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**Proportionality in international humanitarian law**

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# Chapter 1

## Chapter 1: Introduction

### 1.1 Introducing the Study

In war, people die. But that does not mean that war is totally stripped of humanity. International humanitarian law (IHL) provides the legal framework for those who are fighting for one of the parties to an armed conflict, and for those affected by the effects of hostilities. IHL aims to regulate the way the war is fought and to protect those who are not taking part in the hostilities. IHL acknowledges that civilians and civilian objects may legitimately be affected by warfare. It is a myth that civilian casualties can be avoided in their entirety during contemporary armed conflicts, not necessarily because the law is violated, but because collateral damage is caused by other factors.<sup>1</sup> Even though civilians and civilian objects may not be directly targeted, the IHL principle of proportionality allows civilian casualties and damage to civilian objects, under the restriction that these are not excessive to the military advantage anticipated. The IHL principle of proportionality is commonly understood to be codified in article 51 (5) (b) of Additional Protocol I (1977) to the Geneva Conventions:

“[Prohibited are attacks]... which 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.”

The principle of proportionality is one of the principles of IHL.<sup>2</sup> IHL, or *ius in bello*<sup>3</sup>, is one of the branches of public international law.<sup>4</sup> The principle of proportionality in the context of an armed conflict also exists in other branches of international law,<sup>5</sup> such as international human rights law and the law on the use of force by States, or *ius ad bellum*, as it is more generally referred to. This study aims to provide more clarity on that principle in IHL and the balance it requires between anticipated military advantage and expected collateral damage.

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- 1 For example, unexpected collateral damage may be the result of imperfect intelligence, weapon system malfunction or damage caused by hostile forces. See Crowder, slide 19.
- 2 See for example Rogers 2004, p. 3, and the discussion below in Section 3.2.
- 3 Other names for this branch of law include the Law of Armed Conflict or the Law of War. For example, the United States of America prefer the term “Law of War, or Laws and Customs of War”, see Bellinger and Haynes, p. 443.
- 4 Gardam 2004, p.1. For an explanation of the term *ius in bello*: see Kolb 1997, pp. 553-562.
- 5 This study uses the term ‘international law’ as short for ‘public international law’, although the term international private law is technically also part of international law. International private law is not the object of this study.

## 1.2 International Humanitarian Law

IHL is a branch of international law that aims to mitigate the horrors of war by preserving some humanity during armed conflict. The provisions of IHL are applicable whenever there are military operations ongoing during which the armed violence that is used amounts to an armed conflict and in situations of occupation. The provisions of IHL bind the parties to the armed conflict and the members of their forces.

The objective of IHL is twofold. The first is to prevent suffering of those people who are not, or no longer, taking direct part in the hostilities as much as this is possible in times of war. Protected are *inter alia* captured, wounded, sick and even dead soldiers, medical personnel, vehicles and installations, and civilians and civilian objects. Secondly, IHL restricts the effect of means and methods of combat used by those who do participate in the armed conflict. Prohibited methods of combat include attacks against civilians and attacks that misuse the protection that has been awarded to others, such as misuse of the protected emblems of the Red Cross, Red Crescent or Red Crystal. Prohibited means of warfare include weapons that cause serious injury or unnecessary suffering, such as bullets that are designed to explode inside the human body, rendering the death of the victim inevitable.

A unique characteristic of IHL is that it is a preventive framework. Although States remain the main addressees of IHL, individuals are bound by it as well as representatives of those States. IHL has been drafted to influence behaviour on the battlefield, during the armed conflict, and not necessarily to make it possible to prosecute people for violations of IHL. In other words: the rules of IHL are drafted for soldiers, not lawyers. Of course, many lawyers were present during the negotiations of the main instruments of international law, but also military practitioners, with a view to keeping IHL workable for their military forces.

An important factor in IHL is that different legal regimes are applicable to different types of armed conflict. The classical interstate armed conflict, labelled an ‘international armed conflict’, is regulated through extensive rules of treaty law, including the Geneva Conventions of 1949<sup>6</sup> and the First Additional Protocol of 1977,<sup>7</sup> as well as a number of other treaties pertaining mostly to weapons, but also treaties that provide protection for cultural property and the environment. The other category is that of a non-international armed conflict, which is regulated mainly by Common Article 3 of the Geneva Conventions. This article applies to armed conflicts within the territory of one State between the government armed forces and a dissident armed group, armed conflicts between such groups, and arguably a residual group of other types of armed conflicts.<sup>8</sup> To a further restricted number

6 The Geneva Conventions of 12 August 1949: Geneva Convention (I) for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field (GCI); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GCII); Geneva Convention (III) relative to the Protection of Prisoners of War (GCIII); Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (GCIV).

