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Proportionality in international humanitarian law

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Chapter 15

Chapter 15: General Conclusions

This chapter contains the general conclusions of this study and aims to answer the questions posed in Part I.

Section 15.1 summarises the conclusions of Part II, which deals with proportionality from the perspective of principles of international law and the principles of IHL in particular. Section 15.2 builds on these findings by a description of the conclusions of Part III, in which the proportionality notions in different fields of international law are analysed as well as the issue of how these findings may be used to inform the application of the IHL proportionality rule. Section 15.3 contains the most important conclusions of Part IV, in relation to the application of the IHL proportionality rule in practice. Section 15.4 provides guidance on how the IHL proportionality rule must be applied in practice. In Section 15.5 number of final remarks are made.

15.1 Principles

Part II of this study examined the category of legal norms in which the IHL principle of proportionality must be placed. Chapter 2 discussed the sources of international law because proportionality is generally referred to as one of the principles of IHL and ‘the general principles of law recognised by civilised nations’ are one of the primary sources of public international law. To this end, the distinction between rules, principles and policies was adopted and it was established that the term ‘principle’ could refer to something different in varying legal frameworks and contexts. Principles are used as a source of international law, importing norms from national jurisdictions, but they may also constitute an independent source of law within a particular branch of international law, providing a general norm. As a result of the different types of principles, principles play different roles in international law. The designation of a norm as a ‘principle’ may indicate that it may serve, firstly, to fill gaps in the law. Secondly, a principle of international law may be used to interpret other rules of international law. Furthermore, it was established that principles may be designated as such because they are deemed to be particularly important norms of a given legal framework. Lastly, norms may be designated as principles because they are the basis of other norms. Usually, a norm referred to as a principle plays several of these roles simultaneously.

Chapter 3 adopts a method of identifying principles of IHL and finds on the basis of this method that proportionality is indeed a principle of IHL, but that there are still different roles that the IHL principles play. The principles of IHL first of all serve as the bone structure of IHL, providing coherency to the entire branch of IHL. Furthermore, principles of IHL have an educational role, because the application of these principles enables the members

of the armed forces to armed conflicts to apply IHL successfully. Lastly, the principles of IHL have a foundational role, providing the basis for specific rules of IHL. It was concluded that proportionality is referred to as a principle because it is deemed to be a particularly important rule of IHL, but also because it plays the role of a broader, substantive principle of IHL: as a principle of IHL in a strict sense.

This answers the main question of Part II: the category of legal norms in which the IHL principle of proportionality must be placed is that of important rules of IHL. The IHL proportionality rule serves to protect the civilian population against excessive collateral damage when attacks on legitimate military objectives are planned and launched. But in addition to this finding, it has become clear that different principles play different roles. Therefore, there is potential for an additional role for proportionality as a principle of IHL, as a substantive principle of IHL. This potential role is examined in Part III, in which proportionality is analysed as a legal notion in international law.

15.2 Proportionality

The origins and content of the notion of proportionality in international law were analysed in Part III, as well as its different manifestations in a number of branches of international law regulating the use of armed force and that apply during armed conflict. The central research question of Part III is the question of what the content of the principle, or legal notion, of proportionality is in international law and in its different branches. Part III thus aims to analyse whether the manifestations of proportionality across the board of international law constitute a general principle of international law applicable during armed conflict and, as an inspiration or otherwise, how this may influence and increase the understanding of the proportionality rule in IHL. To that end, the manifestations of proportionality were compared on the basis of the characteristics of principles of international law as set out in Part II of this study.

In Chapter 4, it was concluded that proportionality is a concept that is inherent in any legal framework, and thus plays a role in any branch of international law. It allows for flexibility in the application of the rules or underlying legal principles and is also crucial in reaching a fair balance between competing interests. Proportionality is used (1) as a tool or legal technique to interpret vague legal rules, related to equity and reasonableness; (2) to balance competing interests in order to provide reasonable and equitable outcomes and (3) to protect the rights of smaller entities from excessive interference from the larger entity. It was furthermore concluded that a general proportionality principle in international law is applicable in peacetime.

