that the IHL proportionality rule is codified in article 51 (Protection of the Civilian Population) of Part IV (Civilian Population), in Section I (General Protection Against Effects of Hostilities), Chapter II (Civilians and Civilian Population) of API, as well as in article 57, placed in Chapter IV (Precautionary Measures) of the same section, provides an indication that the rule is aimed at protecting civilians. Therefore, when no clarity exists on

19 Wright, p. 853.

20 For a similar view: see Sandoz et al., para 1979: “in some situations there will be no room for doubt, while in other situations there may be reason for hesitation. In such situations the interests of the civilian population should prevail.” See also ICTY, *Prosecutor v. Galic*, IT-98-29-T, Trial Judgement, 5 December 2003, para 58: “[t]he basic obligation to spare civilians must guide the attacking party when considering the proportionality of an attack”.

21 See Dinstein 2004, p. 135 for a list of all the “things that can go wrong as far as civilians are concerned”.

the issue of which side of the scale must take precedence in close cases, the place of the IHL proportionality rule in API, as well as the context concerning the protection of the civilian population points to the conclusion that the main purpose of the IHL proportionality rule is to provide protection to the civilian population.

The second rationale, it is submitted, is the fact that the component of military advantage is qualified in the IHL proportionality rule with the additional qualifiers ‘concrete and direct’, whereas the component of the civilian damage does not have these additional qualifiers. This points to a conclusion that the drafters of the IHL proportionality rule meant to define the military advantage component as more restrictive in the IHL proportionality assessment than the factor of the collateral damage. It obliges military commanders to take *any* collateral damage into account, whereas for the factor of the military advantage, only those military advantageous outcomes of a planned attack can be taken into account that are ‘concrete and direct’.

The third rationale that points in the direction of tilting the proportionality scale in favour of the protection of civilians in close cases, is the rule embodied in article 57 (1) API that “constant care shall be taken to spare the civilian population, civilians and civilian objects”. Since this provision applies to not only attacks but to all types of military operations including attacks, the rule may be understood to apply to factual situations where an imprecise rule of IHL must be interpreted. Thus, as the interpretation of ‘excessive’ in close cases is one of these rules, it is submitted that the obligation to take constant care for the civilian population points to an interpretation of the IHL proportionality rule that in close cases, the protection of the civilian population must take precedence rather than the military advantage that may be expected from a planned attack.

A fourth rationale, although its scope is subject to debate, is the application of the Martens Clause,<sup>22</sup> which points to the possibility to use a general proportionality principle (as opposed to the IHL proportionality *rule*) that may be used to interpret the IHL proportionality rule<sup>23</sup> to the benefit of those not participating in the hostilities, and thus for the protection of civilians.

The fifth rationale for attaching more weight to the prevention of causing civilian damage in cases where only a small difference of value exists between the two components of the proportionality assessment is that IHL allocates the risks of accidents causing civilian damage exclusively on the civilian population. The IHL proportionality rule does not take into account the inescapable fact that the military may make honest mistakes when they are planning attacks. Furthermore, the military may rely in good faith on intelligence that proves to be wrong and use weapons systems that may malfunction from time to time, without running the risk of being blamed for that in terms of a violation of the IHL proportionality rule.<sup>24</sup> In

22 See above, Section 3.2 for a discussion of the Martens Clause.

23 See above, Section 9.3.

24 However, when there is a certain failure rate attached to the use of a certain weapon system which has proven to cause certain collateral damage, this must be taken into account on the civilian side of the proportionality assessment.

addition, a violation of the IHL proportionality rule does not occur in situations where the military has misread the information on a military advantage to be attained by accident, or plotted the wrong coordinate in a system that serves to deliver a piece of ammunition to a pin-point location. Furthermore, attacks that cause unforeseen damage to civilian objects or civilian casualties as a result of other factors that cannot be controlled, such as the influence of weather conditions are not in violation of the IHL proportionality assessment either. It is submitted that in return for the immunity the military enjoys from accidents such as these, it is only fair that in close cases, the IHL proportionality rule must provide some additional protection to the civilian population when compared to the attainment of a certain military advantage.<sup>25</sup>