7 The 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (hereinafter: Additional Protocol I or API).

8 See generally Bartels 2009a.

of types of non-international armed conflicts, the Second Additional Protocol applies in addition to Common Article 3. Of course, apart from the IHL treaties, customary IHL applies as well, and additionally, as is argued below, the principles of IHL.

Much has been written on the history of IHL.<sup>9</sup> Depending on the background of the writer and purpose of the book, a description of the history of IHL may commence by referring to the Bible,<sup>10</sup> the Koran,<sup>11</sup> ancient Hindi texts<sup>12</sup> or texts from other civilisations, including the Maori,<sup>13</sup> the work of Hugo Grotius,<sup>14</sup> the Lieber Code<sup>15</sup> or a description of the Battle of Solferino in 1859. All these texts prove that the idea that warfare must not be unrestricted is universal, and has existed throughout history. Sadly, many atrocities have taken place in history violating these rules. However, at the same time, there have always been examples of commanders who attached value to a sense of humanity. The famous Sultan Saladin was a highly respected commander throughout the region because of his chivalrous behaviour towards his adversaries during and after combat.<sup>16</sup>

The influence of Henri Dunant cannot be overlooked as an important factor in the development of IHL. Dunant published his account of the battle of Solferino in 1862, describing the suffering of thousands of soldiers during and after battle. His book 'A memory of Solferino' is a detailed description of courageous acts of war by mostly generals, dukes and princes. But Dunant also describes the suffering of those left *hors de combat* after the battle, with nobody there to care for them. And it is the suffering of these soldiers that motivates Dunant to propose in his book that there should be written rules to protect – in particular – sick and wounded soldiers. This proposal was successful in the sense that the first Geneva Convention was concluded in 1864, providing basic rules aiming to protect wounded and sick soldiers. The almost simultaneous founding of the International Committee of the Red Cross (ICRC), as it is called today, provided the basis for the leading role that this private organisation played, and still plays, in the development and implementation of IHL. The first Geneva Convention of 1864 has since regularly been updated, mostly after major armed

9 For an overview of the historical development of IHL, see for example: Best, Kalshoven and Zegveld 2011, Greenwood 2008, pp. 15-27, Green, pp. 20-53 and Amerasinghe, pp. 263-287.

10 See for example Deuteronomy, chapter 20: even though this chapter contains a provision stating that all male inhabitants of a conquered city may be killed, it also contains a provision stating that only trees that do not bear eatable fruit may be used to build fortification during a siege.

11 See for example Van Engeland, pp. 155-156.

12 Amerisinghe, pp. 264-267. See also Nirmal, pp. 25-38.

13 Judge Kenneth Keith presented the Maori 'Solemn rules for governing the fighting', during his lecture "Tutti Fratelli?" as delivered on 10 February 2009 in the lecture series of the Hague Initiative for Law and Armed Conflict (HILAC). The rules were used during the battle of Gate Pa, New Zealand, in April 1864.

14 See Grotius' seminal work *de jure ac bella pacis*.

15 Instructions for the Government of Armies of the United States in the Field, promulgated as General Orders No. 100 by President Lincoln on 24 April 1863, but prepared by Francis Lieber (herein after: the Lieber code). See Schindler & Toman, p. 3.

16 Greenwood 2008, p. 17.

conflicts.<sup>17</sup> The result of the Geneva branch of IHL are the four Geneva Conventions of 1949 and its three Additional Protocols.

Many writers argue that this so-called Geneva law was in essence one of the two main lines of development of IHL, the other one being those rules that focus on the means and methods of warfare to be used during the conduct of hostilities. The first modern multilateral effort to regulate affairs during armed conflict was the Declaration of Paris of 1856.<sup>18</sup> A more important founding document is the famous Lieber Code of 1863, which served as an early handbook on IHL for commanders during the American Civil War. The Lieber Code was the main inspiration for the Brussels Conference of 1874<sup>19</sup> and has been the basis for the other main line of development of IHL. This current is usually referred to as Hague law, because the founding treaty in which the main rules for the conduct of hostilities have been laid down, the Hague Regulations, was the result of the two Peace Conferences that took place in The Hague in 1899 and 1907.<sup>20</sup> With regard to the use of certain means of warfare, treaties have been concluded on chemical, biological and conventional weapons. The conclusion of treaties prohibiting or restricting the use of a number of specific weapons have proved the direct impact that IHL continues to have on the battlefield.<sup>21</sup>