With regard to the legal frameworks relating to the use of armed force and applicable in armed conflict, Chapter 5 described proportionality as a mitigating factor in the *ius ad bellum* and in IHRL. Chapters 6 and 7 discussed the manifestations of proportionality within

the legal framework of IHL. The IHL proportionality rule was defined as the prohibition to launch an attack if it may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. In addition to the IHL proportionality rule, other standards of moderation in IHL prevent excessive effects from the use of armed force during armed conflict. These standards include the rules regarding the destruction of enemy property, and the restraints on the use of certain methods and means of warfare against the enemy.

Chapter 8 concludes that the proportionality requirements under IHL and the *ius ad bellum* have common roots, but need to be satisfied primarily within their own frameworks, and thus that there is no integrating relationship between the two rules on proportionality in these legal frameworks. Rather, their relationship is that they work in parallel to the same situation. Parties to an armed conflict thus need to realise that it is their responsibility to sometimes prevent their armed forces from executing certain attacks even though these would be perfectly legal under IHL, because the *ius ad bellum* proportionality rule provides an extra layer of protection to the civilian population. Mostly, however, there is a strict separation between the legal frameworks of the *ius ad bellum* and IHL. With regard to the proportionality rules under IHL and IHRL, it was concluded that they are clearly separate in content and application. Nonetheless, there are factual situations possible in which both proportionality rules must be applied cumulatively, but particularly because the applicability of the IHRL proportionality rule is subject to a large number of conditions when they apply simultaneously, these situations do certainly not occur in every military operation during armed conflict. In IHL, the authority to use lethal force against individuals is mostly based on their status. If these individuals are combatants, they may be attacked. In IHRL however, it is not the status of persons that provides the authority to use lethal force, but the threat persons pose. The proportionality rule in IHRL thus regulates the use of force against the attacked individual, while in IHL, the proportionality equation pertains not to the person who is the subject of the lethal force, but to civilians that may be affected incidentally when a military objective is attacked. Moreover, IHL regulates a primarily horizontal relationship between belligerents, whereas IHRL applies in a vertical relation between the persons against who the armed force is used, and an agent of the governmental authorities under whose jurisdiction those persons may be. As a result of all these factors, it is submitted, that the existence of a general 'capture rather than kill' obligation under IHL as a result of the IHRL principle of proportionality must be denied. Therefore, the IHRL proportionality rule in itself does not inform the understanding or practical application of the IHL proportionality rule. It does nonetheless contribute to the identification of a general proportionality principle applicable to the use of armed force and during armed conflict. Comparing the general proportionality principle under IHL to the proportionality principles applicable in the other legal frameworks during armed conflict reveals a strong resemblance between these norms,

because their ultimate purpose is to mitigate human suffering on the one hand, and to provide leeway to authorities to achieve their legitimate objectives on the other hand.

The objective of Part III was to assess whether the different understandings of the principle of proportionality in international law may be used to clarify the IHL proportionality rule. The conclusion of Part III is that proportionality is found in international law at many levels and in different branches of international law. There is a general underlying notion and there are explicit manifestations in more precise rules. It is clear that the IHL proportionality rule is a very specific manifestation of the notion of proportionality, applicable only in the event of attacks during armed conflict. It is also clear that every rule on proportionality that is found in international law, applies primarily in the context of its own legal framework, but is grounded on shared roots. The rule on proportionality in IHL, that aims to mitigate collateral damage during attacks, is no different in that respect. Increasing civilian casualties during armed conflicts in the twentieth century developed into the awareness that the impact of armed conflict on civilians required better regulation in a rule. But the rule is also both the result of, as well as under the continued influence of, the general principle of proportionality applicable in armed conflict. This principle fills gaps in the rules and assists in the interpretation of the rules of IHL. This general principle is also manifest in other legal frameworks that apply during armed conflict, but in spite of the multitude of rules and principles that may be referred to as manifestations of proportionality applicable in different branches of international law, the rules that apply in these branches are not identical. It has been established that different proportionality rules and equations balance different entities and perform different functions. Therefore, even though a general principle of proportionality applicable in international law may be deduced from the cumulative applications of proportionality, it must also be admitted that the rules that may be characterised as manifestations of proportionality in the respective branches of international law, differ to a large extent.