Lastly, the analysis in the preceding chapters showed that a general principle of proportionality in IHL can be discerned from the different manifestations of proportionality in international law, specifically those applicable in armed conflict and more specifically the standards of moderation that apply within IHL. This general principle of proportionality applies as a touchstone for rules of IHL which have indeterminate components. The discussion in the previous chapters show that the IHL proportionality rule is certainly a rule comprised of subjective factors that require further interpretation. These factors need to be assessed in light of the circumstances ruling at the time, with the general proportionality principle in mind. It is also determined that a general principle applicable in a specific legal framework such as IHL can play this role to both moderate the effects of a rule and to interpret it. This calls for an interpretation of the IHL proportionality rule that favours the protection of the civilian population in the close cases.

It is therefore submitted on the basis of these six rationales, that the interpretation of the IHL proportionality rule must be deemed to tilt more in favour of the humanitarian side aiming to protect civilians, than the use of the word excessive in the IHL proportionality rule would suggest.

#### 14.4 Policy or Operational Factors that Affect the Excessiveness of Collateral Damage

It has been suggested that in particular in operations such as the NATO operation Allied Force in Kosovo, the threshold of proportionality should be higher, because it was an operation to save the civilian population, sometimes referred to as a 'humanitarian intervention' or an operation arising out of the concept of the 'Responsibility to Protect'.<sup>26</sup> Accordingly, it has been argued that "the tolerance of collateral damage would be very different for an invaded nation in the desperate state of survival compared to a state participating in war for

<sup>25</sup> To be fair, it must be noted that in targeting processes conducted by sophisticated armed forces, the worst case scenario for the civilian population is taken into account when a collateral damage estimate is assessed. Therefore, in these cases where such an elaborate procedure is in place, this does not allocate most of the risk to the civilian population.

<sup>26</sup> Bothe 2001, p. 535.

economic gain.”<sup>27</sup> This distinction must be rejected as a matter of law since it is based on *ius ad bellum* concepts, not IHL. Nonetheless, further restrictions for acceptable collateral damage may be placed on the proportionality assessment on the basis of policy considerations. As far as policy is concerned, it seems that the acceptance for collateral damage in accordance with the IHL proportionality rule is lower among the general public than it is according to the law. This may impact on the legitimacy of military operations on the long term, as an experienced general from a sophisticated armed force notes.<sup>28</sup> For example, the IHL proportionality rule provides no basis for placing more weight in the scale on the collateral damage side for young children than for adults. However, military commanders are more likely to accept a higher burden of attempting to minimize civilian casualties in cases where the collateral damage consists predominantly of children. This is for a number of reasons that are unrelated to the IHL proportionality rule as it stands today. One of these may be a desire of military commanders to living without the knowledge that they knowingly placed children in harm’s way, and thus as a preventive measure for their own mental well-being. Second, because they are aware of the fact that children who die as part of collateral damage from a legitimate attack are more likely to shock general public and cause complications on the political level, for example as a result of reports in the press and by advocacy by human rights organisations.

There may also be operational reasons to apply a different understanding of excessiveness, i.e. more protective for the civilian population. A frequently quoted example is any operation that may be characterised as a counter-insurgency operation (COIN). During COIN operations, like the ISAF operation in Afghanistan that started in 2002, the acceptable foreseeable collateral damage would preferably amount to zero.<sup>29</sup> Although an attack that would expect minor civilian casualties would thus be illegal under the restrictions of that particular operation, depending on the military advantage sought, would not *per se* be in violation of the IHL proportionality rule. These restrictions would typically be imposed through rules of engagement. Another example of an operational consideration that may possibly influence the proportionality assessment to the benefit of the protection of the civilian population is the practice of economy of force. “Economy of force is defined as ‘the judicious employment and distribution of forces so as to expend the minimum essential combat power on secondary efforts in order to allocate the maximum possible combat power on primary efforts’.”<sup>30</sup>

27 Reynolds, p. 88.

28 See Efroni, p. 82: “Experience has shown that, in the realm of legitimacy, the tolerance level for collateral damage – and particularly the extent and nature of such damage - is infinitely lower than the tolerance level for collateral damage set by international law”.