Today, the distinction between Hague law and Geneva law is used mainly for historical and didactic reasons.<sup>22</sup> For example, the First Additional Protocol to the Geneva Conventions contains both provisions on the protection of persons during armed conflict and on the conduct of hostilities. In other words, both Hague and Geneva law. The International Court of Justice notes in this regard that “these two branches of law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as IHL. The provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law”.<sup>23</sup>

IHL has today become one of the best developed systems of law on the international plane, consisting of an impressive body of treaty law and a number of rules of customary IHL. Paradoxically, the humanitarian ideals behind the rules of IHL, clearly stemming from natural law sources, have succeeded in being codified in positive law. As Draper puts it: “It is

17 The Geneva Conventions were updated in 1906 and 1929 before they became the applicable four Geneva Conventions of 1949, which have achieved universal ratification, and supplemented by the two Additional Protocols of 1977 and the Third Additional Protocol on the Red Crystal in 2006.

18 Declaration respecting Maritime Law, Signed in Paris, 16 April 1856 (Declaration of Paris). The Declaration of Paris contains provisions on neutrality such as the neutral flag, blockade and contraband of war. Parties were Austria, France, Great Britain, Prussia, Russia, Sardinia and Turkey. See Schindler & Toman, p. 1053. See also Amerisinghe, p. 269.

19 The result of the Brussels Conference, in which representatives of 15 European states took part, is generally referred to as the Brussels Declaration. For the text of the adopted documents, see Schindler and Toman, p. 21. See Amerisinghe, p. 270, and Kalshoven 2006, p. 49.

20 Kalshoven and Zegveld, pp. 10-14.

21 Recent examples include anti-personnel landmines because the use of these weapons has decreased significantly after the conclusion of the Ottawa Convention of 1997.

22 Chetail, p. 238.

23 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (hereinafter: the Nuclear Weapons Advisory Opinion), para 75, p. 257.

a strange reflection that the humanitarian movement of the mid-19<sup>th</sup> century appeared in the noon-tide of positivist theories of international law. When the claims of sovereignty of states were at their highest, when the last relics of moral restraint in the old theories of natural law and its corollary, the ‘just war’ idea, were receding, the full spate of the humanitarian ideal appeared.”<sup>24</sup>

As far as customary IHL is concerned, there is still an ongoing debate on this subject, that has been sparked in particular by the ICRC Customary Law Study, the judgments of the Eritrea-Ethiopia Claims Tribunal, the ad-hoc tribunals for the former Yugoslavia and Rwanda, and the emerging jurisprudence of the International Criminal Court. These latter institutions are part of a major development in international relations that has resulted in the emergence of international criminal law (ICL). The developments in this field of law are remarkable since 1993. It provides procedural rules necessary for a part of the implementation of IHL: the criminal prosecution of individual violators of IHL outside national jurisdictions. Today, ICL judgements provide a valuable source for interpretation of IHL rules and concepts. The focus of this study is however IHL, more in particular the IHL principle of proportionality. As this principle is one of the commonly recognised principles of IHL, it is necessary to obtain some basic insight into the substantive content of the most commonly encountered principles of IHL. For that reason, the following Section provides a short explanation of the substantive content of the principles of IHL.

### 1.3 Principles of IHL

The principles of military necessity, humanity, distinction, proportionality, the prohibition to use means and methods of warfare that cause superfluous injury or unnecessary suffering and the principle of precautions are among those commonly mentioned as relevant principles of IHL, as is established below in Chapter 3. This section provides a short explanation of the substantive content of these principles in order to sketch a broader picture of the context in which the IHL proportionality principle is situated.

#### ***The principle of military necessity***

In peacetime, it is prohibited to kill another person. Armed forces engaged in combat however, may kill their opponents for as long as it is necessary to win the fight and provided there is no other prohibition to attack the person or object. IHL recognises that it is necessary for armed forces to employ deadly force to overcome the enemy. For that purpose, it is permitted to use any legally permissible type of weapons and munitions as much as is military necessary to win the war. The origin of the notion of military necessity may be traced

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24 Draper, p. 131.

back to the time of the Lieber Code of 1863.<sup>25</sup> An accepted definition is: “[m]ilitary necessity permits a state engaged in an armed conflict to use only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.”<sup>26</sup> This is the permissive part of the concept of military necessity. However, military necessity is also a restrictive norm, because it entails that whatever is military *unnecessary*, is prohibited.<sup>27</sup>