Proportionality is usually applied in international law to evaluate certain conduct in hindsight. Situations where an evaluation in hindsight is possible, include the proportionality analysis for countermeasures or to evaluate an armed response in the framework of *ius ad bellum*. In particular, it must be conducted in order to evaluate whether certain damage must be compensated. It is clear that for IHL, the proportionality analysis needs to be conducted in advance, as a restraining factor on future conduct. This follows from IHL's character as a preventive framework providing limits for the use of armed force during armed conflict. It may also be necessary to conduct such an IHL proportionality assessment in hindsight, for example by courts or agencies that report on certain incidents (i.e. Human Rights Watch, Amnesty International or UN reporting mechanisms etc.). The main difference is that there must necessarily be much more room for discretionary powers of the actor who has conducted the IHL proportionality equation in advance than for those that do it afterwards. Decisions of military commanders are based on the information that was reasonably available to him during the planning phase and before the launch of an attack. A comparison between the

different manifestations of proportionality in international law prove that there are, from a theoretical perspective, no obstacles to also evaluate the excessiveness of an attack in hindsight, although knowledge that may be acquired after an attack that was not available to the commander before it, cannot be the basis of any (international) criminal prosecution or state responsibility based on a violation of IHL.

The different manifestations of proportionality in international law show that a proportionality test may be conducted on different levels of authority. For example, in IHRL, proportionality equations may be conducted on a strategic or governmental level, for example to dictate to what extent the government may restrict human rights of their civilians. However, under IHRL, there is also a proportionality test that applies to the magnitude of armed force that may be used by a single member of security forces. Thus, for military operations to which IHL applies, this would support the view that proportionality analysis may be executed at all levels on which military operations are conducted. Thus, proportionality analysis in other legal frameworks do not rule out a separate proportionality test to be executed on grand-strategic (or *ius ad bellum*?) level, strategic level, operational levels and on tactical levels. Since the nature of the military advantage that is sought on these different levels also differs, this potentially means that it is possible to be more precise and practical in the identification of the standard that applies in a specific situation.

The question is whether an individual military commanders tasked with using lethal force may be expected grasp the consequences of all these different obligations based on different manifestations of proportionality in the conduct of their operations. This calls for thorough training, the integration of the applicable norms into rules of engagement and the availability of sound military legal advice.

It is concluded in Chapter 9 that proportionality within the legal framework of IHL performs the important function of interpreting the rules and principles of IHL in their application in practice, as well as the crucial function as a gap-filler, through the Martens Clause, in factual situations where no specific rule of customary or treaty law is available. This general principle of proportionality in IHL (which is not the rule on collateral damage) is also the basis for a number of specific rules in IHL, among which are the rules on collateral damage, precautionary measures and the specific rules that were identified in Chapter 7. It is suggested in this study that this general principle of proportionality applies as an independent legal norm within IHL. This general principle of proportionality in IHL influences the rules of IHL (including the IHL proportionality rule) to a certain extent in terms of interpreting them and to fill gaps. Proportionality is thus a principle of IHL that moderates the use of force during armed conflict more generally and in addition to the IHL proportionality rule. As such, it seems that there is an important mitigating notion of proportionality present in the entire branch of IHL that serves to achieve the dual objectives of IHL and observe the balance between these objectives.¹ This mitigating notion, that seeks to provide reasonable

1 These objectives are, first, to regulate the use of means and methods during armed conflict and, second, to protect those that do not, or no longer participate in the armed conflict.

and equitable outcomes, is based on a balance between humanity and military necessity. Proportionality as a general principle sometimes works in a similar fashion as the principles of equity and reasonableness on the level of the underlying principles of the international legal frameworks. It is suggested based on the potential for principles as a source of international law, that this general proportionality principle may apply either as a principle or as a rule of international customary law. Although it does not set aside specific rules of IHL, such as the IHL proportionality rule, the principle assists in the interpretation of IHL rules and it fills gaps in IHL by prescribing that a reasonable balance is found in these situations between military necessity and humanity.

