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### Proportionality in international humanitarian law

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# Chapter 3

## Chapter 3: Characteristics of IHL Principles

*“It is increasingly believed that the role of international law is to ensure a minimum of guarantees and of humanity for all, whether in time of peace or in time of war, whether the individual is in a state of conflict with a foreign race or with the community to which he belongs.”<sup>1</sup>*

### 3.1 Introduction

This chapter assesses the nature of the principles of IHL, including the principle of proportionality. In order to facilitate the identification of the category of legal norms in which the principles of IHL must be placed, Section 3.2 first discusses the Martens Clause, which plays a role in the assessment of the relevance of certain types of principles of IHL. Section 3.2 then discusses a method to determine principles of IHL, based upon an assessment of *how* the principles of IHL may be identified. The approach described in Section 3.2 is used to assess in Section 3.3 which principles of IHL are recognised. After this analysis, the focus turns to the applicability of principles of IHL in Section 3.4. This section assesses the situations in which there may be a role for principles of IHL. Section 3.5 then describes three roles principles of IHL play.

### 3.2 A Method to Determine Principles of IHL

It is examined in Chapter 2 which types of principles of international law exist, and which roles these principles may play. This chapter sets out to explore how different types of principles may be identified within the field of IHL. For the category of principles that is elevated from domestic law, the method used to identify them is straightforward. In order to see whether a principle may be applied in international law as it is applied in the domestic law context from which it originates, comparative law analysis can be used.<sup>2</sup> For the category of principles of international law that apply within a specific branch of international law, a method identifying these principles, excluding others, is not self-evident.<sup>3</sup> Nonetheless, some authors have expressed a view on this issue.<sup>4</sup> One acceptable approach, it is submitted,

1 Pictet 1966, p. 29–30.

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

3 In the field of IHL, only few authors and courts indicate a method for identifying principles of IHL. It is submitted that this method is nonetheless important, because it helps to explain the character, function and legal significance of the different types of principles of IHL. It is submitted that this is an important and significant gap in the theory regarding principles of IHL. The analysis in this chapter is intended as a proposal for a method, but does not intend to provide a definite solution for this gap.

4 See for example Lammers, p. 74: “[principles] may be either obtained through a process of generalization from more specific rules of customary international law or be regarded as expressions of a general legal conviction of States, albeit

to prove the validity of a principle of international law within a branch of international law is to assess formless inter-State consent.<sup>5</sup> This consent may prove the acceptance of a norm on the international legal level. This consent may be derived from a variety of judgements, authoritative statements, declarations of States, resolutions of international bodies and other sources. Relevant examples include references to resolutions or statements of the UN General Assembly or other international institutions that may represent significant portions of the international legal community.<sup>6</sup>

The Martens Clause may be interpreted as outlining the sources from which IHL must be derived.<sup>7</sup> Although there is no universal agreement on how the Martens Clause must be understood,<sup>8</sup> it is submitted that the present significance of the Clause has become detached from its original function and underlines its importance for the application for some types of principles of IHL. The Martens Clause was initially incorporated into the preamble of the 1899 and 1907 Hague Conventions.<sup>9</sup> As such, according to Kalshoven, it served initially as nothing more than an ‘exhortation’, because a preamble does not possess legally binding power by itself.<sup>10</sup> But the Martens Clause has since been included in the main text of many IHL treaties. Therefore, the Martens Clause is now a legally binding rule, at least for the parties to these treaties.<sup>11</sup> Furthermore, the Martens Clause itself is also regarded as a rule of customary international law.<sup>12</sup> It is common to use the wording of the Martens Clause as it is formulated in article 1 (2) of Additional Protocol I:

“In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.”<sup>13</sup>

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that they have not yet, or not without exceptions, or only in certain specific norms, found application in the practice of States.”

5 Van Hoof, p. 147.

6 Petersen, p. 308, see also Simma and Alston, p. 102.

7 Van den Boogaard 2013, pp. 18-20.

8 See for example Cassese 2000 and Giladi.

9 The Martens Clause first appeared in the preamble to the 1899 Hague Convention II. It was the result of the negotiations led by Friedrich Fromhold Martens, who was part of the Russian Delegation to the Peace Conference in The Hague. The objective of the preamble was to solve a dispute between some smaller States, in particular Belgium, and a number of larger States such as Prussia and Russia on the issue of the status of civilians who took up arms against occupying forces. The discussions in 1899, led by Martens, were the continuation of earlier discussions at the Conference of Brussels in 1874. To solve the deadlock, Martens accepted a Belgian proposal, which was subsequently included in the preamble of the Convention. See generally Kalshoven 1971, pp. 57-62, Kalshoven 2006, p. 48-52, Ticehurst, p. 125, Greig, p. 48-49, M.N. Hayashi 2008, p. 136, Meron 2000, p. 79-80, Meron 2006, p. 17-19, Cassese 2000, p. 187-216 and Salter, p. 405.

10 Kalshoven 2006, p. 51.

11 Miyazaki, p. 436.

12 Skordas, p. 325.

13 As Pustogarov notes on the adjusted language of the Martens Clause in AP I: “Reckoning up the comparison, one can assert that Protocol I changed the Martens clause only in one point: it omitted the notion of “civilized nations”. In other respects, it replaced outdated words with the language of contemporary legal parlance (“basic tenets” with “principles”, “belligerents” with “combatants”). The replacement of the term “population” by “civilians” did not change the content of the notion. But it has a definite meaning for humanitarian law, which attempts strictly to distinguish the civilian population and individual

The question is how the Martens Clause must be interpreted in light of the sources of international law. When the Martens Clause is understood in a narrow sense, all it means is that in addition to treaty law, customary international law is also a source of international law obligations. Indeed, noted experts in IHL, such as Dinstein,<sup>14</sup> and Greenwood,<sup>15</sup> adhere to this view and hold that the Martens Clause is exclusively referring to customary international law. The ICRC Commentary to Additional Protocol I provides a wider interpretation, holding that the Martens Clause means that “something which is not explicitly prohibited by a treaty is not *ipso facto* permitted.”<sup>16</sup> The broadest interpretation is that according to the Martens Clause, in addition to treaty law and customary international law, conduct in armed conflicts is also subject to the principles of IHL.<sup>17</sup> It is submitted that this interpretation is most in accordance with the findings above in Chapter 2 that there are types of principles of international law which may play a role to fill gaps in a specific branch of international law. This last approach also points to the possibility to interpret the Martens Clause as a reference to the sources of IHL.<sup>18</sup> As such, it is submitted, the Martens Clause is another way to phrase what Article 38 (1) (c) also provides: if there is no other law available, i.e. a rule of treaty or customary international law, the principles of international law must be applied.<sup>19</sup> Fortunately, there are today many more rules codified in the IHL treaties than at the time the Martens Clause was drafted. The Martens Clause nonetheless still indicates that the principles of IHL may have a residual role as a source of legal obligation for parties to armed conflicts, in cases where conventional and customary law fail to provide guidance. The question is then how these principles may be identified.

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civilians from combatants with a view to protecting the former from the consequences of military operations. “The laws of humanity” are synonymous in content with “the principles of humanity”. See Pustogarov, p. 128.

14 See Dinstein 2004, pp. 6-7.

15 O’Connell 2013, p. 34, who holds that the suggestion that the Martens Clause goes further than customary international law “is impracticable since the ‘public conscience’ is too vague a concept to be used as the basis for a separate rule of law and has attracted little support”.

16 Sandoz et al., p. 39.

17 Ticehurst, p. 125.

18 Based on the reference to the Martens Clause by the International Court of Justice in both the Nicaragua Case and the Nuclear Weapons Advisory Opinion, Hayashi points to the possible conclusion that the ICJ was referring to the general principles of international law and not customary international law: “because of the way and the location in which the Martens Clause is referred to in these cases, the Martens Clause looks like as if it is the direct source of the identified rules. If so, the identified rules are norms that are not based on custom. (...) Customary international law as a source of obligations is dislocated by the Martens Clause, and possibly by the elementary considerations of humanity, and its place is filled by general principles they themselves embody.” See M.N. Hayashi 2008, p. 149. Thus, the Martens Clause may be interpreted as a procedural rule, pointing to the third source of international obligations, additional to conventional and customary international law.

19 In a case before the United States Military Tribunals at Nuremberg, Krupp and others, the Tribunal stated: “The Preamble is much more than a pious declaration. It is a general clause, making the usages established among civilized nations, the laws of humanity and the dictates of public conscience into the legal yardstick to be applied if and when the specific provisions of the Convention and the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare.” Krupp and others, 15 Ann. Dig. 620, 622 (U.S. Mil. Trib. 1948), see also Meron 2006, p. 19, and Miyazaki, who considers the general principles of law to be one of the sources of international law, and “the principles of the law of nations as mentioned in the Martens Clause to be precisely a part of such general principles of international law and a source of the law of armed conflicts.” See Miyazaki, p. 437.