### **The principle of humanity**

Humanity guards human dignity in times of war. It safeguards a sense of humanity during the most inhumane acts human beings carry out: waging war. It aims to prevent total war and it gives hope for the future that after the armed conflict has ended, society will be able to function normally again. Therefore, the wounded and sick must be spared and cared for and it is inhumane to kill an adversary when he or she has already surrendered. For the same reason, those detained or taken as prisoners, must be treated humanely. It is clear that humanitarian considerations are the basis of a large part of the rules of IHL.<sup>28</sup> Humanity surfaces in specific rules applicable both to the individuals who are participating in warfare themselves, as well as with regard to persons who do not take part in the hostilities, but humanity is also relevant for the rules pertaining to means and methods of warfare. As Pictet notes: “Humanity is the sentiment or attitude of someone who shows himself to be human. With Littré’s dictionary, we would define humanity as being “a sentiment of active goodwill towards mankind”.”<sup>29</sup> An alternative definition is provided by Coupland, who proposes that “humanity arises from and signifies restraining the capacity for armed violence and limiting its effects on security and health. Humanity interpreted in these terms encompasses humanitarianism, morality, development, human rights and human security.”<sup>30</sup>

25 See paragraph 14 of the Lieber Code: “[m]ilitary necessity, as understood by modern civilized nations, consists in the necessity of these measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war”, see also Downey, p. 252.

26 United Kingdom Manual of the Law of Armed Conflict, pp. 21-22.

27 M.N. Hayashi 2008, pp. 142-143, quoting in footnote 58 Gardam, Ticehurst, David and Bothe as proponents of the view that military necessity may be approached as a restraining factor, prohibiting any violence that is not military necessary. See also Geiss 2008, p. 566: “there is an obligation to choose the least intrusive among equally suitable means for achieving a legitimate aim [but] (...) the restrictive element inherent in the necessity requirement has fallen into near oblivion.”

28 As confirmed, for example, by the ICJ in the *South West Africa Cases*, Second Phase, Judgment, (1966) ICJ Reports, 34, where it is noted that “humanitarian considerations may constitute the inspirational basis for rules of law”.

29 Pictet 1966, p. 14.

30 Coupland, p. 988.



### **The principle of distinction**

The notion of distinction is a central rule of the entire legal framework of IHL. As Dinstein puts it: “there are several cardinal principles lying at the root of the law of international armed conflict. Upon examination, none is more critical than the principle of distinction”.<sup>31</sup> The main rule is contained in article 48 of Additional Protocol I, which provides that “Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly direct their operations only against military objectives.” The rule is also accepted as a rule of customary international law, even by States who are not parties to Additional Protocol I. The principle of distinction may be divided into three components: as an obligation to determine who may and who may not be attacked; as a ban on the use of indiscriminate weapons and, thirdly, as a prohibition on the indiscriminate use of otherwise discriminate means of warfare, resulting in indiscriminate attacks.<sup>32</sup>

### **The principle prohibiting the use of means and methods of warfare that cause superfluous injury or unnecessary suffering**

The principle of superfluous injury or unnecessary suffering is firmly established in IHL treaties and customary IHL.<sup>33</sup> The principle embodied in the prohibition to cause superfluous injury or unnecessary suffering holds particularly that means and methods of warfare that cause superfluous injury or unnecessary suffering to combatants are prohibited. The principle is a balance between the effects of a means or method and its military utility.<sup>34</sup> It is military necessary to employ means and methods that cause injury, or death to the opposing fighters. However, it is not humane to make them suffer unnecessarily. Also, as far as methods of warfare are concerned and the treatment of those that do not, or no longer participate in hostilities, the principle may be invoked to assure humane treatment, as is embodied in the expansive body of IHL rules concerning the treatment of these persons. Some attacks that are carried out with legitimate weapons may be carried out in a manner that is inconsistent with the prohibition to use methods of warfare that cause serious injury or unnecessary suffering.

31 Dinstein 2008, p. 1.

32 Schmitt 2005, p. 171.

33 The concept of superfluous injury and unnecessary suffering is captured much shorter in the French term ‘*maux superflus*’, but contrary to the concepts of for example ‘*hors de combat*’ and ‘*levée en masse*’, this French term has never made it to popular use by the English-speaking community. For a discussion on the proper translation of ‘*maux superflus*’, see Meyrowitz, pp. 104-105. See also Boutruche, p. 104-105. Rogers comments that the wording as incorporated in article 35 (2) of AP I is a general principle, bringing together the French and English texts of 1907. See Rogers 1998, p. 328.