29 Because, as Wright notes: “collateral damage’, quite simply, has the capacity to fuel further violence”. See Wright, p. 854. See also the so-called McCrystal Tactical Directive: NATO/ISAF HQ Kabul, 6 July 2009, see [https://www.nato.int/isaf/docu/official\\_texts/Tactical\\_Directive\\_090706.pdf](https://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf).

30 Pratzner, p. 91, referring to JCS, JP 1-02, 2013, p. 81.

It is likely that policy and operational factors provide a higher level of protection to the civilian population than any strict application of the IHL proportionality rule. But as these factors exceed the scope of the legal rule which is the subject of this study, the description in this section suffice for the purpose of this study.

#### 14.5 Different Factors for Different Levels of Decision-making

The application of the IHL proportionality rule is particular in one sense: it applies to States, but also to the single member of the fighting party in the midst of an armed conflict, as well as to those planning and ordering attacks on much higher levels of command. It was established above that proportionality assessments, including those in the phase in which precautionary measures are taken, need to be conducted on all operational levels of an operation.<sup>31</sup>

Thus, when an operation is conducted only on a limited scale, it is only that level on which the IHL proportionality analysis must be conducted. An example is taking out one particular offensive asset of the adversary, that is a threat to the own troops, or may become so in the near future. This is a limited attack that has no bearing on a larger operation that may be planned and decided on a higher level, such as the operational level. An example can be a planned attack, through a precision airstrike, on an enemy battle tank situated in a village, where there is no plan (yet) to attack that village in order to bring it under the control of the attacking forces. Under these circumstances, that tank is highly likely to become a threat to the own forces in the course of the near future, and therefore qualifies as a military objective. Attacking this tank has no bearing on any other level than on the tactical level, and therefore the only incidental damage to civilian objects and civilian casualties that needs to be taken into account is the collateral damage from this single attack. This is consistent with the interpretation that the military advantage of a planned attack must be assessed for the operation 'as a whole', because the scope of the operation in this example is limited to this single airstrike.

It must be noted however that sometimes, the character of the targets may be labelled as 'strategic' targets, even when it concerns one isolated attack. For example, in order to achieve air superiority, anti-aircraft systems may be labelled as such. It is of crucial importance on the strategic level that these types of targets are neutralised as soon as possible when a larger military operation starts, because it enables future operations on the operational and tactical level. In these cases, even though it may concern only a limited operation, it may still be a show-stopper for other operations to commence. This type of attacks may take into account more than only the military advantage to be expected on the tactical level, thus for

31 See also Corn: "a requirement to take "constant care" to mitigate the risk to civilians and civilian property must animate all strategic, operational, and tactical decision-making." See Corn on the Just Security blog, 8 July 2015: <https://www.justsecurity.org/24493/obligation-precautions-fundamental-principle-law-war/>

a single strike. However, if it does so, it also needs to broaden the scope of the foreseeable collateral damage. It would be incorrect to argue that the military advantage that may be gained on a strategic level by a limited attack, should only consist of the civilian casualties expected from the limited tactical attack.

Similarly, if a number of attacks form a part of a more comprehensive military operation, the military advantage of the operation may be assessed in relation to the operation as a whole, consistent with the declarations of a number of States upon accession to API,<sup>32</sup> and not only from one particular part of the attack.<sup>33</sup> It is also clear, that in case the level of operations that are planned or decided upon on an even higher level, that of the strategic level, it must be assured that the operation does not turn into a proportionality level on the level of the *ius ad bellum*.