It is suggested that principles of international law “must pass through a process of objectification, either as precedents in judicial practice or through codification, before the principles have become positive rules of at least some legal branches.”<sup>20</sup> This seems an acceptable approach, because only in situations where norms have successfully passed through such a process, these principles of international law become part and parcel of positive law.<sup>21</sup> Norms can thus only attain the standing of a principle of international law if they have been called upon by the parties to an international legal procedure, or are codified in a treaty. Thus, conversely, if a norm has not, it could never be recognised as being part of the law even when it would be applied in practice. This statement would ignore customary law and principles as part of international law. It is self-evident that law in general is not only applicable in a courtroom. States involved in disputes, which are to be solved on the basis of international law, may also settle their differences outside the courtroom of the ICJ or another tribunal, through the application of customary rules or principles of international law.<sup>22</sup> International law is - as is law in general - particularly designed to regulate affairs in actual and factual situations. Some authors maintain that for the drafters of the ICJ Statute, the decisive point was that principles were not to be derived from mere speculation: objectification of the norm by States or international judges should take place before a norm could be accepted as a principle of international law.<sup>23</sup> Principles of international law may thus also be derived from a more implicit consensus of States and international institutions. This implicit consensus could be derived from international case law, resolutions of the General Assembly, and other types of soft-law, such as preambles of multilateral treaties. The principles that are derived in this manner are distinct from customary law in the sense that these principles do not necessarily require the proof of both State practice and *opinio juris*. The existence of clear *opinio juris* alone may in some views be sufficient to establish this type of principles of international law.<sup>24</sup> It must be noted that a universally agreed and clear methodology to identify a principle of international law, is lacking. It also seems, however, that this is not necessarily problematic. It is submitted that there are different ways acceptable to establish that sufficient formless inter-State consent exists to bring a principle into existence which is legally binding within a branch of international law. But caution is necessary: it must be prevented that the existence of a certain principle of international law is identified too easily. That situation would seem fertile ground for misuse of this category of legal norms, pretending to turn rules *de lege ferenda* into *lex lata*. For principles which bind States, they must consist of *legal* norms, not of mere underlying considerations.

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20 Degan, p. 100.

21 Degan, p. 100.

22 Lammers, p. 74.

23 Simma and Alston quote Van Hoof and Herczegh in this regard.

24 Petersen, p. 292.

Frits Kalshoven proposed a method to identify principles of IHL. This method relates to principles in the sense of article 38 (1) (c) of the ICJ Statute, as principles of international law that apply as substantive legal norms within one specific branch of international law, in this case IHL. The test Kalshoven proposes has three components to determine whether a norm could be accepted as a principle of IHL. In his view, a norm may amount to an accepted principle of IHL when it reflects “some sort of *communis opinio*” on the basis of three criteria: (1) there is a certain degree of support from States, as evidenced for example in their military manuals; (2) the norm reflects a “widely recognised core value of humanity” and (3) the norm “enjoys broad support in informed international discourse.”<sup>25</sup> Kalshoven derives these components of the formless consent of States and other actors of international law from the three sources listed cumulatively in the Martens Clause (established custom; the principles of humanity and the dictates of public conscience).

#### **“A certain degree of support from States”**

It may be noted that the Kalshoven-test attributes major importance to the behaviour of States, albeit that it does not require the fairly high threshold of State practice which is necessary to establish the existence of a rule of customary international law. The ‘usages established among civilised nations’ that the Martens Clause refers to should be understood in a more limited way. This first requirement should therefore take away possible critique States may have that the formation of international law is taken totally out of their hands by admitting that principles of international law form a third source of international law, separate from treaty law and custom. This requirement, it is submitted, is a clear signal that all behaviour a States put on display, including policy statements, military manuals, memoranda of understanding or other soft-law sources, may be taken into account when the existence of a principle of international law is determined. This also includes the voting behaviour of States in international forums, most notably the General Assembly of the United Nations, but also the International Conference of the Red Cross and Red Crescent.

#### **“Widely recognised core value of humanity”**

The second requirement Kalshoven mentions refers to the moral source of a norm. This is a clear expression of natural law influence on the formation of principles of international law. The aim of the norm should be the protection of the well-being of humans. In terms of IHL, this may be understood as a requirement that the norm should mitigate human suffering during armed conflict or, in the words of the Martens Clause, be in accordance with ‘the laws of humanity’. This is a clear reference to the ICJ Corfu Channel Case. The ‘recognition’ of the

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25 Kalshoven 2006, p. 59.

‘core value’ of principles of IHL may thus also be found in judgements of international courts. Regrettably, this second requirement fails to reiterate that IHL norms must also include the other side of the coin: considerations of military necessity. Nonetheless, the assertion by Kalshoven is correct in the sense that the moral source of some norms of IHL is indeed only found in considerations of humanity. When this second requirement is compared to the typology of principles discerned in Chapter 2, it seems that for IHL, it means that the formative principles (or ‘policies’ according to Dworkin) must be the basis of a principle of IHL.

**“Broad support in informed international discourse”**

The third component of the Kalshoven-test for principles of IHL refers to what the Martens Clause calls ‘the dictates of the public conscience’. It is clear that this may consist of many different components. Here, the consent of States for the formation of rules of international law is totally absent, and the major role that non-state actors can play in the formation of international law is revealed.<sup>26</sup> However, the influence of other factors of importance on the international plane may prove to be important, but not sufficient to independently create an obligation under international law. For IHL, obviously, the International Movement of the Red Cross and Red Crescent will be important. Statements of the International Committee of the Red Cross may also play a major role. Additionally, for example, resolutions or statements of the International Conferences of the Red Cross and Red Crescent, in which the ICRC, national societies, their international federation and also States participate, can be a clear sign of a developing or existing principle of IHL. But also other non-governmental organisations may play a role, such as Amnesty International and Human Rights Watch, or a coalition of a large number of organisations.<sup>27</sup> Finally, Kalshoven suggests that also the academic world, as academic authors may be presumed to be ‘informed’, may contribute to identifying this broad support.<sup>28</sup>

The Kalshoven-test to determine principles of IHL reflects some similarities to the sources of international law enumerated in the ICJ Statute. The first component requires consent of States similar to that which is the basis of treaty law. As Kalshoven notes, this consent may become exposed by assessing military manuals of States in which they address principles of IHL. Secondly, the widely recognised values that must underpin a principle seem to point at the underlying motivations for legal norms, similar to Dworkin’s category of policies. These may be found by looking at judgements of international courts. Thirdly, the component of ‘broad support in informed international discourse’ seems to point to a

26 Skordas maintains that the ICTY has acknowledged this in the Kupreskic Case and is also supported by the dissenting opinion of Judge Shahabuddeen. See Skordas, p. 321.

27 It may be argued that the International Campaign to Ban Landmines constituted proof for the existence of broad support in informed international discourse for the banning of anti-personnel landmines.

28 Kalshoven 2006, p. 59.

basis of agreement between an informed audience, as some sense of agreement of opinion which is not restricted to those of States, in other words some sort of ‘*opinio juris*-light’. This component seems to reflect the increasing role of international actors other than States in a globalising world, including noted experts who have written treatises on IHL. It is submitted that this Kalshoven-test provides a workable method to assess inter-State consent and identify principles of IHL.<sup>29</sup> Section 3.3 applies this test for the purpose of this study in order to determine whether the principle of proportionality in IHL is among the principles that may qualify as a principle of IHL.

### 3.3 The Principles of IHL

States, international courts and notable writers identify different norms as ‘principles of IHL’. In addition, the number of principles identified differs to a large extent. There is no “official list of core principles”<sup>30</sup> of IHL. Nonetheless, as a guideline for behaviour in armed conflict, ‘principles’ were recognised more than 150 years ago. For example, the 1863 Lieber Code notes that during an occupation, the “principles of justice, honor and humanity must be applied”.<sup>31</sup> The Martens Clause as noted above, refers to ‘principles of humanity’ in its modern codification.<sup>32</sup> The Geneva Conventions note in the articles about dissemination, that the ‘principles’ of the Geneva Conventions must be instructed to the members of the military as well as to the civilian population.<sup>33</sup> Consequently, as a minimum, it seems that States have a duty to identify which IHL principles must be included in their IHL dissemination programs. Indeed, Corn rightly points out that although the principles are the foundation of the universally accepted and codified IHL rules, it is “impossible to transform every soldier into a LOAC expert. Instead, compliance is built upon a foundation of core principles.”<sup>34</sup> As will be shown below, many States have identified a set of principles of IHL in their military manuals. Furthermore, the Statute of the International Criminal Court (ICC) explicitly refers to principles as part of the applicable law that the ICC shall apply.<sup>35</sup>

A preliminary issue is the number of IHL principles that exist. There is no universal agreement on this issue: for example, the International Court of Justice mentions in the

29 See Corn et al., p. 112, proposing a similar methodology to identify principles of IHL.

30 Solis, pp. 268-269 and 306.

31 Lieber Code, article 4.

32 Article 1(2) API.

33 Article 47 GC I, article 48 GC II, article 127 GC III, article 144 GC IV. Interestingly, the dissemination article in API (article 83 API) and APIII (article 7 APIII) refer to secure knowledge of the “instruments” rather than ‘principles’. Article 19 APII simply states that “[t]his Protocol shall be disseminated as widely as possible.”

