Proportionality in international humanitarian law

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Chapter 2

Chapter 2: Principles as a Source of Public International Law

2.1 Introduction

The purpose of Chapter 2 is to establish an understanding of the term 'principles of international law'. To that end, this chapter ventures to analyse the relevance and role of principles of international law. Section 2.2 analyses the term 'principle of international law' and describes how and in which context the term principle is used. In Section 2.3, it is assessed how principles of international law as a source of international law must be understood. Section 2.4 addresses the roles principles of international law play and their relation to treaty law and international customary law.

Writing about principles of law requires a preliminary remark about law itself. Legal theory advocates different understandings of law in general, and consequently, of international law.[1] These different understandings impact on the roles ascribed to principles in international law. For example, a strict positivist like Kelsen[2] would argue that the formation of law is contingent on the existence of a procedure that establishes a norm as law.[3] As a result, international law is in Kelsen's view limited to those norms that States have formed through their specific consent, and principles as underlying notions of law may be deemed irrelevant. Dworkin,[4] on the other hand, sees law as a more dynamic system, as is explained below.[5] This study is written from the latter perception of international law, but is not intended to provide an in-depth analysis of different legal theories and how these may impact the interpretation of principles of international law. Instead, this study takes the theory of Dworkin as its starting point and adopts as its frame of analysis the distinction between three types of different norms as introduced by Dworkin. This distinction is used in this chapter to refer to different types of legal norms and to explain how principles may be understood. This informs the interpretation of the IHL principle of proportionality in subsequent parts of this study.

1 See for an overview: Orford, The Oxford handbook of the theory of international law.

2 See for example Hans Kelsen 1960, The pure theory of law and Kelsen 1952, Principles of international law.

3 See Slaughter and Ratner: "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." For an in-depth analysis of Kelsen's position with regard to law and the theory of sources, particularly the general principles of international law, see Kammerhofer, pp.105-112.

4 See generally: Dworkin 1977.

5 See Lachenmann: para 26: "Dworkin not only denies that there can be any general theory of the existence and content of law but he also rejects the institutional focus of positivism. Rather than from legislation, Dworkin proceeds from adjudication. According to legal positivism, Dworkin claims, legal rights do not exist prior to legislation; thus, rights can be taken away by the legislator, leaving the individual exposed to legislative arbitrariness. Thus, in court the individual cannot invoke rights that are rooted in human dignity or equality. By concentrating on legal rules, Dworkin says, positivism fails to acknowledge the role of legal principles that come into play in those 'hard cases' that are not clear-cut and not to be solved by mere subsumption. Such principles (eg fairness) may guide the judge's discretion. In Dworkin's opinion, rules and principles together make up the legal system."

According to Dworkin, a distinction must be made between three types of norms: policies, legal principles and legal rules. Policies can be characterized as norms aiming to certain objectives.[6] As such, policies represent values which are not legally binding, but provide a normative quality in political and moral terms. With regard to the difference between legal principles and legal rules, Dworkin maintains that both sets of norms "point to particular decisions about legal obligation in particular circumstances, but they differ in the character they give. Rules are applicable in an all-or-nothing fashion."[7] Thus, if the facts to which a rule relates occur, the rule must be applied. Principles seem to be in between policies and rules. They must be taken into account as a consideration inclining in one direction or another.[8] Dworkin concludes that "principles have a dimension that rules do not – the dimension of weight and importance."[9] The factor that sets principles apart from rules, is the qualitative aspect principles have. This means that it is the objective of principles to obtain a certain goal, which may, or may not, be reached to a certain extent. This requirement of degree is crucial to set principles apart from rules according to Alexy.[10] Rules, on the other hand, are "norms that are always either fulfilled or not".[11]

It is submitted that Dworkin's distinction between policies, principles and rules is useful because it discerns extra-legal considerations (policies) from the law (rules and principles). A principle of law is thus a norm which is not itself a rule but underlies a rule, and explains or provides the rationale for the existence of the rule.[12] Furthermore, principles may be understood as more important norms that rules.[13]

6 Dworkin, p. 22. The term 'policy' is also generally used to indicate actions by a State that are not necessarily motivated by legal concerns, but by, for example, political motives. Dworkin clearly understands the term 'policies' to refer to extra-legal considerations.