34 Boutruche, p. 103-106.

An illustration of how the principle of superfluous injury and unnecessary suffering is put into practice is the use of incendiary weapons: “[i]n instinctively, man is afraid of fire. The injuries caused by incendiary weapons (burns and lesions due to the release of toxic gases) are particularly painful and, to be treated, they require greater hospital facilities than is the case for bullet or shrapnel wounds.”<sup>35</sup> When considerations of humanity outweigh the military considerations with regard to a means or method of warfare, the principle of superfluous injury and unnecessary suffering provides the prohibition to use that means or method.<sup>36</sup> To a certain extent, however, “[t]he superfluity of injury and the necessity of suffering can only be matters for subjective judgement”.<sup>37</sup>

### **The principle of precaution**

Armed conflict is a situation during which all parties to it take turns in launching attacks, conducting a defensive move, and executing a counter attack. Thus, parties to the conflict on the defending side have precautionary obligations as well. These latter type of obligations are codified in article 58 API, and may also be called ‘passive precautions’<sup>38</sup>. Parties to an armed conflict must, to the maximum extent feasible, remove the civilian population, individual civilians and civilian objects under their control from military objectives and avoid locating military objectives within or near densely populated areas.<sup>39</sup>

The rules with regard to precautions in attack are codified in article 57 API. The precautions in attack obligations may be generally divided into two parts: a general obligation to take ‘constant care’ to spare the civilian population in military operations during armed conflict and a list of specific obligations that operate to implement the general obligation during the specific situation of attacks. In addition, precautionary obligations can also be derived from other rules, such as the specific regulations that apply for attacking works and installations containing dangerous forces “if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.”<sup>40</sup> Corn suggests that the obligations to take precautionary measures “should be understood to include a broad range of measures”<sup>41</sup> that also includes measures such as training military lawyers in IHL and the targeting process.

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35 Aubert, p. 489.

36 Some commentators, such as Gardam, refer to the principle of serious injury and unnecessary suffering as the principle of proportionality. See Gardam 2004, p. 59. This view is dismissed by Meyrowitz, p. 109. See also Aubert, p. 478.

37 Haines, p. 286.

38 See Sassòli and Quintin, pp. 112-122, and Jensen, pp. 147-175.

39 See Quéguiner 2006, p. 811-812 and Henckaerts & Doswald-Beck 2005a, Rule 22.

40 See article 56 API and Henckaerts & Doswald-Beck 2005a, Rule 42.

41 Corn 2014, p. 465.

The principle of proportionality, which is the main subject of this study, is closely connected to many of the other principles of IHL. A short introduction into its relevance and the purpose of this study is provided in the next section.

#### 1.4 Proportionality in IHL

The text-book answer to the question of when an attack is conducted in accordance with the IHL principle of proportionality is: 'it depends on the circumstances of each specific case'. This seems to be the inevitable outcome of a principle of IHL that is phrased as a comparison between the rather generic terms of 'military advantage' and 'civilian casualties and damage'. This makes sense: every attack is different, and for each different military objective, or available type of weapon, the proportionality test will have a different outcome. But still, this text-book answer seems highly unsatisfactory. The goal of this study is therefore to get a more precise answer than that. This goal is important for a number of reasons.

Firstly, it is important for the conductors of an attack to receive more guidance on how to balance military advantage and collateral damage. Members of the armed forces of the parties to the conflict, often generally referred to as the military commanders, are the people that have been authorised by States to take the lives of the members of opposing forces. While they are conducting their operations, IHL applies to their actions. If they violate the provisions of IHL, they may face criminal prosecution. In fact, due to the developments in ICL in the past decades, the chances for this actually to occur have increased. Therefore, these fighters are entitled to receive clear guidance about what they can and what they cannot do during hostilities. They deserve this, given the fact that they are the ones putting their lives on the line in combat for the sake of the political goals of their leaders. In turn, States have a responsibility towards their military forces to provide clear guidance on how to conduct the military operations within the boundaries of IHL.

Secondly, clear guidance for members of armed forces participating in armed conflicts is important for reasons of post-conflict reconciliation. The built-in reciprocity of the rules of IHL can prevent total escalation of hostilities. Observance of IHL on one side of the conflict can be very important for observance of the same rules on the opposing side. If the IHL proportionality rule is not clear, disproportionate attacks of one side of the conflict may be retaliated by disproportionate attacks of the adverse party. Total escalation of an armed conflict resulting in massive violations of IHL, is a key obstacle to reconciliation after the conflict. As noted by Pratzner:

"(...) perhaps most importantly, mitigating collateral damage provides for the possibility of a better peace. Warfare in the modern era demands this, perhaps more than conflicts in the past. (...) A vanquished opponent may fight for years and never give up the fight fully, as seen in Afghanistan and Iraq. The indiscriminate use of force does little to weaken this urge; instead,

it may even intensify it. Avoiding and mitigating collateral damage contributes to peace by protecting non-combatants, keeping infrastructure intact, and lessening the enemy's desire to fight perpetual war."<sup>42</sup>