15.3 The IHL Proportionality Rule in Practice

In Part IV, it is analysed how the IHL proportionality rule must be applied in practice. Chapter 10 discusses the practical and legal context in which the IHL proportionality rule must be applied in practice. For that reason, the targeting process is described as an introduction to the context in which the IHL proportionality rule must be applied. It is concluded that the IHL proportionality rule must be integrated in any decision making process in the context of the planning and execution of armed force. The legal obligation applies equally to a private firing his weapon as to an attack that is planned in a high joint military headquarters, through an institutionalised procedure conducted by highly trained and skilled targeteers and military commanders. It starts by armed forces considering whether any incidental collateral damage may be expected from a planned attack. If that is the case, first the distinction rule needs to be applied, precautionary measures must be taken and subsequently a proportionality assessment needs to be conducted.

In order to assess the legal context of the IHL proportionality rule, the notions of indiscriminate attacks and precautionary measures are analysed. According to the definition of a disproportionate attack, it is a subset of the wider category of indiscriminate attacks. The place of proportionality in this context shows the link between the principle of distinction and the IHL proportionality rule. The prohibition of indiscriminate attacks covers (1) attacks that fail to take into account whether the target may have a protected status under IHL; (2) attacks using means and methods that are indiscriminate; (3) attacks using means and methods whose effects cannot be contained (such as water, fire, poisonous wells); (4) attacks that fail to treat singular military objectives as separate targets but instead attack an area that also contains civilians and objects and (5) disproportionate attacks. These examples of indiscriminate attacks also indicate which types aimed at military objectives are disproportionate and assist in interpreting the IHL proportionality rule's standard of 'excessive'.

Military commanders can generally prevent their attacks from being indiscriminate by taking appropriate precautions in attack. The IHL proportionality rule has been drafted in

the context of the rules regarding precautions in attacks and is a precautionary measure in itself, aimed at limiting collateral civilian damage during attacks. The precautions in attack are an important part of the targeting process, where they fit in the different phases and guide the sequence of steps of which the targeting process is comprised. The precautions in attack consist of a number of coherent legal obligations, which form an extensive framework of checks the commander needs to take into account in order to shield civilians and civilian objects from the effects of hostilities. The proportionality rule is only one of these measures. Even in the event all precautionary requirements are complied with, the IHL proportionality rule must be applied as a last step before a planned attack may be launched. Conversely, in case an attacker has refrained from taking precautions in attack, a proportionate attack may still lead to a violation of the precautions rule, if civilian casualties and damage could have been avoided or minimised by taking precautionary measures. One could say that the proportionality rule is a secondary rule that only finds application in situations where it is impossible to take precautionary measures which are expected to avoid all civilian collateral damage.

The discussion in Chapter 11 shows that there is extensive debate on the interpretation of the different components of the IHL proportionality rule. The analysis of the components of the proportionality equation reveals that diverging opinions exist on almost all components of the proportionality equation. As a result, the IHL proportionality rule cannot be captured into a mathematical formula. It however requires a thorough analysis of its components as far as circumstances permit. The fog of war may make it impossible to acquire more information concerning possible civilian casualties, or the expectations of military commanders with regard to the military advantage of their planned attack may be misperceived. Nonetheless, military commanders need a sufficient understanding of the components of the IHL proportionality assessment before they are able to apply the IHL proportionality rule consistent with the circumstances ruling at the time of a planned attack.

The examples analysed Chapter 12 reveal that in none of these situations, a detailed yardstick is applied to come to a conclusion on a proportionality analysis on the strategic or operational level.