Depending on the level of the proportionality assessment, different factors need to be taken into account. For example, expected weapons malfunction may normally not be factored in for a single attack, but cannot be ignored for larger operations. This is because the attacking force normally has figures on the failure rate of its weapons systems, based on previous experience, testing or on assessments provided by the producer of the weapon system. Therefore, these foreseeable factors need to be taken into account in assessing the proportionality of an attack 'as a whole', thus often on an operational level. This also includes other factors that are mostly irrelevant for a proportionality assessment on the tactical level, but do play a role in the proportionality assessment on an operational level. First, this must include the factor that not all intelligence that is the basis of some attacks is reliable. This also makes sense from an operational perspective: the commander will seek to achieve a certain objective or effect, and he needs to allocate sufficient use of force in order to achieve that goal. In cases where the information whether that goal may indeed be attained is based on speculation rather than reliable information, the operational objectives of the operational are similarly uncertain to be attained. Therefore, the magnitude of the military advantage expected from the operation is also uncertain, and this factor must be balanced against the risk to harming the civilian population by that operation.

A second factor is the extent to which foreseeable reverberating effects must be taken into account. These effects may be better foreseeable on an operational level than they are on a tactical level. Here too, planning staff on the operational level is expected to analyse the foreseeable reverberating effects on the civilian population, and take these into consideration in the proportionality assessment. These reverberating effects may, for example, also include environmental harm and mental harm to the civilian population, when these are foreseeable based on reliable reports, past experience and feasible research. This is of course not applicable on the tactical level of a single attack, but these factors enter the IHL proportionality assessment as soon as it is conducted on a higher level of command.

32 See for example the Declarations on Article 51 and 57 API by Italy (27 February 1986), Germany (14 February 1991), the United Kingdom (2 July 1992) and France (11 April 2001).

33 Oeter 2008, p. 186.

Conversely, there are also factors that are less relevant in the proportionality assessment on the operational level, but more relevant on the tactical level. One of these is the factor of self-preservation of the individual soldier or unit. In offensive operations on a large scale, the expected own troops that may be killed by a planned attack is a very relevant operational factor for a commander. Here, the level of decision making and the urgency of the attack also play a role and may result in a less stringent interpretation of excessive in cases where it concerns emerging targets, as opposed to deliberate and pre-planned targeting.<sup>34</sup> It is however not a factor that can be balanced to the expected civilian casualties and damage to civilian structures. On a tactical level, however, a group commander who finds himself and his unit surrounded by enemies and pinned down on a certain location, may certainly take this factor into account when he is planning his next course of action. This right to save your own life is however not unlimited, because of the nature of the profession of the soldier. IHL attaches a different degree of protection to the status of combatants and civilians, which implies that some risk must be assumed by the former in order to safeguard the latter.

It is submitted that the awareness among military commanders to include the correct factors into the IHL proportionality assessment on the appropriate level must be thoroughly integrated in procedures and training. This ensures a realistic application of the IHL proportionality rule that safeguards both the requirements of military necessity as envisioned in the rule as well as the protection of the civilian population.

#### 14.6 Is There a Need to Clarify or Change the IHL Proportionality Rule?

In recent years, a number of subjects and issues within the realm of IHL that needed clarification have been addressed. These issues include, for example, the notion of direct participation in hostilities,<sup>35</sup> detention,<sup>36</sup> the rules that apply to private military companies,<sup>37</sup> the rules that achieved the status of customary IHL,<sup>38</sup> and the rules for air and missile warfare.<sup>39</sup> It is noteworthy that there have not been successful efforts to conclude new, additional treaties on these subjects, but that instead there have been a number of expert-processes that have sought to clarify the challenges that were faced in practice. New treaties have been negotiated in the last ten years only on specific types of weapons, more in particular on cluster munitions (2008) and nuclear weapons (2017).

34 Clarke, pp. 79-80.

35 Melzer 2009.

36 The Copenhagen Process on the handling of detainees in international military operation: principles and guidelines, 2014.

37 Swiss Federal Department of Foreign Affairs and the ICRC (2008): The Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict.

38 Henckaerts and Doswald-Beck (2005): Customary International Humanitarian Law.

39 Program on Humanitarian Policy and Conflict Research at Harvard University (2009): Manual applicable to air and missile warfare.

