Proportionality in international humanitarian law

van den Boogaard, J.C.

Citation for published version (APA):
This study examines the principle of proportionality as it applies in international humanitarian law (IHL). The study first examines international law to determine the category of legal norms in which the IHL principle of proportionality must be placed. Subsequently, the notion of proportionality is analysed in a number of branches of international law. The interrelationship of these notions is clarified in light of the theory concerning principles of international law. The study then turns to an in-depth analysis of the IHL proportionality rule and how this rule must be applied in practice and on different levels of decision-making.

The final conclusion of this study is 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 is an inherently imprecise and flexible yardstick that nonetheless helps in protecting the civilian population. 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.
Proportionality in International Humanitarian Law

Principle, Rule and Practice

Jeroen van den Boogaard
Proportionality in International Humanitarian Law

Principle, Rule and Practice
Promotiecommissie:

Promotor: prof. dr. T.D. Gill Universiteit van Amsterdam

Overige leden: prof. mr. P.A. Nollkaemper Universiteit van Amsterdam
 prof. dr. P.A.L. Ducheine Universiteit van Amsterdam
 prof. mr. dr. H.G. van der Wilt Universiteit van Amsterdam
 prof. dr. E. Lijnzaad Universiteit Maastricht
 prof. dr. R. Geiss University of Glasgow

Faculteit der Rechtsgeleerdheid
Acknowledgements

This book is the result of approximately eleven years of work. I have often compared writing my doctoral thesis with climbing Alpe d’Huez on a child’s tricycle. It is possible; you are convinced that you will reach the summit. But you also know that it’s hard, and that it takes a long time and some suffering to get there. The work was interrupted often as a result of everyday life, teaching obligations, change of jobs, side-projects, many other distractions or, as Geert Tummers once put it: life’s rush-hour. I would first of all like to thank all my friends and colleagues who helped me and encouraged me on my journey. Sometimes, this help was in the form of merely asking when I would finish. Although that is the one question any PhD candidate hates, it is necessary and I have drawn renewed energy from all these conversations. Others have helped me by proof-reading draft-chapters. Thank you very much, Jelle, Mark, Barbara, Sigrid, Kinga and Rogier. I have also been very lucky to encounter superiors at the NLDA and JDV who enabled and even encouraged me to continue working on my dissertation. Thank you very much, Paul, Joop, Geert, Ben, Jeaco, Tjeerd, Ron, Michel, Sander and Mario. I also wish to thank the ACIL for hosting my PhD and more particularly for the generous mr. I. Henri Hijmans grant I had the privilege to receive. Furthermore, I am grateful to Niels van Tol and his colleagues at the Peace Palace Library for letting me work in peace and for providing access to simply anything I was looking for.

Of course, this book would never have been completed if it wasn’t for my supervisor professor Terry Douglas Gill, who knew exactly when it was time to encourage me and when to let me work in my own tempo, while always keeping up the faith that I would one day finish the dissertation. Thank you very much for your support, feedback, supervision and for believing in me. It has been a great privilege.

Last but not least, this book is as much mine as it is my family’s. Thank you, Wendy, for putting up with me all the times my mind was so occupied by my research that it forgot there were other things more important. Thank you Pa, Ma, Hanny and John, for supporting us and for taking turns in baby-sitting and picking up the children from day-care and school. For Fabio and Amber: the two of you remain my dearest and most impressive babies.

Delft, July 2019
Table of contents
# Table of contents

**Acknowledgements** .......................................................................................................... 7

**Table of contents** ............................................................................................................... 9

**Part I: Introduction**

**Chapter 1: Introduction** ................................................................................................... 17
  1.1 Introducing the Study ............................................................................................... 17
  1.2 International Humanitarian Law ............................................................................ 18
  1.3 Principles of IHL ........................................................................................................ 21
  1.4 Proportionality in IHL .............................................................................................. 25
  1.5 Structure and Methodology of the Study ............................................................... 26

**Part II: Principles**

**Chapter 2: Principles as a Source of Public International Law** ....................................... 35
  2.1 Introduction ............................................................................................................. 35
  2.2 Principles of International Law .............................................................................. 37
  2.3 Principles as a Source of International Law ........................................................... 38
  2.4 Three Roles for Principles of International Law .................................................... 40
  2.5 Conclusion ............................................................................................................... 43

**Chapter 3: Characteristics of IHL Principles** .................................................................... 45
  3.1 Introduction ............................................................................................................. 45
  3.2 A Method to Determine Principles of IHL .............................................................. 45
  3.3 The Principles of IHL ................................................................................................. 51
  3.3.1 IHL Principles Identified by States ....................................................................... 52
  3.3.2 IHL Principles Identified by International Courts ............................................... 54
  3.3.3 IHL Principles Identified by Doctrine ................................................................... 58
  3.3.4 Other Practice ........................................................................................................ 61
  3.3.5 Sub-Conclusion ..................................................................................................... 61
  3.4 The Applicability of the Principles of IHL ............................................................... 63
  3.5 Three Roles for the Principles of IHL ...................................................................... 69
  3.6 Conclusion ................................................................................................................ 71