On the strategic level, the committee in the Kosovo Report held that it found no evidence to conclude that the entire bombing campaign was aimed at causing substantial incidental civilian casualties, looking at the totality of civilian victims. This method however seems insufficient for assessing the potential excessiveness of the incidental civilian damage and casualties of that bombing campaign. The report does contain helpful guidance in the sense that it shows that the IHL proportionality rule must be applied at the several levels of command. The Chilcot Report may be used to assess *prima facie* which factors must be taken into account in the IHL proportionality analysis on the strategic level. The Report shows an example of a State that took expected civilian damage and casualties into account before a campaign was launched. The British armed forces looked into the expected collateral effects of both their planned air and their ground operations and based this assessment on the lessons learned

during earlier operations. The methodology for that assessment seems to be a primarily quantitative analysis and with regard to the scope of the expected incidental civilian damage and casualties, the phase after the removal of the Saddam Hussein government is also taken into account. The military advantage side of the proportionality assessment seems to take into account which civilian suffering would be avoided by removing Saddam Hussein from power. Nonetheless, the Chilcot report is indeterminate about the issue of whether the analysis is meant to be based on the *ius ad bellum* or must be understood as a description of the IHL proportionality analysis by a State on a strategic level. In the situation of the Korean artillery attacks, the ICC Prosecutor acknowledges that the conclusions were not based on the prospective plans of the North-Korean armed forces, but instead on the results. This alone makes the conclusion that no prosecution is recommended for violation of the ICL proportionality rule inevitable. The report indicates that the ICC Prosecutor believes that a quantitative analysis is appropriate. It is however unclear why the ICC Prosecutor bypasses the issue of the application of the IHL proportionality rule to the South-Korean counterattack, given the fact that the South-Korean authorities reportedly showed willingness to provide information to the ICC Prosecutor with regard to the incident.

The situations on a tactical level reveal that sometimes the assessment of the military advantage of an attack is complicated by the different levels on which that advantage is expected to materialise. The military advantage of the attack on the RTS building alone was small, but must be assessed in relation to the bigger picture of the objective to disable the communications and command and control system of the entire Yugoslav armed forces. Similarly, the military advantage of the attack on Martić was disrupting his ability to exercise his command, not necessarily attacking the two buildings in which he was believed to be present. The military advantage of killing Salah Shehadeh and General Al-Majid could also be deemed to be more significant than killing one commander: it may be argued that it also was intended to end the string of attacks that they had reportedly ordered, and safeguard both the own troops and the civilians that could be affected by future attacks ordered by them. The question however arises to what extent these uncertain future advantages may be taken into account, because they would potentially allow a higher ratio of permissive collateral damage but perhaps not qualify as 'direct and concrete'. Nonetheless, in terms of a quantitative assessment, the situations of the attack on Salah Shehadeh and General Al-Majid show that presumably, expected civilian casualties between 20 and 50 civilian lives may be considered acceptable by States when a high-level commander is attacked. The two situations involving German armed forces indicate that the safety of one's own forces is taken into account when the military advantage of an attack is assessed. This is the opinion of the German Federal Court of Justice in the Kunduz Fuel Tankers situation and of the on-scene commander in the situation of the fire-fight along the Baghlan River. The latter situation however indicates that there is a limit to that: the safety of the own forces do not justify a full disregard for civilian casualties on that basis, but it also confirms that the IHL proportionality rule finds application not only in offensive operations, but also in attacks in response to an attack.

In sum, the situations in Chapter 12 demonstrate that commanders conduct proportionality analysis on different levels, and may adjust their operations, or even in some cases refrain from launching an attack they were planning or even ordered to execute. Still, it remains difficult to deduct actual guidance for how the assessment of proportionality must be done according to military practice, primarily due to the structural absence of accounts of military commanders describing their thought process preceding attacks.