With regard to all the uncertainties and controversial issues that accompany the application of the IHL proportionality rule in practice, one may ask the question whether there is a need for new rules on the IHL proportionality rule, or whether an interpretative guidance would be useful for the IHL proportionality rule. The idea to conduct some kind of international process with a view to clarifying the application of the IHL proportionality rule in practice is not a new idea. Krüger-Sprengel underscored the need for the clarification of the IHL proportionality rule in October 1979, just two years after its codification in API, acknowledging that an international process was necessary aiming at reaching a uniform interpretation of the IHL proportionality rule.<sup>40</sup>

Fenrick noted in 2000 that the rules with regard to targeting and proportionality must become more transparent: “outsiders, including military experts and legal advisers not directly involved in particular conflicts, should learn from the military planning process. A vigorous informed discussion of targeting and proportionality issues based on case studies, both historical and hypothetical, can contribute substantially to clarification of how the law can and should be applied.”<sup>41</sup> Bothe noted in 2001 that “[w]hat is necessary in this respect is the dialogue between civil society and the military, which then has to be reflected in military decision making.”<sup>42</sup> It is however unclear how this dialogue with civil society must be held.

Dill noted in 2010 that proportionality is “largely ineffective” and “features a number of design flaws and remains extremely vague”.<sup>43</sup> Therefore, she proposed that a similar expert process would be started as the one that was conducted under auspices of the T.M.C. Asser Institute in The Hague and the ICRC that resulted in the 2009 ICRC Guidance on direct participation in hostilities.<sup>44</sup> Furthermore, Clarke launched a proposal in 2012 to draft a guidance document on the application of the IHL proportionality rule, outlining a number of issues that should be addressed in such a document.<sup>45</sup> Clarke also noted that “ideally, the ICRC would coordinate expert meetings on proportionality and also the drafting of the text.”<sup>46</sup>

In more recent years, three separate groups have indeed attempted to clarify parts of the IHL proportionality rule.<sup>47</sup> First, a Study Group of the International Law Association on current challenges of IHL devoted considerable effort in offering a further interpretation of

40 Krüger-Sprengel, p. 195: “A l’avenir, il s’agira de trouver, tant à l’échelon national qu’à l’échelon international, une solution aux problèmes suivants posés par l’application de la règle de proportionnalité...les efforts entrepris à l’échelon international en vue d’une interprétation uniforme de la règle de proportionnalité”

41 Fenrick 2000, p. 80.

42 Bothe 2001, p. 535.

43 Dill 2010, p. 1.

44 Dill 2010, p. 8.

45 Clarke, p. 121.

46 Clarke, p. 122.

47 The current author was part of these three processes, and a number of points in the current study have also been proposed in the context of those processes.

the IHL proportionality rule. The Final Report of the ILA Study Group was published in 2017.<sup>48</sup> The ICRC has also repeatedly called for further clarification of the IHL proportionality rule.<sup>49</sup> The ICRC organised an expert meeting devoted to the clarification of the IHL proportionality rule in June 2016 in conjunction with Laval University in Quebec, Canada. A report of the meeting is published in 2018. Thirdly, Chatham House organised an expert Group process that published its report 10 December 2018 on the ‘civilian side’ of the proportionality principle.<sup>50</sup>

What may be drawn from all proposals to clarify how the IHL proportionality rule must be applied in practice, is firstly that it is difficult to attain a common understanding of all the components of the IHL proportionality rule. Secondly, it seems that the assessment of the excessiveness of collateral damage for a specific planned attack by military commanders is an inherently subjective factor. Shamash wonders whether the difficulties in clarifying the IHL proportionality rule result from the reluctance of the international legal community to “come out and say that twenty civilians are worth a bridge.”<sup>51</sup> Given the inherent subjective character of the assessment of expected military advantage, this seems highly unlikely. It is therefore submitted that Dinstein’s observation may be accepted, that although the “subjective evaluation of proportionality is viewed with a jaundiced eye by certain scholars, (...) there is no serious alternative.”<sup>52</sup> Therefore, not even a survey among a large number of experienced and well-trained military commanders would provide, for example, an answer to the question posed by Shamash of how many civilian casualties would be acceptable for the destruction of one bridge. Nonetheless, the points noted above in this and previous chapters may provide at least some additional guidance for military commanders.