**Part III: Proportionality**

**Chapter 4: Proportionality in International Law** ........................................................... 75
  4.1 Introduction ............................................................................................................. 75
  4.2 Origins and Functions of Proportionality in International Law ............................ 75
  4.2.1 Proportionality as a Limit on the Functional Powers of an Entity ..................... 78
4.2.2 Proportionality as a Means to Resolve Conflicts between Competing Interests... 80
4.3 Proportionality, Equity and Reasonableness ...................................................... 82
4.4 Conclusion ......................................................................................................... 84

Chapter 5: Proportionality and the Use of Force ......................................................... 89
5.1 Introduction ........................................................................................................ 89
5.2.1 Introduction .................................................................................................... 90
5.2.2 From Morality to International Law ............................................................... 90
5.2.3 Proportionality in Just War Theory ............................................................... 92
5.2.3.1 The ius ad Bellum Proportionality in Just War Theory ............................... 92
5.2.3.2 The ius in Bello Proportionality in Just War Theory .................................. 93
5.2.4 Sub-Conclusion ............................................................................................... 95
5.3 The Concept of Proportionality in the ius ad Bellum ...................................... 95
5.3.1 Introduction .................................................................................................... 95
5.3.2 Proportionality in the Use of Force in Self-Defence .................................... 97
5.3.2.1 Components of the ius ad Bellum Proportionality .................................... 98
5.3.2.2 The Temporal Component ...................................................................... 100
5.3.2.3 Necessity and Proportionality in the ius ad Bellum ................................. 101
5.3.3 Other Proportionality Equations in the ius ad Bellum ................................. 102
5.3.4 Sub-Conclusion .............................................................................................. 104
5.4 The Concept of Proportionality in International Human Rights Law .......... 105
5.4.1 Introduction ................................................................................................... 105
5.4.2 Applicability of International Human Rights Law during Armed Conflict ...... 107
5.4.3 Proportionality Restraining the Use of Force in International Human Rights Law .............................................................................................................. 109
5.4.4 Sub-Conclusion .............................................................................................. 114
5.5 Conclusion ......................................................................................................... 115

Chapter 6: The Concept of Proportionality in International Humanitarian Law ...... 117
6.1 Introduction ....................................................................................................... 117
6.2 Proportionality, Distinction and Precautions .................................................. 118
6.3 The Development of International Humanitarian Law Proportionality .......... 120
6.3.1 The First Codifications of International Humanitarian Law ......................... 120
6.3.2 Legal Doctrine before World War II .............................................................. 123
6.3.3 After World War II: the Red Cross Draft Rules ............................................ 125
6.3.4 Additional Protocol I .................................................................................... 126
6.3.4.1 Draft Article 46 (the present article 51 API) .............................................. 127
6.3.4.2 Draft Article 50 (the present article 57 API) .............................................. 129
6.3.5 The Rome Statute of the International Criminal Court .............................. 131
6.4 IHL Proportionality in International Customary Law ...................................... 132
6.4.1 Challenges in Establishing a Customary IHL Proportionality Rule ................... 133
6.4.2 The ICRC Customary Law Study ........................................................................ 136
6.4.3 Case Law on the IHL Rule on Proportionality .................................................... 137
6.4.3.1 The Shimoda Case (1963) ................................................................................. 138
6.4.3.2 The Nuclear Weapons Advisory Opinion (1996) ............................................. 139
6.4.3.3 ICTY Case Law (1995-present) ....................................................................... 140
6.4.3.4 The Eritrea-Ethiopian Claims Commission (2000 – 2005) ............................. 141
6.4.3.5 The Supreme Court of Israel Sitting as the High Court of Justice (2005) ...... 143
6.4.3.6 Sub-Conclusion on Case Law ......................................................................... 144
6.4.4 Other Indicators ................................................................................................ 144
6.4.5 Customary Law both in IAC and NIAC? ..............................................................147
6.4.6 Sub-Conclusion: the Customary Character of the IHL Rule on Proportionality ............................................................................................................148
6.5 Conclusion ............................................................................................................. 149

Chapter 7: Other Standards of Moderation in International Humanitarian Law ...... 151
7.1 Introduction ............................................................................................................151
7.2 Combatants as Human Beings .............................................................................. 151
7.2.1 Methods of Warfare .............................................................................................153
7.2.2 Means of Warfare ...............................................................................................155
7.3 The Destruction of Enemy Property ......................................................................156
7.4 Blockades ................................................................................................................157
7.5 Belligerent Reprisals ...............................................................................................159
7.6 Security Measures during Occupation ....................................................................161
7.7 Conclusion ...............................................................................................................162