Thirdly, and perhaps most importantly: more clarity of the concept of proportionality in armed conflict will also provide better protection for those civilians and civilian objects that find themselves in the midst of the armed conflict. The obligation to apply a legal rule is at odds with a vague and subjective balance, restricted only by the discretion of military commanders. It is not an easy task for members of the armed forces to balance the concepts of military advantage and collateral damage. The two concepts are of a different nature and there is not always enough information available to assess the exact value of the two components of the IHL proportionality rule. The situation needs to be avoided that the principle of proportionality can be abused to justify the outcome of any attack. Because if that were the case, the protective character of the IHL proportionality rule may prove to be an illusion. As a result, the IHL proportionality rule would merely undermine the prohibition to directly attack civilians and civilian objects.

Thus, the main purpose of this study is to provide more clarity on the principle of proportionality that is applicable in armed conflict, both for the sake of the conductors of the attack and for the civilians that may be affected by it.

### 1.5 Structure and Methodology of the Study

The central research question of this study is: what is the normative legal content of the principle of proportionality in IHL? The approach to answering this question is based on a modern positivistic approach to international law.<sup>43</sup> Therefore, for answering the central question and sub-questions arising from it, this study explores the sources of international law, citing and interpreting its rules. Furthermore, there is also a significant role for unwritten law, such as customary law, general principles and soft law instruments, although written rules are the starting point of the analysis. Where necessary for answering the research questions, this study uses illustrations based on military doctrine, such as targeting procedures, and descriptions of the moral underpinnings of the rules that are analysed, such as Just War theory.

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42 Pratzner, p. 92.

43 This study does not seek to address questions of legal philosophy. See for a general overview of seven different approaches to international law: Slaughter and Ratner, pp. 291-302.: "Positivism summarizes a range of theories that focus upon describing the law as it is, backed up by effective sanctions, with reference to formal criteria, independently of moral or ethical considerations."

The study starts in the domain of general public international law by exploring the rather general notion of principles of international law, which is also a source of international law. This is a study of the theory in relation to the applicable treaty law and its *travaux préparatoires*, judicial decisions of international courts and tribunals and the doctrine, or ‘the teachings of the most highly qualified publicists of the various nations’.<sup>44</sup> But the study aims to end on a very practical level: the applicability and interpretation of the IHL principle of proportionality to individual members of an armed or military group who are taking part in actual hostilities. That means that the study aims at formulating practical recommendations on how the principle of proportionality in IHL must be interpreted and applied. This objective requires interpretation of the legal norms embodied in international law.<sup>45</sup> Especially for the rules of IHL, this interpretation is informed by “the promotion of humanitarian principles, beyond the purely ‘written’ text.”<sup>46</sup>

## Part I

In order to get to the purpose of this study, and to find answers to the main research questions, Part I introduces the subject of the study in this Chapter 1 and provides insight into the subject, structure and methodology of the study. It therefore introduces IHL as a branch of international law in Section 1.2 and the main principles of IHL in Section 1.3. Section 1.4 then provides a short description of the reasons why clarity on the IHL proportionality principle is important.

## Part II

IHL is a branch of international law. Because proportionality is generally referred to as a ‘principle’ of IHL, Part II provides an answer to the question of what the relevance and role is of principles as a source of international law (Chapter 2) and in relation to the character and application of the principles of IHL (Chapter 3). On the basis of the findings in these chapters, the applicability and three roles of principles of IHL – as a subsystem of international law – are identified. Part II thus aims to answer the question of what the relevance and role is of the principles of IHL.

44 Article 38 of the Statute of the International Court of Justice.

45 Article 31 of the Vienna Convention of 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.”

46 Lieblich 2014, p. 201.

The obvious starting point of the research in Part II is article 38 of the Statute of the International Court of Justice, because it enumerates the main sources of public international law, including the general principles of international law. The main purpose of this part is to establish how a principle of general international law finds its way to the battlefield, where it can be the decisive factor for a participant in an armed conflict to squeeze the trigger, or cancel the planned attack. Questions that are answered in Chapter 2 include: what are principles of international law? What is their normative value, in particular when compared to the other sources of international law? Do they have any normative character, or are they just the guidelines that only step into the light of legal relevance when they have been incorporated in a binding treaty rule, or have been established by a court of tribunal as a rule of customary international law? To find answers to these questions, general public international law is studied and discussed: the applicable treaty law; the case law of the International Court of Justice and other international courts as well as doctrine on this subject.