Another option would obviously be to dismiss the current IHL proportionality rule because of its inherent subjective character, and draft a new, preferably more objective rule protecting the civilian population. It must be stressed at the outset that this author would not necessarily support changing the existing IHL rule on proportionality, because the outcome of such a process is uncertain and may even result in a rule that is even less useful for the military, and less protective for the civilian population. Nonetheless, for the purpose of having a starting point for a discussion on the subject, it is worth to explore how a different formulation of the IHL proportionality rule could read.

One option in this regard that may be feasible is to introduce a rebuttable prohibition of causing collateral civilian damage and civilian casualties. However, to be clear, such a rule is outside of the law as it currently stands in both treaty and international customary IHL. It would presumably also be found unacceptable to States and to military commanders who need to apply that rule in practice, because it would arguably tilt the balance within the

48 For documents related to the Study Group, see <http://www.ila-hq.org/en/study-groups/index.cfm/cid/1040>. The Final Report of the Study Group is available online: <http://www.ila-hq.org/index.php/study-groups?study-groupsID=58>.

49 For an overview of the statements of the ICRC on this issue: see Clarke, p. 96-97.

50 See Gillard 2018.

51 Shamash, p. 127.

52 Dinstein 2004, p. 122.

IHL proportionality rule too much to the civilian protection, ignoring reasons of military necessity. Thus, in a possible new draft of the rule aiming to minimise excessive expected incidental damage and casualties, some kind of exception based on military necessity is necessary. Therefore, a rule prohibiting incidental civilian damage and casualties needs to reference to a certain proportionate ratio between the military advantage and civilian damage expected to result from the attack. An advantage for adopting a new rule would be that certain small alterations could already be implemented into the rule, such as attaching more weight to human lives than to damage to civilian objects, except specifically protected objects, and factoring in the probability that the effects of the attack will be as expected. Also, combatants *hors de combat* and medical personnel could be brought into the equation explicitly. Furthermore, the element of probability of success could be made explicit. Lastly, arguably, the rule could be brought closer in line with an interpretation of the level of excessiveness that is more protective to the civilian population than the rule may be understood after a literal reading of the text of the IHL proportionality rule.

This rule could read as follows:

- a. Taking into account the probability that the effects of the attack will be as expected, it is prohibited to plan or launch an attack on a military objective which may be expected to cause incidental loss of civilian life or injury to civilians and specifically protected objects, or a combination thereof, except in cases where military necessity imperatively requires the military objective to be attacked and the expected concrete and direct military advantage of that or the overall attack would clearly justify the expected incidental loss.
- b. Taking into account the probability that the effects of the attack will be as expected, it is also prohibited to plan or launch an attack on a military objective which may be expected to cause incidental damage to civilian objects, as well as to combatants *hors de combat* and medical personnel, or a combination thereof, except in cases where considerations of military necessity requires the military objective to be attacked and the expected concrete and direct military advantage of that or the overall attack would justify the expected incidental loss.

An advantage of a rule that would be formulated as such is that there is a stronger prohibition on causing collateral damage. Military commanders would be forced to take an additional mental step in asking themselves whether there would be reasons of imperative military necessity to override the prohibition to cause incidental civilian casualties. This is a moderate version of Shamash's idea to place the burden of proof that an attack is proportionate on the attacker, since that person is best placed to assess the legality of the attack in terms of proportionality,<sup>53</sup> without placing military commanders in a position where it is presumed that they violate the IHL proportionality rule in any event that collateral damage occurs.

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53 Shamash, p. 146.

However, the inherent subjective components remain part of the rule and as such, the prohibition still would need further clarification with regard to the question of when the one or the other component of the rule would take precedence. It is assumed that military commanders would not necessarily be in favour of an alternative and more elaborate proportionality rule as formulated above, although the rule may be of use in situations where operational or policy considerations would require a more restrictive regime with regard to causing collateral damage.