34 Corn et al., p. 110.

35 Article 21 (Applicable law) of the ICC Statute reads:

1. The Court shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

Nuclear Weapons Advisory Opinion that there are only two ‘cardinal’ principles of IHL: distinction and the prohibition to cause unnecessary suffering to combatants.<sup>36</sup> McDougal and Feliciano stated in 1961 that it “is commonly stated in the learned literature that three basic principles underlie the more detailed prescriptions of combatant law: the principle of military necessity, the principle of humanity and the principle of chivalry.”<sup>37</sup> Pictet<sup>38</sup> and Chetail,<sup>39</sup> on the other hand, identified a rather high number of principles of IHL. One writer even notes that since the Geneva Conventions have been universally ratified, the question may be raised whether all their articles constitute principles of IHL.<sup>40</sup> This disagreement on the number of principles of IHL serves as a caution that any attempt to identify those norms that qualify as principles of IHL, including their substantive content, is contingent on the definition of an IHL ‘principle’ by the respective State, court or commentator. However, as this section demonstrates, there is agreement on the classification of a number of norms as principles of IHL. This section takes stock of these principles of IHL, on the basis of a review of military manuals of a number of States, a number of judicial opinions of international courts, a review of doctrine and other sources of State practice.

### 3.3.1 IHL Principles Identified by States

States may express the principles of IHL they recognize in their military manuals.<sup>41</sup> Since not all States have published military IHL manuals and those that are available are furthermore not all translated into a language understandable to the author, the review in this study is restricted to a review of the military manuals of the following seven States: Canada,<sup>42</sup>

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(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status. (emphasis added)

36 Nuclear Weapons Advisory Opinion, para 78, p. 257. In the interpretation of McCormack, however, these two paragraphs contain 3 principles. McCormack, p. 78.

37 McDougal and Feliciano refer to Oppenheim (1952), p. 227 and Greenspan (pp. 313-316). See McDougal and Feliciano, pp. 521-522.

38 According to Pictet, “one could reduce the substance of [IHL] to a few very simple notions, about fifteen in all, closely linked and in logical sequence, each of them being subdivided in turn into several principles of application.” Pictet 1966, p. 26.

39 Chetail, pp. 252-262.

40 Bulman, p. 166. This statement however overlooks the provisions of all other treaties of IHL.

41 For a more general assessment of military manuals of IHL, see N. Hayashi 2010a.

42 The Canadian Manual of 2001 deals in Chapter 2 with the ‘basic’ principles of IHL. The manual provides a classification of three types of norms: first, there are the three ‘primary concepts’, that “underlie [IHL]: military necessity, humanity and chivalry.” Secondly, the manual discerns three ‘fundamental’ principles: the ‘Humanitarian Principle’, the ‘Principle of the Law of Geneva’ and the “Principle of the Law of War (or Law of The Hague)”. The third type of norms that are discerned are the ‘operational principles’: distinction, non-discrimination, proportionality and reciprocity.

Germany,<sup>43</sup> Israel,<sup>44</sup> the Netherlands,<sup>45</sup> Norway,<sup>46</sup> the United Kingdom,<sup>47</sup> and the United States.<sup>48</sup> It follows from this review that States view the principles mostly reflective of the source of the rules of IHL to which they are bound. For all seven States, this applies in

- 43 Neither the 1992, nor the 2013 version of the German Military Manual explicitly identify principles of IHL as such. However, following Section III on the 'Legal Basis' of IHL, the Manual of 2013 notes in Section IV on 'Military Necessity and Humanity' that "[a]ccording to the principle of military necessity, all military measures are permissible in armed conflict which are required for the successful execution of military operations in order to engage an enemy, provided that these measures are not forbidden by LOAC. (...) LOAC is a compromise between military and humanitarian requirements. Its rules take account of both military necessity and the dictates of humanity. Considerations of military necessity can therefore not justify a departure from the rules of humanitarian law; to seek a military advantage using forbidden means is not permissible." See: Law of Armed Conflict – Manual, p. 25.
- 44 According to the Israel Defense Forces, "Underpinning the Laws of Armed Conflict are four basic principles that must be implemented in each context: military necessity, distinction, proportionality and humanity." See the 2006 Israel Military manual: "Rules of Warfare on the Battlefield, Military Advocate-General's Corps Command, IDF School of Military Law, Second Edition, 2006" Elsewhere, the four principles are further specified: "[t]he IDF closely adheres to the four fundamental principles of the laws of armed conflict: military necessity – permitting the use of force as long as it is in order to achieve a military objective; distinction – requiring the distinction between combatants and military targets, which may be attacked, versus civilians and civilian objects, which may not be intentionally attacked, and to the extent possible, should not be harmed during the hostilities; proportionality – which acknowledges the possibilities that civilians and civilian objects may be harmed (as collateral damage), as long as the expected collateral damage is not excessive in relation to the concrete and direct military advantage anticipated from the attack; and humanity – which provides the obligation to avoid actions that are liable to cause superfluous injury or unnecessary suffering. The effects of the hostilities on the civilian population should be minimized as much as possible." See Efroni, p. 82.
- 45 The Handbook on international humanitarian law, VS 27-412/1, published in 2005 by the Royal Netherlands Army identifies five principles of IHL. These five are the principles of military necessity, humanity, distinction, proportionality and the principle of chivalry and good faith. See: VS 27-412/1, pp 30-36. This author was secretary and member of the committee of military lawyers responsible for drafting this military manual from 2000-2003. The Manual is currently under review. The manual explains that these principles are of utmost importance to a full understanding of the rules of IHL, as well as the basis for IHL rules. For that purpose, the principles are formulated 'generally abstract'. See VS 27-412/1, p. 34.
- 46 The draft-Military Manual of Norway notes in the chapter on 'basic' principles, that IHL "is based on four principles: distinction, military necessity, humanity and proportionality." It also notes that the principles constitute customary law, and, referring to the Martens Clause, play an important role when IHL rules lack clarity or in case States is not bound by a treaty rule. Furthermore, the manual notes that the specific IHL rules are "different expressions of the principles" and although there is a certain overlap between the principles, they "together constitute the heart" of IHL for all types of armed conflicts. See: Draft-English translation of the Norwegian military manual, p. 19-20.
- 47 The UK Manual of the Law of Armed Conflict was published in 2004 and identifies four "fundamental principles [that] still underlie the law of armed conflict." These are the principles military necessity, humanity, distinction and proportionality. The UK Manual identifies only treaty law and international customary law as sources of IHL. See: UK Manual, p. 21. Also, note 1 on page 21 of the Manual states that the right of the parties to the conflict to choose methods or means of warfare is not unlimited is a "general principle firmly rooted in the law of armed conflict"
- 48 Chapter II of the revised Department of Defense Law of War Manual contains a description of five principles: military necessity, humanity, proportionality, distinction and honor. The reference to principles in the Law of War Manual is not a novelty in the practice in the United States. In fact, the Lieber Code already contained references to principles. Furthermore, the 1956 US Army Field Manual also notes that IHL "places limits on the exercise of a belligerent's power in the interests mentioned in paragraph 2 and requires that belligerents refrain from employing any kind or degree of violence which is not actually necessary for military purposes and that they conduct hostilities with regard for the principles of humanity and chivalry." Department of the Army Field Manual, The Law of Land Warfare, (FM 27-10), July 1956. In the current version of the DOD Manual, it is noted that military necessity, humanity and honor "provide the foundation for other law of war principles, such as proportionality and distinction, and most of the treaty and customary rules of the law of war." The Manual notes furthermore, referring to Article 38 (1) (c) of the ICJ Statute (in note 2) and the Martens Clause (in note 3) that these principles must be understood as "[g]eneral principles of law common to the major legal systems of the world [and that these principles] are a recognised part of international law" With regard to the use of the principles, the Manual notes that the principles are the basis of the specific rules of IHL, and because of their more general formulation, may lead to varying interpretations in specific circumstances. They thus "(1) help practitioners interpret and apply specific treaty or customary rules; (2) provide a general guide for conduct during war when no specific rule applies; and (3) work as interdependent and reinforcing parts of a coherent system." See: DOD Law of War Manual, (3rd revised version, December 2016), pp. 50-69, available online on <https://www.hsdl.org/?view&did=797480>.

particular to the principles of humanity and military necessity, and in some States also to the principle of honor and good faith, which is sometimes also referred to as chivalry. Six out of the seven military manuals recognise distinction and proportionality as principles. In addition, the North Atlantic Treaty Organisation (NATO), as a coalition of 28 States, discerned four principles in its Allied Joint Doctrine for Joint Targeting: military necessity, humanity, distinction and proportionality.<sup>49</sup>

### 3.3.2 IHL Principles Identified by International Courts

The most prominent international court that has dealt with principles of IHL is the International Court of Justice (ICJ). The ICJ mentions the principles of IHL in the Corfu Channel Case<sup>50</sup>, the Nicaragua Case<sup>51</sup> and the Nuclear Weapons Advisory Opinion.<sup>52</sup> In the Corfu Channel Case, the ICJ refers particularly to the principle of humanity. In the Nicaragua Case, the ICJ repeats this and refers to precautionary obligations that follow from it.<sup>53</sup>

The ICJ expanded on this in the Nuclear Weapons Advisory Opinion in 1996, clarifying that even those States that have not ratified the Geneva Conventions and its Protocols are nonetheless bound to fundamental rules of IHL because they constitute “intransgressible principles of international humanitarian customary law.”<sup>54</sup>

The ICJ had the task in the 1996 Nuclear Weapons Advisory Opinion, to “identify the existing principles and rules, interpret them and apply them to the threat or use of nuclear weapons.”<sup>55</sup> As a result, at least a number of principles of IHL were identified by the ICJ, but arguably not all of them.<sup>56</sup> The ICJ clearly looked at the principles of IHL as part of customary law, and stated that:

“The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian

49 AJP-3.9, May 2008, p. 1-6.

50 In its first case, 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.” 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. Corfu Channel Case, p. 22.