15.4 Guidance on Applying the Principle of Proportionality for the Military

This study aims to formulate guidance for conducting the proportionality assessment of a planned attack. It therefore turns in Chapter 13 to a further analysis of how the IHL rule on proportionality must be applied. Section 13.2 discusses whether the notions of military advantage and expected civilian casualties and damage can be meaningfully balanced, or must be seen as inherently incomparable. It is concluded that it is difficult to compare the different components of the IHL proportionality rule, but the law requires military commanders to assess and compare these factors in spite of these difficulties. Furthermore, the components of the IHL proportionality rule may sometimes involve quantitative factors, particularly in the assessment of expected civilian damage and casualties. But even then, a qualitative assessment is required to apply the IHL proportionality rule, because the assessment of the military advantage of a planned attack necessarily involves a multitude of factors that cannot be expressed only in quantitative terms. This confirms the conclusion that it is impossible to formulate the IHL proportionality rule as a mathematical formula.

Section 13.3 discusses whether the quantitative and qualitative factors in the IHL equation can result in an objective test of excessiveness. It is submitted that there are two main reasons for preferring an objective IHL rule on proportionality: the passive and active protection rationales. The passive protection rationale entails that in order to protect the civilian population by prohibiting excessive casualties, the protection of these civilians should not be dependent on the subjective perspective of the military commander, but instead on objective parameters. The active protection rationale means that with the responsibilities of the members of the armed forces to lawfully attack military objectives while also causing civilian casualties and destroying civilian objects, these professionals also run the risk of prosecution for a violation of IHL. An objective IHL proportionality rule can be applied in a more or less predictable manner and would thus protect the members of armed force better from criminal prosecution than a subjective standard would. There are a number of procedural measures the parties to a conflict may take to improve the objectivity of the application of the IHL proportionality rule. These measures are to some extent procedural in nature, and include, among others, the level of knowledge and training of military commanders and the availability of well-trained legal advisers; the existence of procedures and systems to assist the military commanders in quantifying and predicting the

effects of planned attacks. It is however concluded that the IHL proportionality calculation remains a subjective standard, although some its components can and must be objectivised as far as possible in the process of the proportionality calculation.

Section 13.4 analyses the use of the term 'reasonable military commander' in the application of the IHL proportionality rule. This term as such is not included in the text of the IHL proportionality rule. Nonetheless, it seems undisputed that reasonableness is a key factor in the application of the IHL proportionality rule. It is concluded that this requirement of reasonableness is not a separate component of the IHL proportionality rule, but instead the manifestation of the general principle of international law of reasonableness. Reasonableness is used for a clash between unequal interests, which requires a more qualitative assessment. It is submitted that the IHL proportionality rule fits that description. The term 'reasonable military commander' as such does not provide guidance for implementing the IHL proportionality rule or for enhancing its objectivity. The measures increasing objectivity may assist in determining whether military commanders acted (un) reasonably in their assessment of the excessiveness of a planned attack. But since there is also a material component of reasonableness in the standard of the IHL proportionality rule, the principle of reasonableness must be applied to determine whether a planned attack complies with the IHL proportionality rule. This may also be perceived as a manifestation of the general IHL principle of proportionality seeking to provide an equitable outcome of the balance between humanity and military necessity.

Section 13.5 seeks to provide guidance for military commanders that may assist them in assessing proportionality by analysing the question of how the term 'excessive' must be understood.

It is clear that the term excessive is different from the term 'extensive'. The term 'extensive' points in the direction of an absolute maximum of collateral damage that may be prohibited based on the sheer magnitude of its consequences for the civilian population. The IHL proportionality rule however consists of a comparison between two different entities. It is concluded therefore that the extensiveness of civilian casualties and damage usually would not stand in the way of a planned attack, provided the anticipated military advantage justifies it. Nonetheless, the possibility that the extensiveness of an attack stands in the way of its lawfulness under the IHL proportionality rule, it is submitted, should not be dismissed categorically. Based on the obligation to take constant care of the civilian population as well as the general principle of proportionality in IHL, it is submitted that there is a difference between the civilian side and the military advantage side of the IHL proportionality rule, when both are stretched to their extremes. The outer limit of the civilian side of the proportionality equation is the prohibition to attack civilians and to launch indiscriminate attacks. These are absolute legal obligations. The outer limit of the military advantage, at least for a large scale planned attack, leaves ultimately still a choice to the attacker. There is no absolute legal obligation to launch an attack, no matter how advantageous it may be. The ultimate incentive to conduct an attack that would cause extensive civilian casualties,

which could be acceptable because of the massive military advantage that is expected from it, is found in *ius ad bellum*, not in IHL. It may therefore be argued that the limit for the humanitarian side of the IHL proportionality equation is contained within the law, whereas the limit for military advantage is not. Nonetheless, in a normal situation, expected *extensive* civilian damage is normally *excessive* in relation to the anticipated military advantage. The applicable standard is thus that of excessiveness.