7 Dworkin, p. 24. See also Alexy, p.44 v., Petersen, p. 287-291.

8 Dworkin, p. 26.

9 Dworkin, p. 26. The distinction between rules and principles as drawn by Alexy is consistent with the distinction drawn by Dworkin, however, he assimilates policies with principles, stating that any norm "is either a rule or a principle." See Alexy, p. 44.

10 Alexy, p. 47-48

11 Alexy, p. 48. See also Gillich, p. 12: "rules and principles contain different levels of intensity in which a specific command is set out or in which a specific aim has to be fulfilled."

12 Fitzmaurice, p. 7, see also Van Hoof, p. 148.

13 See also Van Hoof, p. 149: "have a wider scope of application and also more far-reaching consequences (...) Principles constitute a more important or fundamental standard than rules.".

2.2 Principles of International Law

Principles of law play an important role in any legal framework. However, the term 'principle' can have a variety of meanings,[14] which poses additional challenges in analysing doctrine, conventional law and case law for principles of international law in general and for principles of IHL. Therefore, this section assesses how the term 'principle' is used within international law.

The term 'principle of law' is very loosely used in many different contexts, often without taking the distinctions to rules and policies as drawn by Dworkin into account. As a result, it is crucial to discern the exact type of norm States, courts[15] or scholars are referring to when the term 'principle' is used. It may be deduced from the scholarly literature on the subject however that the term 'principles' is often used for very general norms.[16] This is the first type of principles. The legal content of these principles is not as narrowly and precisely defined as that of rules. On the other hand, these principles are part of the law, and are not as broad as general political or moral concepts (in Dworkins typology: policies). A second type of principles consists of those norms that are deemed particularly important.[17] As a result, the term 'principle' may thus signify not only general norms, but may also point to specific norms, or in other words: the most important rules of a certain legal framework.[18] Thirdly, the term 'principle' is used to refer to underlying notions that have helped to shape other norms.[19] These principles are thus formative norms that serve as a basis of rules. It is submitted that many writers use the term principle in this last context, but within the categories of norms as discerned by Dworkin, principles of this type would often constitute policies, because they consist of extra-legal considerations. It must be noted that norms that are referred to as 'principles' often have characteristics of more than one of these three different types: they may thus overlap and are not mutually exclusive. For example, the principle of distinction is referred to in the realm of IHL as a very important principle, but it is also the basis of specific rules of IHL. Furthermore, the principle of distinction provides a

14 Concise Oxford English Dictionary, p. 1141: The Oxford Dictionary describes a "principle" as: "(1) a fundamental truth or proposition serving as the foundation for belief or action; or in other words: a rule or belief governing one's personal behaviour; (2) a general scientific theorem or natural law; and (3) a fundamental source or basis of something." See also Salmon, p. 876-883, identifying nine different categories of 'principles'.

15 For example, the ICTY Trial Chamber states that "in the light of the way States and courts have implemented [the Martens clause], this clause clearly shows that *principles* of [IHL] may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent." (emphasis added) It is unclear whether the Chamber is referring to principles as general rules of IHL, as opposed to more specific rules; as the more important rules of IHL, or as the primary source, or origin of rules of customary IHL. Prosecutor v Kupreskic et al. 14 January 2000, IT-95-16-T, Trial Chamber, Judgement, para 527.