Having established the role and relevance of principles of international, the focus will shift in Chapter 3 to the relevance and meaning of the principles IHL. This is the first step into the field of IHL, which is the main focus of this study. A method to identify the principles of IHL is provided first, as well as a short introduction into the relevance and role of the principles of IHL. For this objective, the applicable treaty law in the field of IHL is studied, as well as customary international law, case law of the International Court of Justice and other international tribunals and the doctrine on the subject of principles of IHL. Through an assessment of the State practice and an analysis of jurisprudence of international courts and doctrine, the principles of IHL are identified. The focus then turns to the question of the applicability of these principles. For this purpose, an answer needs to be found to the question of whether these have any individual normative value, or only apply because they have been codified in the provisions of the treaties that apply in armed conflict. In other words: is there any normative value of the principles of IHL, next to existing treaty law and customary international law, and which roles do the principles of IHL play in the field of IHL? This includes an answer to the question of how a principle of IHL finds its way to the persons that need to apply the principle in practice, such as the planning cell of a military headquarters that is involved in a combat operation or an individual soldier.

### **Part III**

The focus of Part III is on proportionality as a legal concept in connection to armed conflict. The central research questions of Part III include the question of what the origins and content of the principle, or legal notion of proportionality, are in different branches of international law. The objective of this is to use these different understandings of the principle of proportionality in order to improve the understanding of, and clarify the principle of proportionality in IHL.

Chapter 4 provides a description of the historical and normative origins of the notion of proportionality, as well as the content and use of proportionality in general international law. As a result, a number of different functions of the notion of proportionality are discerned. Furthermore, the notions of reasonability and equity are discussed in relation to proportionality.

Chapter 5 aims to provide an overview of the use of a proportionality test in the legal frameworks relating to the use of force, particularly those that apply during armed conflict. In order to find these, the study takes a modest sidestep outside legal analysis, because proportionality in armed conflict is closely connected to the moral notion of proportionality in Just War Theory. For that purpose, the writings of leading moral theorists are explored. Furthermore, the notions of proportionality as it applies during armed conflict in the *ius ad bellum* and international human rights law are analysed. In this phase, it is studied what proportionality means in these sets of rules applicable in armed conflict. The study of the notion of proportionality in other legal frameworks is mostly based on doctrine, but also includes an analysis of treaty law such as the Charter of the United Nations, jurisprudence of Human Rights bodies and case law of the International Court of Justice and the European Court of Human Rights.

The principle of proportionality as it applies in IHL is the main object of this study and it is first explored in Chapter 6. The principle of proportionality in IHL is codified as a rule in Additional Protocol I to the Geneva Conventions. The research will focus on the principle as it has been codified in Protocol I, but also subsequent treaty law such as the Rome Statute.<sup>47</sup> Therefore, a closer look to the *travaux préparatoires* of these treaties is part of the analysis in Chapter 6. The principle of proportionality has been commented upon by many leading experts in IHL, and their writings will be an important source for the study. In addition, the principle of proportionality has been addressed in a number of cases of, for example, the International Court of Justice<sup>48</sup> and the International Tribunal for the former Yugoslavia.<sup>49</sup> The questions that need an answer in this chapter include the following: what is the codification history of the IHL proportionality principle? Is the principle of proportionality *in bello* a part of customary international law? Is there a difference in the application of the principle in international armed conflict or in non-international armed conflict?

Subsequently, a number of other, related, standards of moderation contained in the rules of IHL are identified and discussed in Chapter 7. For that purpose, it is assessed whether the principle of proportionality only applies in IHL as a balance between collateral damage and military advantage, or whether it also exist as a legal obligation to use only 'proportionate' force between combatants. Furthermore, moderation standards in using blockades, security

47 Rome Statute of the International Criminal Court, 1998, printed in *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (D. Schindler & J. Toman (eds.) 4<sup>th</sup> edition), p. 711.

48 For example in the Nuclear Weapons Advisory Opinion.

49 For example in the Kupreskic case (ICTY, Prosecutor vs. Kupreskic, Case no. IT-95-16-T, Judgement, Trial Chamber, 14 January 2000).

measures during occupation, the destruction of enemy property and belligerent reprisals are discussed.

Chapter 8 deals with the interrelationship of the legal content of the principles of proportionality in the different fields of law applicable during armed conflict. In this chapter, it is analysed whether, and if so, how, the concepts of proportionality in the said bodies influence each other, interrelate or perhaps are totally distinct from each other. It aims, if possible, to come to a synthesis of the legal concept of proportionality during armed conflict. The purpose of this endeavour is to analyse in Chapter 9, which concludes Part III, whether proportionality functions as a general principle of international law in general, and separately, during armed conflict and within IHL. The conclusions reached in Part II concerning the normative value of principles of international law and IHL in particular inform this analysis in Chapter 9.