51 The Nicaragua Case, p. 14. The ICJ mentions the phrase ‘general principles of IHL’ in six different passages: see paras 215; 218; 219; 225, 256 and in the decision on p. 148. The ICJ also refers back to the Corfu Channel Case, and notes that “principles of humanitarian law [are] underlying the specific provisions” See para 215 on p. 112.

52 Nuclear Weapons Advisory Opinion, p. 226.

53 In the Nicaragua Case, para 215 on p. 112, the ICJ notes that “principles of humanitarian law [are] underlying the specific provisions” of treaty rules, in this case the 1907 Hague Convention VIII on Submarine Mines.

54 Zyberi, p. 336, referring to the Nuclear Weapons Advisory Opinion, p. 257, para 79. Zyberi does not comment on the fact that the ICJ seems to switch from the concept of principles of international law to customary law. The ‘intransgressibility’ of the principles was explained by the ICJ in the Advisory Opinion of the Wall, in which it held that many rules of IHL incorporate “obligations which are essentially of an *erga omnes* character.” Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (hereinafter: “the Wall Advisory Opinion”), ICJ Reports 2004, p. 136, see para 157, at p. 199. See also Zyberi, p. 336.

55 Nuclear Weapons Advisory Opinion, para 13, p. 234 and para 74, p. 256.

56 Gill 1999, p. 620.

objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering.

In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.”<sup>57</sup>

In addition, the ICJ referred in its Nuclear Weapons Advisory Opinion to three other principles. First, referring to its ruling in the Corfu Channel Case,<sup>58</sup> the ICJ seems to refer to the principle of humanity, noting that the high rate of ratifications of the Geneva Conventions is due to the fact that “a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and ‘elementary considerations of humanity’”.<sup>59</sup> The principles of military necessity and proportionality are furthermore referred to in the discussion dealing with the rules concerning the protection of the environment during armed conflict in the pursuit of legitimate military objectives.<sup>60</sup> The ICJ also refers to the application of the principle of proportionality for the specific issue of determining the legality of belligerent reprisals.<sup>61</sup>

### **International Criminal Courts and Tribunals**

Furthermore, the International Criminal Tribunal for the Former-Yugoslavia (ICTY), the Special Court for Sierra Leone (SCSL) and the International Criminal Court (ICC) have addressed the principles of IHL in order to inform their respective criminal prosecutions of violations of IHL. The ICTY Appeals Chamber notes in the Tadic Jurisdiction Decision that “customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general *principles* and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental *principles* and rules regarding means and methods of combat in civil strife.”<sup>62</sup>

In the Kupreskic Case, the Trial Chamber uses the term ‘principle’ in the context of IHL many times, to express the foundational character of certain norms. For example, the Trial Chamber notes that “it is now a universally recognised *principle*, recently restated by the International Court of Justice, that deliberate attacks on civilians or civilian objects

57 Nuclear Weapons Advisory Opinion, para 78, p. 257.

58 Corfu Channel Case, p. 22: “certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war”.

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

60 Nuclear Weapons Advisory Opinion, para 30 and 32, p. 242.

61 Nuclear Weapons Advisory Opinion, para 46, p. 246.

62 Tadic Appeals Chamber, Judgement, para 134 (emphasis added).

are absolutely prohibited by international humanitarian law<sup>63</sup> and “[i]n the case of attacks on military objectives causing damage to civilians, international law contains a general *principle* prescribing that reasonable care must be taken in attacking military objectives so that civilians are not needlessly injured through carelessness. This *principle*, already referred to by the United Kingdom in 1938 with regard to the Spanish Civil War, has always been applied in conjunction with the *principle* of proportionality (...).”<sup>64</sup> It thus seems that the Trial Chamber describes distinction, precautionary measures and proportionality as principles of IHL. However, in later cases, the ICTY translates the precautionary measures principle into a more general ‘principle of protection’. In the Galic case, the Appeals Chamber held that “[t]he principles underlying the prohibition of attacks on civilians, namely the principles of distinction and protection, have a long-standing history in international humanitarian law. These principles incontrovertibly form the basic foundation of international humanitarian law and constitute “intransgressible principles of international customary law.”<sup>65</sup> Furthermore, the Chamber stated that “[o]ne of the fundamental principles of [IHL] is that civilians and civilian objects shall be spared as much as possible from the effects of hostilities. This principle stems from the principles of distinction and the principle of protection of the civilian population.”<sup>66</sup>

In subsequent judgements, different chambers of the ICTY<sup>67</sup> have referred to three ‘fundamental’ principles of IHL: the principles of distinction, precaution, and protection, lastly in the Karadzic Trial Chamber Judgment of 24 March 2016.<sup>68</sup> This latter principle is described “as referred to in Article 51(1) of Additional Protocol I and Article 13(1) of Additional Protocol II, [and] ensures that the civilian population and individual civilians enjoy general protections against dangers arising from military operations.”<sup>69</sup>

The Special Court for Sierra Leone (SCSL) includes as the sources of law on which basis it prosecutes “(ii) where appropriate, other applicable treaties and the *principles* and rules of international customary law [and] (iii) general *principles* of law derived from national laws or legal systems of the world, including, as appropriate, the national laws of the Republic of Sierra Leone, provided that those principles are not inconsistent with the Statute, the Agreement, and with international customary law and internationally recognised norms and standards.”<sup>70</sup>



63 Kupreskic Trial Chamber, Judgement, para 521. (emphasis added).

64 Kupreskic Trial Chamber, Judgement, para 524. (footnotes omitted, emphasis added).

65 Galic Appeals Chamber, Judgement, para 87, on p. 40 (footnotes omitted).

66 Galic Appeals Chamber, Judgement, para 190, on p. 83 (footnotes omitted).

67 Galic Trial Judgement, para. 56; Dragomir Milošević Trial Judgement, paras. 942, 951. See also Kordić and Čerkez Trial Judgement, para. 328; Kordić and Čerkez Appeal Judgement, paras. 47–68.

68 Karadzic, Trial Chamber, Judgement, footnote 1484, para 450, p. 174.

69 Karadzic, Trial Chamber, Judgement, footnote 1484, para 450, p. 174. See also Dragomir Milošević Trial Judgement, Case No. IT-98-29/1-T, 12 December 2007, para. 941, p. 308: “The principle of protection ensures that the civilian population and individual civilians enjoy general protection against dangers arising from military”

70 Rule 72bis, RSCSL, Rules of Procedure and Evidence, <http://www.rscsl.org/Documents/RSCSL-Rules.pdf>. (emphasis added)

In the Taylor Case, the Appeals Chamber of the SCSL acknowledges the principle of distinction, referring to both the ICJ as the ICTY, affirming that “[t]he prohibition and criminalisation of attacks against civilians is one of the essential principles of international humanitarian law.”<sup>71</sup> As a criminal court, it is unsurprising that the SCSL expands the principle of distinction to the criminalisation of its violation, however this is a factor that is usually treated separately in the context of the enforcement of IHL.

In the case concerning the Armed Forces Revolutionary Council (AFRC), the SCSL Trial Chamber refers to ‘principles of IHL’, when it discusses the distinction between civilians and a person *hors de combat*.<sup>72</sup> Furthermore, the SCSL Trial Chamber refers to the “the principles of humane treatment.”<sup>73</sup> This is a clear reference to the principle of humanity as embodied in common Article 3 of the Geneva Convention, that contains the minimum protection of persons during non-international conflicts.

In the Katanga Verdict, Trial Chamber II of the ICC notes the IHL principles of distinction, proportionality and arguably precaution. The Trial Chamber mentions with regard to the interpretation of the crime of directly attacking civilians, that it “considers that the inclusion of the third element of the crime, which specifies that “[t]he perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack”, does not constitute a particular intent requirement but is justified in particular by the presence of the word “intentionally” in the text of the article (...) and by the need to make a clear distinction between this crime, which proscribes violations of the *principle of distinction*, and acts violating the *principles of proportionality and/or precaution*.”<sup>74</sup> It thus follows from the reference to ‘and/or’ that the ICC Trial Chamber did not rule on the question whether the obligation under IHL to take precautionary measures constitutes a separate principle of IHL, or that it must be interpreted as part of the principle of proportionality.

Furthermore, Trial Chamber VI of the ICC notes in the Ntaganda Case that the ‘scope of the protection’ against rape or sexual slavery is not only limited to persons in the power of a party to the conflict, but also to other individuals, on the basis of the Martens Clause, because the IHL protective scope also includes “the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.”<sup>75</sup> Also, the ICC refers to the principle

71 Prosecutor against Charles Ghankay Taylor, Case No. SCSL -03-01-A, Appeals Chamber of the Special Court for Sierra Leone, Judgment, 26 September 2013, pp. 153-154.

72 AFRC Case, para 219, referring to the ICTY Galić and Blaškić Appeal Judgements.

73 See Prosecutor against Alex Tamba Brima, et al (the AFRC Case), Judgment Trial Chamber II, 20 June 2007, Case No.: SCSL-04-16-T, para 715, p. 221. <http://www.rscsl.org/Documents/Decisions/AFRC/613/SCSL-04-16-T-6135.pdf>.