16 See for example Alexy, p. 45.

17 Van Hoof, p. 149.

18 Nasser, p. 64.

19 See Concise Oxford English Dictionary, p. 1141: [principles are] a fundamental source or basis of something." See also Salmon, p. 877: "Principe: Cause ou source première des règles".

general distinction between categories of persons and objects, which is further specified in numerous rules.[20]

2.3 Principles as a Source of International Law

Principles are referred to as one of the sources of international law.[21] The sources of international law both serve as the place where international norms are found, as well as how these norms are created.[22] There is a clear tendency to accept Article 38 of the Statute of the International Court of Justice as the starting point of the analysis,[23] because it includes principles as one of the sources of public international law to be used by the International Court of Justice (ICJ).[24] The text of the article places principles on an equal footing with treaties and customary law, as the primary sources of international law. The inclusion of principles of international law in Article 38 of the ICJ Statute is the result of the deliberations in the Committee of Jurists as appointed by the Council of the League of Nations in 1920 to prepare the Statute of the Permanent Court of International Justice (PCIJ).[25] The category of general principles of law as codified in Article 38 (1) (c) of the ICJ Statute was at the time of drafting aimed at principles of domestic legal orders, that could be used in international law, after the "discussion moved from considering them in naturalistic overtones to thinking of them in a more positivistic manner as principles of national law, applicable by analogy in inter-State relations".[26]

20 The ICJ referred to the importance of the principle of distinction by referring to it as 'cardinal', see Nuclear Weapons Advisory Opinion, para 78, p. 257. The principle is however also the origin of specific rules, such as article 44(3) API: "(…) combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself (…)"

21 Scholars writing on the subject of general principles as sources of international law often start by stating that there is controversy on the subject. See, for example, Van Hoof, p. 131, stating that "the general principles as a source of law are probably the most controversial one", and Degan, p. 1, stating that "[n]o other source of law raises so many doctrinal controversies as the general principles of law "recognized by civilized nations" (…) Writers disagree on the substance and content of general principles of law, as well as their legal scope and relationship with the other main sources, namely treaties and customary law."

22 Kolb 2006, p. 4.

23 See for example Kleffner 2016, p. 71. For a different view: Besson 2010, p.164, referring to article 38 of the ICJ Statute as "the now largely obsolete but still venerated triad of sources".

24 Article 38 of the ICJ Statute reads:
"(1) The Court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply:
(a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting States;
(b) International custom, as evidence of a general practice accepted as law;
(c) The general principles of law recognised by civilised nations;
(d) Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
(2) This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto."

25 See for descriptions of this process: Degan, pp. 7-54, Van Hoof, pp. 136-139 and Lammers, pp. 59-60.

26 Koskenniemi, p. 402.

The PCIJ and the ICJ have not used the principles of international law extensively,[27] but that does not mean that the principles of international law have played no role at all.[28] The PCIJ applied principles in the Chorzow Factory Case[29] and the Lotus Case.[30] The ICJ applied principles in, for example, the Anglo-Norwegian Fisheries Case, stating that "it does not at all follow that in the absence of rules having the technically precise character alleged by the United Kingdom Government [concerning the course and length of straight base lines], the delimitation undertaken by the Norwegian Government in 1935 is not subject to certain principles which make it possible to judge as to its validity under international law."[31] In these cases, the principles concerned were principles taken from domestic jurisdictions, 'elevated' to international law and applied in specific cases.[32] Courts can use comparative law techniques to identify and apply these principles.[33]

In other cases, particularly the Corfu Channel Case, the Nicaragua Case and the Nuclear Weapons Advisory Opinion, it is not clear whether the ICJ applies principles originating from national law. In the Corfu Channel Case of 1949, the ICJ recognised the existence of "certain general and well-recognized principles, among which elementary considerations of humanity, even more exacting in peace than in war."[34] The ICJ based State responsibility for Albania on these principles, but did not explain the exact content and scope of these principles in this judgment. Nonetheless, these principles seem of a different character than those applied in the earlier cases at the PCIJ, because these 'considerations of humanity' seem to inspire rules of international law (in this case IHL) rather than qualify as firmly established rules of domestic law. The ICJ confirms this in the Nicaragua Case, noting that "principles of humanitarian law [are] underlying the specific provisions [of IHL]"[35] Furthermore, in the Advisory Opinion concerning nuclear weapons, the ICJ notes that States that have not ratified the Geneva Conventions and its Protocols are nonetheless bound to "intransgressible principles of international humanitarian customary law."[36]