Furthermore, although in international criminal law (ICL) the standard of *clearly excessive* is adopted, the IHL standard for applying the IHL proportionality rule does not contain this additional requirement of clarity of the excessiveness of the civilian damage in relation to the military advantage. The standard of the proportionality rule is thus stricter for IHL than it is in ICL.

It is concluded that the term *excessive* is used to assess the relation between two or more factors. If that relation is in balance, it may be said that the situation is normal, and thus not-excessive. The ordinary literal understanding of the word ‘*excessive*’ in balancing military advantage and civilian casualties and damage seems to suggest that even when the two factors are in balance, the collateral damage cannot be said to be excessive. This seems to tilt the scale in favour of military advantage. A number of reasons however may be raised why the interpretation of the term ‘*excessive*’ may not be as clear-cut as the ordinary literal meaning suggests. It may be useful to adopt a scaled approach in the practical application of the IHL proportionality rule, in which both the expected collateral damage and the anticipated military advantage are categorised in one of five levels. The proposed qualifiers are (ranging from small to large): marginal, minor, medium, major, massive. Using a matrix assists in making the proportionality equation clear. However, because of the overriding importance of the unique circumstances of each planned attack, the resulting parameters must be understood as guiding, not as authorising. The qualitative factors as well as a common sense reality check will need to accompany the guidance military commanders can derive from the proposed five-step scaled analysis. Furthermore, it is submitted that it is mostly a ‘zone’ of excessiveness rather than a sharp dividing line between excessive and non-excessive, as a result of the qualitative factors that need to be taken into account.

IHL already contains some indications in other rules on how the dividing line must be drawn between excessive and non-excessive collateral damage. The dividing line is thus not a straight line. First, on the lower end of expected military advantage and collateral damage, the qualifier “concrete and direct” in the definition of the military advantage anticipated means that in case it is expected that a planned attack will result in marginal military advantage and also marginal collateral civilian damage is expected from the attack, it is likely that the planned attack must be labelled as causing excessive collateral damage. This is because when the military advantage is likely to be just marginal, it may also be expected to be insufficiently ‘concrete and direct’ compared to the marginal collateral damage, and the law does not contain an additional qualifier to the expected collateral damage. Second, on the higher end of expected military advantage and collateral damage, the prohibitions

of indiscriminate attacks dictate that certain ratios must be labelled as disproportionate attacks.

It is submitted that the IHL proportionality rule is not as simple as the model of a scale would suggest and as the ordinary literal understanding of the word *excessive* seems to indicate. Indeed, it seems that there is another factor that impacts on the determination of excessiveness: the *probability* that the anticipated collateral damage, respectively the military advantage will indeed materialise as expected. As is discussed in Section 14.2, particularly when the military advantage of a certain planned attack is high, but when the probability that the attack will have the anticipated effect is low, this must be taken into account. Because the probability of success does not detract from either the expected civilian damage, or from the military advantage the attacker hopes to attain, it is submitted that the probability of success must be seen as an additional factor.² The result is a three dimensional assessment of excessiveness, taking into account (1) the military advantage anticipated from the planned attack; (2) the expected collateral damage and (3) the probability that the results of (1) and (2) will materialise as expected.

Furthermore, it is submitted that the perceived understanding of the word *excessive*, attaching more weight to the expected military advantage than to civilian damage, must be adjusted in the other direction. This latter proposal would adjust the ordinary literal interpretation of the word 'excessive' and tilt the balance more to the humanity side than it may currently be understood. This may be of assistance for military commanders in close cases, or in other words, in those situations where the expected civilian damage and casualties is beneath the standard of 'clearly excessive', when compared to the expected military advantage. This also includes the hypothetical situation that a military commander would conclude that the ratio is in balance.