74 Situation in the Democratic Republic of the Congo in the Case of the Prosecutor against Germain Katanga, No.: ICC-01/04-01/07, 7 March 2014, note 1851 to para 806, p. 286 (emphasis added). The principle of proportionality is mentioned again in para 895, p. 336.

75 Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Bosco Ntaganda, No. ICC-01/04-02/06, 4 January 2017, para 47, p. 25.

of proportionality, explaining it as an example of a justification for “the death of persons that may not be legitimately targeted.”<sup>76</sup>

### Summary

In sum, it seems from its jurisprudence that the ICJ identifies the following five principles of IHL: distinction, the prohibition to cause unnecessary suffering to combatants, humanity, military necessity and proportionality. The ICTY refers to the principles of distinction, precaution, and protection. The principle of proportionality is sometimes included within those three principles and sometimes noted as a separate principle. The SCSL identifies the principles of distinction and that of humane treatment. The ICC mentions the principle of humanity when it discusses the Martens Clause, as well as the principles of distinction, proportionality and precaution. It may be argued that these courts have never intended to provide a definite and exhaustive list of the principles of IHL because in the individual cases only the law relevant for the case at hand would be addressed. Nonetheless, the jurisprudence adds to the formation of consent for those norms which were mentioned as principles of IHL by the courts.

### 3.3.3 IHL Principles Identified by Doctrine

A general reference to the principles of IHL is found in most treatises of IHL. This Section assesses which principles of IHL have been identified by a number of notable writers.

In doctrine, different authors have demonstrated a different understanding of the norms they claim to qualify as a principle of IHL. Many authors use the phrase ‘principles of IHL’ or ‘fundamental principles’ to indicate rules of IHL they deem most important for the entire field of IHL.<sup>77</sup> Many writers simply note that there are a number of principles of IHL, although it differs which these are. For example, Rogers<sup>78</sup> and Blank and Noone,<sup>79</sup> limit the principles to four: humanity, military necessity, distinction and proportionality. Some authors, such

76 Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Bosco Ntaganda, No. ICC-01/04-02/06, 4 January 2017, footnote 116, para 49, p. 26.

77 Rogers, for instance, talks about “the great principles of customary law”. See Rogers 2004, p. 3.

78 Rogers’ *Law on the battlefield* identifies in Chapter 1 a number of “great principles of customary law, from which all else stems”: military necessity and humanity and the ‘rules’ of distinction and proportionality. See Rogers 2004, p. 3-23.

79 Blank and Noone discern in their coursebook *International Law and Armed Conflict* four ‘basic’ or ‘fundamental’ principles: humanity, military necessity, distinction and proportionality. They note that “[t]ogether, the four principles create a framework that can guide examination of the obligations and actions of parties to conflicts and the rights and privileges of individuals in the conflict zone.” See Blank and Noone, p. 35-36.

as Dinstein,<sup>80</sup> Solis<sup>81</sup> and Crawford and Perth<sup>82</sup> add the principle that prohibits to use means and methods of warfare of a nature to cause superfluous injury or unnecessary suffering to the opponent to this list.

An often recurring theme is to understand principles as occurring on different ‘levels’, as for example understood by Kolb and Hyde,<sup>83</sup> Gill,<sup>84</sup> Pictet,<sup>85</sup> Corn<sup>86</sup> and Chetail.<sup>87</sup> This seems to indicate that on a first level, the authors use the term ‘principles’ as the basis of other norms. On this level, the principles of IHL are used in combination with the word ‘basic’ or ‘foundational’, referring to the moral principles from which the legal rules in the Geneva Conventions originate.<sup>88</sup> The principles that are identified in doctrine to play this role are

- 80 See Dinstein 2004, p. 16 and p. 255; Dinstein recognises as ‘basic’ principles of IHL: “[t]he principle of distinction (between combatants and civilians), the principle of causing no unnecessary suffering to combatants, the principle of proportionality in attack etc.”. Although the list he provides is apparently non-exhaustive (given the use of “etc.”), Dinstein notes that these principles “are elevated to the pinnacle of the law regulating the conduct of hostilities in international armed conflict”, but he provides no further elaboration on the use, legal characteristics or functions of these principles. ‘considerations’ of humanity and military necessity are in his view the ‘two diametrically opposed impulses’ that forge “a subtle equilibrium” for IHL in international armed conflicts. In the 3<sup>rd</sup> edition of his handbook of 2016, Dinstein calls these two factors the ‘driving forces’ of IHL. See Dinstein 2016, pp. 8-9.
- 81 Solis’ *The Law of Armed Conflict – international humanitarian law in war* (second edition) contains a chapter that discusses IHL’s ‘core’ principles. The chapter notes that there are four principles that are closely intertwined: distinction, military necessity, unnecessary suffering and proportionality. See Solis, p. 269. Interestingly, only Solis is of the opinion that the principle of humanity is of a moral character rather than a legally binding concept, and excludes it from his list of ‘core’ principles for that reason. See Solis, p. 305-309.
- 82 As “fundamental principles ... from which all the substantive rules of IHL are derived”, the authors identify the principle of distinction, of which the principle of discrimination (prohibition on indiscriminate attack) is a part; the principle of military necessity; the principle of proportionality; the prohibition on causing unnecessary suffering and superfluous injury; ... and the principle of humanity. See Crawford and Perth, pp. 41-48. The authors also mention ‘the principle of neutrality in their list.
- 83 Kolb and Hyde’s *An Introduction to the International Law of Armed Conflicts* provides the reader with a chapter devoted to the ‘basic’ principles of IHL, in order to “understand the basic principles upon which the detailed rules of [IHL] rest and from which they can be deduced.” The principles of humanity and military necessity are recognised as the ‘fundamental’ principles on the “most general level”. Somewhat more specific, they mention “[a]nother pair of fundamental principles that govern [IHL] are those that dominate Hague Law and Geneva Law respectively. The detailed rules of [IHL] may be shown to be elaborations of these two general principles, which exist at the apex of the system of [IHL]. These two foundational principles may also form a basis upon which gaps of the law may be filled and particular rules of [IHL] can be interpreted, especially in cases of doubt.” These principles are the principle of limitation and the principle of humanity. After these two principles on an “intermediate level” level, Kolb and Hyde identify three principles on a more “concrete” level: those of distinction, necessity and proportionality. See Kolb & Hyde, p. 43-50.
- 84 Gill notes that “[t]he fundamental principles of military necessity and humanity are the two keystone principles which lie at the heart of the balance between military requirements and the need and objective to limit the suffering and devastation caused by war and provide protection to those most vulnerable, such as the wounded and captured, and to the civilian population. These two main principles are complemented by several other fundamental principles which are drawn from the two main ones and which complement them in forming the overall system. These include the principle of distinction, which has the function of demarcating who and what is, and is not, subject to attack; the principle of proportionality (in bello) which sets out a balance between expected military advantage and probable incidental injury and damage to civilians and civilian objects in conducting attacks upon military targets; the principle of prohibition of unnecessary suffering and superfluous injury in the use of certain types of weapons and means of combat as a sub-principle of humanity; and the principle of equal application, which establishes an equality between opposing forces and participants in the application of the law of war, irrespective of considerations of the legality of resorting to force between States or the motivations of the opposing parties.” See Gill 2013, pp. 40-41.
- 85 Pictet 1985, pp. 59-60.
- 86 Corn et al., p. 110 and 112.
- 87 Chetail, p. 252-267.
- 88 See Kolb and Hyde, p. 45, and Pictet 1985, pp. 61-62.

those of humanity and military necessity.<sup>89</sup> Some also include the principle of chivalry, which is sometimes referred to under different names, such as the principle prohibiting perfidy; honour or good faith.<sup>90</sup> Also, it is argued by one author that a ‘principle of ambituity’ exists which is the foundational principle of IHL rules concerning the protection of civilians.<sup>91</sup>

On a more practical level, the majority opinion seems to be that the principles of distinction, proportionality and the principle of unnecessary suffering must be applied. Others, however, add an implementing principle of humane treatment, clearly derived from that of humanity. For example, the San Remo Manual on non-international armed conflicts, which was drafted by a number of recognised experts in IHL,<sup>92</sup> mentions three ‘general’ principles of IHL: the principles of distinction, prohibition of unnecessary suffering, and humane treatment.<sup>93</sup> In addition, Corn argues that also the obligation to take precautionary measures qualifies as an additional ‘substantive’ principle of IHL, because:

“[p]recautionary measures, including the targeting process itself, play a vital role in mitigating the risk to civilians and civilian property during armed conflict. As such, the obligation to implement such measures should be considered equally fundamental as that related to substantive principles such as distinction and proportionality. Treating precautions as a fundamental LOAC principle will increase the likelihood that precautions will be more broadly conceived at every step of the training, planning, and mission execution process, and will not be viewed as a last-minute afterthought once a course of action involving lethal targeting has been largely approved for execution. Furthermore, an expanded conception of precautions – a conception that ranges from training, through the process for LOAC implementation, to the substantive warning and less harmful alternative consideration – will contribute to the improvement of targeting practices among all armed forces, and in turn to a more credible balance between the necessities of armed conflict and the humanitarian interests of risk mitigation.”<sup>94</sup>

89 See for example Dinstein 2004, p. 16 and Corn et al., p. 112. Dinstein notes that IHL is “in its entirety ... predicated on a subtle equilibrium between two diametrically opposed impulses: military necessity and humanitarian considerations.” Corn et al. note in their IHL textbook *The Law of Armed Conflict: an operational approach* that the principles of military necessity and humanity “lie at the core of all battlefield regulation.”