27 Friedmann explains why the PCIJ and the ICJ have made very little practical use of general principles. Firstly, many cases before the courts dealt with solving disputes concerning diplomatic relations between States in which principles did not play a role. Secondly, international judicial institutions, such as the ICJ, depend for their jurisdiction, as well as for the acceptability of their decisions and opinions, upon the consent of States. The Courts therefore need to be extremely careful in applying principles of international law, in order to avoid being "accused of unauthorized exercise of international legislation." See Friedmann, p. 280.

28 For a thorough survey of the practice of the PJIC and the ICJ, see Degan, p. 41-53

29 Factory at Chorzow, Merits, Judgement No. 13, PCIJ Series A, No. 17 (1928), pp. 47-49.

30 S.S. Lotus Case, PCIJ Series A, No. 9 (1927), p. 31.

31 Fisheries Case, (United Kingdom v. Norway), Judgement, 18 December 1951, ICJ Reports 1951, p. 132.

32 Many commentators, for example Bin Cheng, hold the view that the principles as put down in Article 38 (1) (c) exclusively refer to principles originating from national law. See for an overview: Lammers, p. 57.

33 Bassiouni p.773. See also Lammers, p. 62 and Van Hoof, p. 32.

34 Corfu Channel Case, Judgment of April 9th, 1949, ICJ Reports 1949, p. 22 (hereinafter referred to as the "Corfu Channel case").

35 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment (hereinafter referred to as "the Nicaragua Case"), ICJ Reports 1986, para 215 on p. 112.

36 Nuclear Weapons Advisory Opinion, p. 257, para 79.

It may thus be suggested that the principles that are mentioned in Article 38 (1) (c) of the ICJ Statute also include principles of international law that do not originate from domestic, but instead from international law.[37] The question then arises whether these principles, which apply in a particular branch of international law, may be understood as an independent source of that branch of law, or that the ICJ meant these principles to be included into the category of customary law.[38] Some commentators[39] as well as at least one State[40] seem to accept principles as a separate source of law within a particular branch of international law. This however raises the issue of how principles as a source of international law relate to treaty law and international customary law and which role these principles play within a particular branch of international law.

2.4 Three Roles for Principles of International Law

The types of principle as identified in Section 2.2 already indicate the roles these principles may have. First, as a general norm, principles play the role of an interpretative tool. Courts may use the principles of international law to interpret existing rules of international law, be it customary or treaty rules, in accordance with the general rules for interpretation of international law.[41] The principles may clarify obscure or uncertain elements in rules to determine the scope of rights and legal duties, for example through the principle of

37 Mosler raises this point, see Mosler, p. 522. Lammers provides an overview of the authors who share this opinion, see Lammers, p. 58. Lammers, writing in 1980 with regard to the mere existence of this category, argues that a *contrario*, there are no indications that the Committee of Jurists that drafted Article 38 of the ICJ Statute was opposed to the idea of filling gaps in conventional and customary international law by means of principles of international law. Secondly, as a textual interpretation of the article, he argues that 'law' in the concept 'principles of law' may refer to national law, but also to international law. Thirdly, Lammers uses the teleological argument that the rationale and purpose of the provision was intended to enable the Court to deal with gaps and uncertainties in conventional and customary international law. Therefore, principles of international law may be looked upon as an expression of the legal conviction of States, which is more directly related to inter-State relations than are principles of national law. See Lammers, p. 66-67.

38 For instance, this seems to be the opinion for principles of international environmental law. See generally Dupuy and Beyerlin.