#### **Part IV**

Part IV of the study operationalises the IHL principle of proportionality by taking a closer look to the way the legal concept of proportionality in IHL, as it was identified in Parts II and III, is applied in practice, i.e. by those involved in combat on the battlefield.

In order to establish this, the operational and legal context of the IHL proportionality rule is analysed in Chapter 10. The operational context consists of the targeting processes that are used during different types of military operations. This is where the actual proportionality equation, balancing the military advantage and collateral damage, takes place. The legal context concerns the IHL rules with regard to indiscriminate attacks and precautions in attack, because the IHL proportionality rule is codified in that context.

The content of the IHL proportionality rule and the components of which it consists is analysed in Chapter 11. Issues that are addressed include an assessment of who is responsible for conducting the proportionality analysis, the temporal scope and an assessment of both the 'civilian side' and the 'military advantage' side of the proportionality equation.

Chapter 12 includes a number of examples of situations in which the principle of proportionality has been applied in practice. Describing these examples is complicated because most militaries are not prepared to openly display the way they conduct their proportionality equation. Nonetheless, some governments have conducted their own investigations and published reports of their military operations. Furthermore, the Prosecutors of the International Tribunal for the Former Yugoslavia and the International Criminal Court published reports of military operations they investigated. Also, international non-governmental organisations like Human Rights Watch and Amnesty International have



drafted reports on a number of recent armed conflicts.<sup>50</sup> The analysis of the examples is intended to increase the understanding of the issue of how the IHL proportionality rule is put into practice in reality, on different levels of authority.

Chapters 13 and 14 subsequently analyse how the IHL proportionality rule must be applied and how the term ‘excessive’ must be understood. It is discussed whether the rule is either subjective or objective and how the rule must be interpreted in close cases. What does it mean to conclude that the civilian damage is ‘excessive’? And what is the significance in this respect of the notion of the reasonable military commander? Also, it is assessed whether (the interpretation of) the IHL proportionality rule must be changed or merely needs further clarification.

The general conclusions of this study are presented in Chapter 15. The chapter includes the answer to the main research question: how could more clarity be provided for the application of the principle of proportionality in IHL? The chapter also explains how the general principle of proportionality interacts with the IHL proportionality rule balancing collateral damage and military advantage of a planned attack. In the concluding chapter it is further concluded to what extent other manifestations of proportionality in other legal frameworks may be useful for this purpose and recommendations and guidance are proposed for those that need to apply the principle in practice.

50 For example the Human Rights Watch report “Up in Flames” concerning the war between Russia and Georgia in 2008, available on <http://www.hrw.org/en/reports/2009/01/22/flames-o> and the Amnesty International report “Lebanon: Deliberate destruction or collateral damage? Israeli attacks on civilian infrastructure” on the war in Lebanon in 2006, available on <http://www.amnesty.org/en/library/info/MDE18/007/2006/en>.



## Part II: Principles

As proportionality is generally referred to as a ‘principle’ of IHL, Part II of this study aims to clarify what it means that proportionality is referenced to as a ‘principle’, more particularly a principle of law.<sup>51</sup> Being part of international law, IHL is based on the same sources as international law.<sup>52</sup> Principles are enumerated as one of these sources of international law, alongside treaty law and customary international law.<sup>53</sup> Insight into the origins and legal status of principles as sources of international law is therefore relevant for determining the legal substance of principles of international law and the category of legal norms in which the IHL principle of proportionality must be placed. Before final conclusions may be drawn in this regard, it is also necessary to assess the notion of proportionality as it is found in international law. That is the subject of Part III of this study. This category is relevant for interpreting the principle of proportionality in IHL, which is the subject of Part IV.

This Part sets out in Chapter 2 with describing and analysing the term principles of international law. Chapter 3 builds on this description by analysing the particularities of principles of IHL.<sup>54</sup>

■  
51 Law in general must be understood to consist of both national and international law. International law must be understood particularly as public international law.

52 Kleffner 2016, p.71. See for a discussion on whether the theory of sources of IHL is different from that of general public international law: Van Steenberghe, pp. 891-911 and Ratner, pp 912- 935.

53 Article 38(1)(c) of the Statute of the International Court of Justice: “The general principles of law recognised by civilised nations”.

54 This part of the study has served as the basis of the book chapter ‘Fighting by the Principles: Principles as a Source of International Humanitarian Law’, see Van Den Boogaard 2013.