90 Gill pleads for the acceptance of the principle of chivalry and honor as a principle of IHL, on the basis of the fact that (1) this has historically always been part of the ‘code of the warrior’; (2) as the foundation of specific rules of IHL, and (3) “that as a fundamental principle of the law of war, they perform another of the functions of a general principle of law, namely as a means to assist in the interpretation of the law and as a guiding principle in both a legal and in a wider sense of incorporating extra legal considerations of ethics and military tradition into the practice of warfare” See Gill 2013, p. 49. However, with regard to the principle of chivalry, Rogers notes that although it has played an important role in shaping the rules of IHL as they stand today, chivalry may “be classified as an element of the principle of humanity”. See Rogers 2004, p. 3.

91 Koppe 2013, p. 53: Koppe argues that in addition to the principles mentioned by most other authors (the principles of military necessity, distinction, proportionality and humanity), there is an additional principle of IHL that is the basis for a number of rules of IHL, because their origin can only be explained on the basis of this underlying principle. Koppe proposes this ‘principle of ambituity’ because it is the “legal basis of the protection of the environment during armed conflict in general, and of the prohibition against excessive collateral damage to the environment in particular”.

92 The Sanremo Manual for Non-International Armed Conflicts, 2006. The drafting committee consisted of Schmitt, Garraway and Dinstein.

93 See paragraph 1.21 of the San Remo Manual for Non-International Armed Conflicts, p. 8.

94 Corn 2014, p. 466.

### 3.3.4 Other Practice

Multilateral statements by States are also relevant to identify principles of IHL. An example is Resolution 2444 of the United Nations General Assembly, adopted unanimously in 1968. It identifies four “principles for observance by all governmental and other authorities responsible for action in armed conflicts.” The wording of the resolution seems to suggest that these principles were to be applicable in both international and internal armed conflicts.<sup>95</sup> These principles were derived from the XXVIII Resolution adopted at the XXth Conference of the Red Cross, which “declares that all Governments and other authorities responsible for action in armed conflicts should conform at least to the following principles:

1. that the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;
2. that it is prohibited to launch attacks against the civilian populations as such;
3. that distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible;
4. that the general principles of the Law of War apply to nuclear and similar weapons<sup>96</sup>

### 3.3.5 Sub-Conclusion

In applying the Kalshoven-test, the overview of military manuals, judgements of international courts, doctrine and other practice in this section has made it clear that the term ‘principles of IHL’ is often used to indicate that a particular norm is seen as the basis of rules of IHL. This applies particularly to military necessity, humanity and, to a lesser extent, to chivalry or good faith.<sup>97</sup> These notions lack normative force but are usually described as the underpinnings of the rules of treaty and customary IHL. These norms may be labelled as formative principles, and in the categorisation of Dworkin as ‘policies’ instead of principles.<sup>98</sup> Therefore, it is submitted that military necessity, humanity and chivalry must be excluded

95 Kalshoven 2006, p. 53.

96 XXVIII Resolution adopted at the XXth Conference of the Red Cross, published in the IRRC, No. 56, November 1965, p. 589. ([https://www.loc.gov/frd/Military\\_Law/pdf/RC\\_Nov-1965.pdf](https://www.loc.gov/frd/Military_Law/pdf/RC_Nov-1965.pdf))

97 See for example Gill 2013, p. 34, referring to the ‘principle’ of chivalry, which “which has been, and still is, identified in some military manuals as one of the fundamental principles of [IHL] and elements of it have obtained the status of binding rules of law of a conventional and/or customary nature”. See also Koppe 2013, introducing the IHL ‘fundamental principle’ of ‘ambiguity’ to “explain the emergence” of the IHL rules on the protection of the environment. See Koppe 2013, p. 60.

98 Kalshoven and Zegveld use the word ‘limits’ instead of policies, describing a similar category of norms. They state that: “the ‘limits’ of the law of war may be distinguished into principles and rules. Overriding principles are military necessity and humanity. The first principle tells us that for an act of war to be at all justifiable requires that it is militarily necessary: a practical consideration; and the other, that the act cannot be justified if it goes beyond what can be tolerated from a humanitarian point of view: a moral component. Obviously these are extremely broad principles: over time, they have been elaborated into ever more detailed principles and rules”. Kalshoven and Zegveld 2011, p. 2. Ronen describes necessity and humanity as “standards, not practicable rules” See Ronen, p. 496.

from the category of legally binding principles of IHL, in the sense that these policies are incapable of conveying rights and obligations to States and individuals. The function of this type of principles is rather to form the extra-legal, underlying basis of the substantive rules and principles. They may be used to interpret rules and principles IHL, but cannot fill gaps in the law themselves.

Furthermore, a second category of IHL principles that may be discerned is that of very important rules of IHL. The principle of distinction is the most prominent of this type, but the principle of proportionality is also among the principles that is recognised in this category by States, courts and doctrine. Arguably, according to the categories of norms as discerned by Dworkin, the principles of this category (distinction and proportionality), would be rules rather than principles, because they do not necessarily contain an objective, but the characteristic that military operations are either distinguishing between military objectives and civilians or civilian objects or not (distinction) and the collateral damage expected from a planned attack is either excessive or not (proportionality). The function of these rules is not to serve as an interpretative tool or to fill gaps in the law, because they apply in clearly delineated circumstances, such as when planning and conducting attacks. These norms are thus always either fulfilled or they are not.<sup>99</sup> Different States, courts and authors also mention other rules they deem to be particularly important, but these are not shared among these categories of actors. It seems that State practice as well as the opinions of the majority of courts and authors point in the direction to refer to the rules of distinction and proportionality as principles nonetheless.

A third category may be referred to as 'general' principles, the principles of IHL 'in a strict sense', or 'substantive' principles. In the field of IHL, it is submitted, this category includes the prohibition to cause superfluous injury or unnecessary suffering and the precautionary principle, but also, again, the principles of distinction and proportionality. These have been mentioned by a considerable number of States, writers and courts as principles of IHL. These later two IHL principles are of a more general nature than the specific *rules* of distinction and proportionality (that are based on these principles), because these principles also have the role to serve as a foundation for other, more specific rules. These principles do contain a certain objective, but are more specific than the foundational principles (humanity and military necessity): to minimise the impact of military operations on civilians (precautions, proportionality and distinction) and on the opposing forces (proportionality and the prohibition to cause superfluous injury or unnecessary suffering). These objectives are mostly specified in more detailed rules. The rules based on the prohibition to cause superfluous injury or unnecessary suffering are most notably those on the use of means and methods of warfare, but could arguably also include the rules pertaining to the humane treatment of those do not, or no longer participate in hostilities. The rules based on the precautions principle include those in articles 57 and 58 of API, and the corresponding customary rules.

■  
99 Alexy, p. 48. See Chapter 2 above.

The principles of distinction<sup>100</sup> and proportionality are the basis of a number of specific rules, but may, as follows from the practice of particularly States, also apply more broadly. It is submitted that these are principles of IHL in a strict sense, meaning that they may potentially serve as a gap-filler, and in that capacity these principles are capable of creating legal rights or obligations, and as such, they are part of the law, not of an extra-legal character.

Furthermore, the different categories of principles function on different levels, corresponding to the roles they play. The above may thus be summarised as follows:

Formative principles	Principal principles	General principles
military necessity, humanity and chivalry	The rules of distinction and proportionality	prohibition to cause superfluous injury or unnecessary suffering, the precautionary principle, distinction and proportionality

### 3.4 The Applicability of the Principles of IHL

It follows from the above, that principles of IHL may potentially be applied as an independent source of legal obligations during armed conflict in some situations. That these principles of IHL are legally binding has been argued by a number of courts and authors.<sup>101</sup> There are however notable authors who deny such a prominent role for the principles of IHL, as well as the use of the Martens Clause to come to that conclusion.<sup>102</sup> In nearly all situations, there is a

<sup>100</sup> See for the principle of distinction: Quéguiner 2008, p. 161.