39 Lammers, p. 66. His view is shared by, among others, Anzilotti and Akehurst, see Lammers, p. 57. Cassese accepts principles in international law as norms that apply in a certain branch of international law, but he reserved the 'article 38 (1) (c) principles' for only a limited number of principles. Cassese was of the opinion that the principles as referred to in Article 38 of the Statute of the ICJ are not the same principles as the fundamental principles of IHL. In his view, there are a very limited amount of 'Article 38 principles', and each of the branches of international law, such as environmental law, the law of state responsibility and IHL, in turn have their own principles. These principles are "general legal standards overarching a whole body of law governing a specific area." See Cassese 2005, p. 103.

40 The 2015 US Manual on Law of Armed Conflict (LOAC), updated in 2016, mentions customary international law and treaty law as the main sources of IHL, and doctrine and judgements as subsidiary sources. This does however not mean that principles of international law are omitted as a source of IHL. In the chapter on principles of IHL it is mentioned that there are three foundational principles (military necessity, humanity and honor). In addition, under reference to article 38 of the Statute of the ICJ, the Manual states that the IHL principles are "a recognized part of international law." According to the Manual, the functions of these principles are (1) to help practitioners interpret and apply specific treaty or customary rules; (2) to provide a general guide for conduct during war when no specific treaty or customary rule applies; and (3) to work as interdependent and reinforcing parts of a coherent system." US DoD Manual, p. 34 and 50-51.

41 As mentioned in articles 31-33 of the Vienna Convention of the Law of Treaties.

good faith or the principle of equitable application of the law.[42] Principles can thus help interpreting terms "not susceptible to an ordinary or common meaning interpretation, or as a means for ascertaining the intent of the parties."[43]

As a second role, principles may be used as a gap-filler when there is no rule of customary or treaty law available. This was the function the drafters of the PCIJ Statute had in mind when they inserted the principles of international law as one of the sources to be applied by the court.[44] The principles of international law reinforce weak points of the law in this role or bridge gaps in general international law and in between specific branches of international law.[45] This role of the principles of international law to fill gaps in the law is essential for international law to be applied as a coherent legal system. As an example, when a completely new type of weapon is developed, there are usually no specific rules of treaty law governing the use of that weapon. Nonetheless, the principles of IHL may be used to assess whether the use of such weapons would be in accordance with IHL.[46] In the gap-filling role, these principles may subsequently become the foundation of other rules, be it treaty rules or rules of customary international law.

It is evident that principles used to interpret the law and fill gaps, are those that are seen as the most important principles of international law. This brings us to a possible third role of principles of international law: a corrective role. According to some writers, the principles of international law can consist of such important norms, that they set aside and be a modifier of treaty rules and rules of customary international law.[47] In this role, principles would function as a primary source of international law, embodying an equal or even a higher order of norms than custom and treaty law. This corrective role is however difficult to square with the predominant consensual character of norms of international law as embodied in treaty law and customary law. Furthermore, this risks bringing subjective natural law concepts into the law, which could undermine the certainty of the law as expressed in treaty law and customary law.[48]

This brings us to the relation between principles of international law and the other main sources of international law: treaty law and custom. The majority view among commentators is that the principles of international law are a subsidiary source of international law, while treaty law and custom are the two primary sources, because these manifest the consent

42 Lammers, p. 64-65.

43 Bassiouni, p. 800-801. See also Bin Cheng, p. 390, who notes that the principles of international law are 'guiding', and as such serve international judges to interpret and apply rules of international law.

44 Lammers, p. 64.

45 Kolb 2006, p. 31.

46 See also article 36 AP I for a confirmation of this in treaty law.

47 See for example Bassiouni p. 776 and 801, Favre and Dahm, as quoted by Lammers, p. 65, and Kolb 2006, p. 32-33. Verdross claimed as early as 1935 that general principles could set aside treaty provisions or customary rules. Verdross, p. 204-205, see also Simma and Alston, p. 104-105. Lammers, however, denies the existence of a corrective function in which principles of international law would prevail over conflicting rules of conventional or customary international law and may modify these rules or even set them aside. At the same time, however, Lammers notes that this does not apply to rules of *ius cogens*.