Chapter 8: Interrelationship of Proportionality in Armed Conflict ......................... 165
8.1 Introduction .............................................................................................................165
8.2 Proportionality in IHL and the Ius ad Bellum .........................................................165
8.2.1 The Strict Separation between IHL and the Ius ad Bellum .................................165
8.2.2 Possible Relationships between the Ius ad Bellum and IHL Proportionality ... 169
8.2.3 Proportionality in the Ius ad Bellum Influencing IHL Proportionality in Operations to Protect Civilians ................................................................. 171
8.2.4 The IHL Proportionality Rule Influencing the Ius ad Bellum Proportionality in Terms of the Magnitude of the Permissive Collateral Damage .................. 173
8.2.5 Sub-Conclusion .................................................................................................. 176
8.3 IHRL and IHL Proportionality ............................................................................... 176
8.3.1 The General Relationship between IHL and IHRL .......................................... 177
8.3.2 Lex Specialis and Complementarity .................................................................. 178
8.3.3 Proportionality Relationship between IHL and IHRL ...................................... 181
11.6 The Civilian Side ...................................................................................................260
11.6.1 Civilian Immunity............................................................................................261
11.6.2 Human Shields ...............................................................................................264
11.6.3 Physical Injury, Sickness and Mental Harm .....................................................267
11.6.4 Civilians inside a Military Objective ..............................................................268
11.7 What are Civilian Objects? .................................................................................270
11.7.1 Civilian Objects and Military Objectives .........................................................270
11.7.2 The Natural Environment as Part of the Proportionality Equation. .................272
11.7.3 Dual-use Objects and Proportionality ...............................................................275
11.8 Combatants Hors De Combat and Other Protected Persons and Objects ..........277
11.9 How to Evaluate a ‘Combination’ of Incidental Loss of Civilian Life, Injury to
Civilians and Damage to Civilian Objects? ...............................................................281
11.10 The Military Advantage Side ...........................................................................282
11.10.1 Concrete and Direct Military Advantage .........................................................283
11.10.2 The “Overall” Military Advantage ................................................................285
11.10.3 Military Advantage and Force Preservation ...................................................285
11.11 Conclusion .........................................................................................................288

Chapter 12: Proportionality in Practice .................................................................291
12.1 Introduction .......................................................................................................291
12.2 The Strategic and Operational Level .................................................................292
12.2.1 Kosovo 1999: the NATO Bombing Campaign .................................................293
12.2.2 The 2003 UK Intervention in Iraq ...................................................................294
12.2.3 The 2010 Artillery Attack on South Korea .......................................................296
12.3. The Tactical Level ............................................................................................297
12.3.1 The Destruction of Mostar’s Old Bridge ...........................................................301
12.3.2 The Attack on Milan Martic .............................................................................305
12.3.3 Kosovo 1999: the NATO Bombing Campaign .................................................308
12.3.4 The Killing of Salah Shehadeh ..........................................................................310
12.3.5 The Attack on General ‘Chemical’ Ali Hasan Al-Majid ..................................313
12.3.6 The Attack on the Kunduz Fuel Trucks ...........................................................315
12.3.7 Firefight along the Baghlan River ...................................................................318
12.4 Conclusion ........................................................................................................320

Chapter 13: Assessing Proportionality .................................................................325
13.1 Introduction .......................................................................................................325
13.2 Are the Components of the IHL Proportionality Rule Comparable? ..................325
13.3 The Search for an Objective IHL Proportionality Rule ........................................327
13.3.1 The Passive and Active Protection Rationales for an Objective Proportionality
Rule.........................................................................................................................328
13.3.2 Are the Factors in the IHL Proportionality Rule Objective or Subjective?...... 330
13.3.4 Measures to Limit the Subjective Application of the IHL Proportionality
Rule ............................................................................................................................. 332
13.4 The ‘Reasonable Military Commander’............................................................. 336
13.4.1 The Objectivity of the Concept of the ‘Reasonable Military Commander’ .... 336
13.4.2 Remaining Subjective Factors for ‘Reasonable Military Commanders’ ......... 338
13.4.3 Sub-Conclusion...............................................................................................340
13.5 What is ‘Excessive’? ......................................................................................... 342
13.5.1 Extensive or Excessive? ..................................................................................... 343
13.5.2 Excessive or Clearly Excessive?.........................................................................345
13.6 Conclusion............................................................................................................347

Chapter 14: Determining Excessiveness and a Plea for Tilting the Balance Towards
Humanity .......................................................................................................................349
14.1 Determining Excessiveness ............................................................................... 349
14.2 Probability of Success as a Factor Determining Excessiveness ......................... 354
14.3 Tilting the Balance of Excessiveness Towards Humanity ................................... 356
14.4 Policy or Operational Factors that Affect the Excessiveness of Collateral Damage .............................................................. 359
14.5 Different Factors for Different Levels of Decision-making ................................. 361
14.6 Is There a Need to Clarify or Change the IHL Proportionality Rule?................. 363
14.7 Empirical Analysis as a Possible Way Ahead ...................................................... 367
14.8 Final remarks .....................................................................................................368

Chapter 15: General Conclusions ............................................................................... 371
15.1 Principles ............................................................................................................. 371
15.2 Proportionality ................................................................................................... 372
15.3 The IHL Proportionality Rule in Practice ........................................................... 376
15.4 Guidance on Applying the Principle of Proportionality for the Military ......... 379
15.5 Final Remarks.....................................................................................................384

Summary .......................................................................................................................387

Bibliography .................................................................................................................399

Table of cases ............................................................................................................... 449

Table of treaties ............................................................................................................ 457

Samenvatting ............................................................................................................... 461