### 14.7 Empirical Analysis as a Possible Way Ahead

Another possible venue to strive for a more objective IHL proportionality rule and to clarify the interpretation of the rule could be empirical analysis. The U.S. Law of War Manual notes that “[t]he weighing or comparison between the expected incidental harm and the expected military advantage does not necessarily lend itself to empirical analysis”<sup>54</sup> but fails to provide a further explanation as why this would be the case. Obviously, however, the exact meaning of excessiveness has been established as a subjective factor, but this does not mean *per se* that empirical research would *a priori* be useless. Shamash suggests that much of the uncertainty in the proportionality equation may be eliminated by changing the figures and debate the excessiveness of cases between the two extremes cases of clear disproportionate attacks and clear proportionate attacks.<sup>55</sup> It may thus be valuable to take an empirical approach in order to attempt to reach some general conclusions on excessiveness.

It may be possible to conduct a large-scale survey, in order to find out an average norm where operators and civilians draw the line between excessive and acceptable collateral damage in a number of scenarios.<sup>56</sup> It must be noted, however, that such a survey would presumably require States’ willingness to subject their military and civil personnel to the survey. The data that follows from that survey could provide a wealth of State practice from which more refined assessments with regard to planned attacks may be made. If nothing else, a survey such as the one suggested may provide training opportunities for assessing excessiveness to military commanders and planners.

Furthermore, the results of this survey could be fed into software containing artificial intelligence that is subsequently tasked with running an infinite number of slight alterations of the circumstances of the initial survey. Indeed, it is expected by some people that in the future, autonomous weapons systems will be capable to conduct a proportionality analysis

54 U.S. Department of Defence Law of War Manual, 2015, update May 2016, para. 5.12.4, p. 244.

55 Shamash, p. 130.

56 For an example in this direction: see also Janine Dill’s online survey and the critique on this survey by Jensen, Corn and Blank on the Just Security blog: <https://www.justsecurity.org/21474/surveying-proportionality-reasonable-commander/> as well as her response: <https://www.justsecurity.org/21529/meaning-proportionate-collateral-damage-care-civilians/>. See for another suggestion to conduct an empirical study, see Whittemore, pp. 632-634.

without a human decision-maker in the loop, using artificial intelligence.<sup>57</sup> Possibly, using artificial intelligence may provide an opportunity to narrowing down the grey area between excessiveness and non-excessiveness of collateral civilian damage on the basis of empirical research. Such algorithms could perhaps subsequently be made available to planners and military commanders, for the purpose of assisting them in their responsibility to make decisions. Perhaps, these autonomous weapons systems will thus provide an opportunity in the future for creating a more refined and objective understanding of the proportionality rule. Whether this will lead to a situation in which the proportionality analysis reaches the level of an objective rule, remains unlikely. In addition, it seems questionable whether we should trust an autonomous weapons system, that is really only a very sophisticated 'pocket-calculator', to autonomously decide whether collateral damage to civilians is excessive.<sup>58</sup>

Empirical research could potentially provide insight into the question of whether military decision makers would make different decisions when they base themselves on the current IHL proportionality rule, or on the one as it is formulated above. This insight could potentially provide an incentive to strive for persuading States to agree to altering the current text of the IHL proportionality rule to a more elaborate or precise rule.

#### 14.8 Final remarks

The probability of success of the operation to materialise as planned must also be taken into account as an inherent part of the proportionality assessment, given its prospective character. The result is a three-dimensional model of proportionality, existing of an assessment of the military advantage anticipated, the expected civilian damage and the probability that these two components will materialise as planned. This chapter shows that there are a number of factors that would support the assumption that the term 'excessive' could be interpreted more protective for the civilian population than it would seem at first sight. A scaled approach may be used by commanders in order to assist them in taking a more structured approach in applying the IHL proportionality rule in practice. Changing the rule as it is could provide a number of advantages, such as including combatants *hors de combat* and medical personnel into the proportionality assessment, but it cannot be expected that States would be willing to alter the IHL proportionality rule codified in API at this point in time. Empirical research may in the future possibly be used as a venue to further define the fine line between acceptable and excessive collateral civilian damage and casualties.

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57 Backstrom and Henderson, pp. 493-494. See also Schmitt and Thurnher, pp. 253-257.

58 Van den Boogaard 2015, p. 283, quoting Kalshoven.