48 See for example Koskenniemi, p.402, who looks at the 'elementary considerations of humanity' as introduced by the ICJ in the Cofru Channel Case in the context of customary international law.

of States to their rules in a more apparent manner.[49] Some writers however regard the principles of international law as equivalent to treaties and customary law as far as their status of international law is concerned.[50] This latter opinion corresponds to the text of article 38 of the ICJ Statute, but in practice, it is true that almost all rules of international law are contained in treaties and customary international law. However, it is submitted that through the roles set out above, as confirmed by the ICJ, the principles of international law have the potential to play an important supporting role.[51]

If principles of international law are perceived as a separate source of international law, this does not mean that they operate independently from customary international law and treaty law. On the contrary, there is a very close relation between these three sources. Many treaty rules have become part of customary law, and the other way around. Thus it may be argued that some principles of international law have similarly been incorporated in treaties or are recognised as rules of customary law. Clear expressions of *opinio juris* regarding a certain norm without any supportive State practice may evidence an existing principle of international law.[52] Indeed, it is submitted that principles of international law may have developed into rules of customary law because States have based their practice on pre-existing principles. This customary rule may subsequently have been codified in treaty law. The inclusion of such principles in treaty law may be understood as confirming the existence of the norm as a principle and, conversely, the principle as a legal norm. In practice, however, principles of this category are invoked and applied by reference to their codification as a treaty rule for reasons of clarity and certainty of the law. Thus, there is an intertwining relationship between principles, customary and treaty law where the one may be the evidence or the origin of the other. There may perhaps not be much residual value in establishing norms as principles of international law when these have also been codified in treaty law and are recognised as rules of customary international law. However, depending on the type of principle of international law, it is submitted that, for example in light of their gap-filling role, principles of international law may still be relevant in some situations.[53] Also, if the principles are not accepted as an independent source of international law, the ICJ would at least on some occasions be faced with the problem of having to declare a *non*

49 See for example Lammers, p. 66. For an overview of writers that concur with him, see note 72 on that same page. Degan confirms, after reviewing many cases of the International Court of Justice, the conclusion by Max Soerensen of 1946, that the general principles of law in relation to the two other main sources of law (treaties and custom) have a subsidiary character: "the present level of development of customary law and of conventional relations between States scarcely make necessary the application of these principles as a distinct source, that is to say in cases of genuine gaps (lacunae) in customary and conventional international law. In addition, the maxim *lex specialis derogat legi generali*, which is itself a general principle of law, prevents a more frequent use of these principles in judicial practice. On the other hand, the [ICJ] was sometimes eager to resort to general principles in order to confirm or verify its judicial considerations and motives within its large discretionary power." See Degan, p. 53. For another discussion on this subject, see Bassiouni, p. 781-783.

50 Bassiouni, p. 784-785.

51 According to article 38 of the ICJ Statute, judicial decisions and the teachings of the most highly qualified publicists of the various nations, are subsidiary means for the determination of rules of law. They too influence the content of the rules in the other sources of international law.

52 Bassiouni, p. 768-769 and 800-801. See also Simma and Alston, pp. 202-203 and Petersen, p. 277.

53 See also Chapter 3.

liquet.[54] As a result, it is submitted that in the absence of the principles of international law, the international legal order would also lose its coherence as a system of legal norms.

2.5 Conclusion

From the analysis in this chapter, it occurs that there are different types of principles of international law, playing different roles. Potentially, therefore, proportionality in IHL may be perceived as one or more of the following: first, as a principle applied in international law because it is elevated from domestic law. Alternatively, the principle of proportionality may be understood to constitute an independent source of law within a specific branch of international law, such as IHL. Furthermore, it may be that proportionality is referred to as a principle because it merely underlies a specific rule of IHL, and does not apply as a legally binding norm, but as a 'policy'. Lastly, proportionality may be labelled as a principle because it is a particularly important norm within the branch of law in which it occurs, in this case IHL. In order to determine where in these categories the principle of proportionality fits in, it is necessary to analyse the substance of principles of IHL, their content and how they may be used. This is the subject of the next chapter.

54 Degan, p. 54.