<sup>101</sup> For example, Kalshoven cites the 1995 Tadic Jurisdiction Decision of the ICTY Appeals Chamber as well as the 2006 Galic Judgement, claiming that the Tribunal in fact has not applied customary international law, but principles of IHL. He states that “these principles are not customary but moral in nature. They stem, in other words, from the mind rather than from actual battlefield practice. Reflection of a principle in texts such as treaties or military manuals helps to give the principle body and, so to speak, anchor it in somewhat more solid ground. The crucial point is however that for its existence as a principle of law, it does not depend on a showing that in the conduct of war, a certain mode of acting, apart from being accepted as law, is demonstrably customary. And the point may be emphasised again that “principles of law recognised by civilised nations” (as they are styled in the Statute of the International Court of Justice) or the “principles of the law of nations” (as they are listed in the Martens clause) are “law”: they must be respected and should be enforced as much as other sources of law.” See Kalshoven 2006, p. 67. See also Miyazaki p. 439: “the principles of the law of nations, as they result from the laws of humanity, which were mentioned expressly in the Martens Clause as incorporated in Additional Protocol I are *lex lata* binding on the Parties.” Rosemary Abi-Saab may also be deemed to support this, because of her statement that “the fundamental general principles of humanitarian law belong to the body of general international law, in other words, they apply in all circumstances, for the better protection of the victims.” See Abi-Saab, p. 375. Chetail argues in the same direction. He concludes, from the jurisprudence of the International Court of Justice in the field of IHL, that the fundamental rules of IHL that are contained in multilateral conventions “go beyond the domain of purely conventional law” and amount to obligations of general international law with their own separate and independent existence. He holds that the Geneva Conventions have merely given specific expression to the general principles of IHL: “the fundamental principles of humanitarian law identified by the International Court of Justice provide a condensed synthesis of the law of armed conflicts and constitute the normative quintessence of this traditional branch of international law. They give expression to what the Court has called “elementary considerations of humanity”. As general principles of international law, they thus provide a minimum standard of humane conduct in the particular context of armed conflict.” See Chetail, p. 268. See also Strebler, p. 327.

<sup>102</sup> For example, Kleffner notes that “the principles of humanity and dictates of public conscience mentioned in the Martens Clause” cannot provide a basis for restraints to the parties to an armed conflict “as long as [they] have not found their expression in a treaty provision, a rule of customary international law, or other source of positive international law (...)

more precise rule of treaty law or customary law available. Nonetheless, it is submitted that the principles of IHL may play a role to fill gaps in IHL. This section examines the situations in which there may be a role for the substantive principles of IHL. This section first examines the potential for the applicability *ratione materiae* of the principles of IHL, followed by a short description of their applicability *ratione personae*.

In practice, it seems that there have indeed been instances where the principles of IHL were referred to as the main source of law for a given case. One early example of how a principle of IHL fills the gap that customary and conventional IHL have left is that of the enforced use of Russian prisoners of war on German military installations during the World War II.<sup>103</sup> This was a clear violation of the 1929 Geneva Convention relative to the Treatment of Prisoners of War.<sup>104</sup> Even though Germany was not restrained by this treaty rule because Russia was not a party to the treaty, a judge referred to a memorandum of the German Admiral Canaris, which noted that “therefore only the principles of general international law on the treatment of prisoners of war apply. Since the 18<sup>th</sup> century these have gradually been established along the lines that war captivity is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war.”<sup>105</sup> The judge found the position of the Admiral to be correct and in accordance with accepted international law, although he did not clarify whether these ‘principles’ were understood as customary law or as principles in the sense of article 38 of the ICJ Statute.

After the Second World War, the Nuremberg Tribunal also referred in connection with IHL to the possibility of applying the principles of international law as one of the three sources of international law. It held that “the law of war is to be found not only in treaties, but in the

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Principles of humanity and dictates of public conscience may be driving forces for the development of the law, but they do not constitute the law.” See Kleffner 2012, p. 40. See also Wilmschurst, p. 412-413: She warns that “while State forces and armed opposition groups should be encouraged to act in a humanitarian way and, indeed follow the Martens Clause, the exigencies of conflict and the powerful interests of belligerents will frequently be such that only firmly established rules of law will be sufficient to constrain battlefield conduct in a direction contrary to military desirability. In such circumstances, those claiming the existence of legal rules, whether treaty or custom, must be able to substantiate them as such. Unsupported rhetoric about the existence of legal norms may cause the law to fall into disrepute with the result that there will be failure to observe such rules as there are. In other words, clarity about the existence of rules of law can assist in securing compliance.” Furthermore, Crawford and Pert note that treaty rules and rules of customary IHL are the main sources of IHL. Principles of international law are mentioned in passing as a separate source of international law, but they are dismissed as a source of IHL because “in practice, only treaties and custom are considered to be binding sources of international law”. See Crawford & Pert, footnote 61 on p. 40. However, soft law instruments may “provide useful instructions and guidance for States and non-State actors, and often reiterate or elucidate existing international law norms.” See Crawford & Pert, p. 37. The authors cite as examples of these soft law instruments, that are not legally binding: UN resolution or declarations, codes of conduct issued by international organisations, and other instruments such as manuals or interpretative guidance documents. See also p. 40 for examples of these documents. See also Van Steenberghe 2017, p. 895: “All those specific approaches, which derive the existence of unwritten IHL and ICL sources from considerations of natural law or objective justice, are highly debatable. Given the very subjective nature of these considerations and the absence of any further elaboration or guidelines on the specific way in which those sources may emerge, the latter are likely to be arbitrarily claimed and applied.”

<sup>103</sup> For a description of the case at hand, see Greig, p. 50 and accompanying notes.

<sup>104</sup> Article 31 (1) of this convention: “Work done by prisoners of war shall have no direct connection with the operations of the war. In particular, it is forbidden to employ prisoners in the manufacture or transport of arms or munition of any kind, or on the transport of material destined for combatant units.”

<sup>105</sup> Greig, p. 50.

customs and practices of states which gradually obtained universal recognition, *and* from the general principles of justice applied by jurists and practised by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do not more than express and define for more accurate reference the principles of law already existing.”<sup>106</sup>

These two historic examples show the potential for principles to fill gaps that the IHL treaty rules and customary IHL rules have been unable to fill. However, it is submitted that this role is still relevant in contemporary armed conflicts.

A first situation that may be imagined for a role of the principles of IHL is that of non-international armed conflicts. IHL applicable in an international armed conflict is well-codified in treaty law. A much higher number of IHL treaty rules is applicable to international armed conflicts than to non-international armed conflicts, although the operational realities for the parties to the conflict is in many situations very similar. Common Article 3 of the Geneva Conventions and, if applicable, the provisions of Additional Protocol II are the only treaty rules available, together with a number of specific treaties, such as the CCW. There is thus an absence of specific provisions applicable to non-international armed conflicts. Many of the gaps left by treaty law have been filled by customary law, as evidenced by the ICRC Customary Law Study, containing a large number of rules that are claimed to apply both in international armed conflicts as in non-international armed conflicts. However, because the existence of rules of customary IHL is sometimes hard to prove, and controversies exist with regard to the methodology to identify customary rules, gaps remain.<sup>107</sup> These gaps may be filled by applying principles of IHL.<sup>108</sup> A second situation in which principles of IHL may provide guidance is the situation where the applicability of the rules of IHL is unclear, because there is uncertainty whether the applicability clauses of IHL<sup>109</sup> have been fulfilled. This may include situations in which it is unclear whether an non-international armed conflict has started, for example because the level of organisation of one of the parties to the conflict is not clearly established yet, although the intensity of the violence has risen to a level which would normally be designated as one of hostilities.<sup>110</sup> A third situation where a gap may exist, is the situation in which one State is a party to a treaty containing rules of IHL, while its opponent or ally is not. This situation corresponds to the example above regarding the treatment of the Russian prisoners of war during World War II. Fourthly, problems may

106 IMT, vol. I, pp. 220-221, as quoted also by Greig, p. 49 (emphasis added).

107 See Van Den Boogaard 2013, p. 13-16 for a more elaborate analysis of this issue.

108 Kalshoven asserts that the criminal tribunals for Rwanda and the former Yugoslavia have handled many cases in which the facts indicated that there was a non-international armed conflict. In these decisions, Kalshoven observes critically, “the Tribunals should not have based their decisions on asserted yet non-existent custom, but on principle, a source of law as effective and, indeed, convincing as custom in the promotion and enforcement of the law of armed conflict.” See Kalshoven 2006, p. 68. His critique is thus directed both to the methodology the Tribunals used to establish customary international law, and to the refusal of the courts to acknowledge that what they are actually applying are principles of international law, which he calls “a source of the present-day law of armed conflict”. See also Kalshoven 2006, p. 59.

109 Common article 2 and 3 of the Geneva Conventions and the respective Articles 1 of Additional Protocol I and Additional Protocol II.