The rationales for tilting the balance towards preventing collateral damage, it is submitted, are (1) the purpose of the proportionality rule; (2) the fact that the component of military advantage is qualified in the IHL proportionality rule with the additional qualifiers 'concrete and direct'; (3) the precautionary rule to take 'constant care' of article 57(1) API; (4) the application of principles through the application of the Martens Clause (5) the allocation of risk on the civilian population for the militaries' mistakes, faulty intelligence, malfunction of weapons systems or misreading and misunderstanding of information and other factors that cannot be controlled, such as the influence of weather; and (6) a general principle of proportionality in IHL. These factors are explained in Section 14.3.

Section 14.5 explains how different factors are relevant for the practical application of the proportionality analysis on different levels of decision making. For example, expected weapons malfunction may normally not be factored in for a single attack, but cannot be ignored for larger operations. This is because the attacking force normally has statistics

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2 Note that some systems used by the military to calculate the expected collateral damage of a planned attack do take probability into account when determining the expected results of an attack. Nonetheless, it is submitted that the probability should be regarded separately from the assessment of the military advantage and collateral damage.

on the failure rate of its weapons systems, based on previous experience, testing or on assessments provided by the producer of the weapon system. Therefore, these foreseeable factors need to be taken into account in assessing the proportionality of an attack 'as a whole', thus often on an operational or higher level. Thus, each level has its own set of factors that must be assessed in the IHL analysis. The awareness among military commanders to include the correct set of factors into their IHL proportionality assessment on the appropriate level must be thoroughly integrated into procedures, rules of engagement and training.

Section 14.6 discusses the necessity of a different or more precise formulation of the IHL proportionality rule. To start a future discussion on a different formulation, a possible alternative wording of the IHL proportionality rule is suggested, taking into account the factors that are identified in this study.

This rule could read as follows:

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

An advantage of a rule that would be formulated as such is that it introduces a stronger prohibition on causing collateral damage. Military commanders would therefore be forced to take an additional mental step in asking themselves whether there would be reasons of imperative military necessity to override the prohibition to cause incidental civilian casualties. This is a moderate version of Shamash's idea to place the burden of proof that an attack is proportionate on the attacker, since that person is best placed to assess the legality of the attack in terms of proportionality,³ without placing military commanders in a position where it is presumed that they violate the IHL proportionality rule in any event that collateral damage occurs. Also, the suggested rule assigns a higher value to the lives of civilians than to damage to civilian objects, and a higher degree of protection to specifically protected objects than to specifically protected persons. However, the inherently subjective

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3 Shamash, p. 146.

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

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

15.5 Final Remarks

The aim of this study is to formulate guidance for conducting a proportionality assessment of a planned attack. It is concluded that in IHL, proportionality is understood both as a general principle permeating the interpretation and application of all IHL rules, as well as an important rule of IHL. In its practical application, the IHL proportionality rule must be accepted as it is: an inherently imprecise and flexible yardstick that nonetheless does play its role as the last line of protection for the civilian population, and an obligation for military commanders to take that protection seriously into account. Nonetheless, this study suggests that the balance of the proportionality assessment should in close cases tilt more towards protecting the civilian population than the wording of the rule may suggest. Changing the rule as it is could provide a number of advantages, but there is no certainty that States would be willing to alter the IHL proportionality rule in a way that would improve the protection of the civilian population. Applying a general IHL principle of proportionality may be understood to be among the factors that argues in favour of such a suggestion. This would mean that the IHL rule of proportionality is actively influenced by the IHL principle of proportionality, from which the rule has originated. In a way, this may be understood as a return of proportionality to its ethical roots, when proportionality was understood as a general guideline for the commander, applying it to all military operations (including attacks) during armed conflict, because it would ultimately prevent excesses and assist in building a sustainable peace after the armed conflict.