110 See generally, also for some other situations: Van Den Boogaard 2013 p. 10-13. See also Corn et al. 2012, p. 113.

arise if third armed actors, like multinational troops or peace forces are present in a certain conflict zone without actually being a party to that conflict.<sup>111</sup>

One method States use to fill these gaps in cases where the applicability of IHL has not been evident, is to apply the principles of IHL as a matter of policy. Examples of this are their application during peacekeeping and other military operations and the application in armed conflicts where it has not been evident whether the rather limited number of legal rules of non-international armed conflict, i.e. common article 3 of the Geneva Conventions and in some cases Additional Protocol II to the Geneva Conventions, are applicable or the rules applicable in an international armed conflict. In other types of operations, such as peace support operations or stability operations, there is very limited treaty or customary law. The principles of IHL are usually made applicable through policy. However, given the character of the principles of IHL as set out above, they could be considered to apply *de jure*, as principles of international law, applicable not only to States, but also to individual participants to armed violence and armed groups, thus to private military companies, peacekeepers and other organised non-state actors.<sup>112</sup> This legal character of the principles may be confirmed by the Martens Clause, understood as another way to phrase what article 38 (1) (c) of the ICJ Statute also provides: if there is no other law available, i.e. a rule of conventional or customary international law, the principles of international law must be applied. This counters the threat that States may attempt to deny the applicability of legal rights and obligations by declaring that they follow the principles of IHL out of policy considerations. After all, when States consider that a policy is no longer necessary, they may conclude that there is no legal framework applicable. However, the invocation of the principles of IHL should only be allowed if its applicability would enhance the protective character of the relevant rule. Thus, the use of the principles may only be done in accordance with the purpose of IHL, which is to protect those not participating in the hostilities and restrict its means and methods. They cannot be used to override more stringent rules, such as the rules that apply to the use of lethal force in law enforcement situations.<sup>113</sup>

With regard to the applicability *ratione personae* of the principles of IHL, there is no reason to diverge from the basic premise that States are the main subjects of international law. However, as Lauterpacht stated: “in relation to both rights and duties, the individual is the final subject of all law.”<sup>114</sup> States have certainly lost their monopoly as actors in international law.<sup>115</sup> That there are also other actors follows from a number of developments, including the emergence of international organisations as producers of international norms and, secondly, from the fact that increasingly also individuals have become the direct addressees of rules

111 This issue is explored into more depth in Van den Boogaard 2013, pp. 10-16.

112 See generally also Corn 2006.

113 Kleffner 2013, pp 74-75.

114 Lauterpacht 1950, p. 69.

115 Cassese 2005, p. 144.

of international law.<sup>116</sup> If it is true that the system of international law is still an imperfect legal framework with regard to States, this is even more the case for the applicability of international law to individuals, which has only recently become more sophisticated.<sup>117</sup> Presently, it may be said that individuals are participating in the international legal system, but not to the same extent as States.<sup>118</sup>

According to traditional international law, individuals did not enjoy the status of subjects of international law, but they remained under the exclusive control of States.<sup>119</sup> There were only very few exceptions.<sup>120</sup> As the PCIJ put it in 1928: “according to a well-established principle of international law, [a treaty] cannot, as such, create direct rights and obligations for private individuals.”<sup>121</sup> However it was deemed possible that States in concluding international agreements were able to confer rights and obligations on individuals that could be called upon by individuals in proceedings in national courts.<sup>122</sup> It has since then increasingly been maintained that also individuals may invoke and are bound by international law.<sup>123</sup> The first significant exception was the setting up of the International Labour Organisation in 1919, although this concerned a group of persons.<sup>124</sup> The fact that after 1945, at the Nuremberg Trials, individuals have been prosecuted for war crimes on the basis of their individual criminal responsibility during the Second World War is also a clear indication in this direction.<sup>125</sup> However, more recent developments have made it possible to implement and maintain the obligations of IHL by creating its own framework for prosecuting war crimes internationally, through the framework of international criminal law. As Judge Harhoff put it:

“whatever the case may be after the Nuremberg Trials, the fact remains that, by creating the two Criminal Tribunals for the Former Yugoslavia and Rwanda, The Security Council took a great leap forward and established beyond any doubt that individuals may now, in respect of IHL, appear as subjects bound by certain legal obligations directly under international law, and that they can be individually responsible before an international forum for their violations

116 Cassese 2005, p. 143. For an overview of the doctrine on the subject of the position of the individual in international law in traditional international law up to 1962, see Norgaard, p. 34-78.

117 Franck 2008a, pp. 2-3.

118 McCordquodale, pp. 328-329.

119 Cassese 2005, p. 142.

120 Cassese argues that in fact already at the end of the 19<sup>th</sup> century, international law pertaining to piracy imposed direct obligations on individuals. See Cassese 2005, p. 144, quoting Kelsen, p. 203-205 and Westlake (1894).

121 The Danzig Railway Officials Advisory Opinion, 3 March 1928, PCIJ Series B nr. 15, pp 17.

122 The Danzig Railway Officials Advisory Opinion, 3 March 1928, PCIJ Series B nr. 15, pp 18.

123 See for example Shaw 2014, p. 188-189, Brownlie 2008, p. 65 and Cassese 2005, p. 142-150.

124 Franck 1999, p. 64.

125 But see Zoller, writing in 1990, on page 99-100, arguing that individuals are not subjects of international law, because the two prerequisites have not been met: (1) rights and obligations should be established directly by international law and (2) direct enforcement of these rights and obligations should be in place.

of these obligations. This is a remarkable development in international law with far-reaching implications for, *inter alia* the concept of state sovereignty.”<sup>126</sup>

Treaty law has accorded rights and obligations to individuals in a variety of situations, such as the Rome Statute of the International Criminal Court.<sup>127</sup> Treaties may thus afford provisions obliging States to implement such enforcement mechanisms. The dominant view for customary law has always been that an individual has no individual rights in this respect under customary international law and is dependent on the political discretion of the home State, for example as to whether or not to present a claim for the individual.<sup>128</sup> Still, although it is certainly much more difficult to prove these rights to exist, in the field of IHL, the ICRC stated in its 2005 Customary IHL Study that the argument can be made that individuals are afforded rights and obligations under customary international law.<sup>129</sup> Similarly, general principles as a basis of individuals’ responsibility in international law were invoked by the Supreme Court of Israel in the Eichmann Case and by the French *Cour de Cassation* in the Klaus Barbie case and described in the Nuremberg principles as being consistent with the general principles of law recognised by the community of nations.<sup>130</sup> The acceptance of such a statement remains of course dependent on the understanding one has of the legal status of principles of international law and the type of principle at hand.<sup>131</sup>

When international law is viewed as a coherent system in which principles of international law may be binding on States, it seems illogical to deny that these principles may in some situations bestow legal obligations on individuals directly. Although the identification of a norm originating from principles of international law is arguably more difficult, it seems unnecessary to require that rights and obligations rules originate only from the two dominant sources of treaty and customary international law. Particularly in the field of IHL, rules must ultimately be applied by the military - even individual soldiers - during their participation in armed hostilities or while conducting other military operations.<sup>132</sup> The rules in which the

126 Harhoff, p. 665.

127 For example, article 75 of the ICC Statute affords individuals the right to bring international claims to seek reparation.

128 Malanczuk, p. 2 and Bantekas, p. 122

129 Henckaerts and Doswald Beck, pp. 551-558. Rule 151 states that “Individuals are criminally responsible for war crimes they commit” and Rule 152 states that “Commanders and other superiors are criminally responsible for war crimes committed pursuant to their orders.”

130 Socha, p. 74.

131 For a contrary view: Zoller states that “finding grounds for the norm of responsibility in the general principles of law may be justified. But this implicitly relies on the assumption that general principles of law are autonomous rules of international law, different from international custom, which is rather doubtful.” See Zoller, p. 105-106. See also Van Steenberghe 2017, p. 896: calling this approach “so isolated that it does not seem relevant to consider whether they imply the existence of specific secondary norms regulating the formation of some unwritten IHL (...) sources”.

132 See for example the 1992 Military manual of Germany, rule 133 and 134 concerning the “Binding Effect of International Law for the Soldier”: The obligations of the Federal Republic of Germany under international humanitarian law are binding not only upon its government and its supreme military command but also upon every individual.” And “According to Article 25 of the Basic Law of the Federal Republic of Germany, the general rules of international law form part of the federal law. They take precedence over the law and entail rights and duties for all inhabitants of the Federal territory. These general rules include those provisions of international humanitarian law demanding a behaviour as it results from the principles of humanity and from the dictates of public conscience (Art. 1 para 2 AP I; Preamble para 4 AP II).” See Humanitarian Law in

IHL proportionality principle is codified refer expressly to “those who plan or decide upon attack”, which must be understood to mean a person rather than an abstract entity such as a State. As such, it seems that international law could bind the individual soldier as an agent of a party to the conflict and it is not required that the norm is first confirmed in a specific treaty rule or as a rule of customary international law. The question of whether an individual soldier is bound directly by a principle of international law, in particular a principle of IHL, may thus in some cases be answered in the affirmative, although this is dependent on the type of principle that needs to be applied.

### 3.5 Three Roles for the Principles of IHL

Although it may be unclear to which principles of IHL States mean to refer to when they declare that they will apply the principles of IHL, this will probably include both the rules of distinction and proportionality, as well as the four principles of IHL in a strict sense. The different character of the principles of IHL that have been identified above needs to be taken into account. Substantively, military necessity and humanity give some general guidance in a certain direction, whereas the rules on distinction and proportionality provide more specific legal obligations. Nonetheless, this author concurs with Pictet that the principles of IHL are “of capital importance” because they “motivate the whole, enable the respective value of the facts to be appreciated and also offer solutions for unexpected cases. They contribute towards filling gaps in the law and help in their future development by indicating the path to be followed.”<sup>133</sup> As a result, there are three roles that the principles of IHL play: the coherency role, the educating role and the foundational role.

#### **The coherency role**

The principles of IHL are thus a source of the legal obligations for States, armed groups and the individual arms bearers whenever armed violence is employed in the course of military operations that exceed law enforcement and are qualified as hostilities. These norms complement the norms these actors have already agreed to in treaties or – through their practice and *opinio juris* – customary international law. There are also other notions that are very important for IHL, but nonetheless fail the criteria to be labelled as principles of IHL. Examples of these notions are chivalry, reciprocity, the principle of equal application and neutrality.<sup>134</sup> These notions are part of the framework of IHL and together, IHL forms a

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Armed Conflicts - Manual, edited by The Federal Ministry of Defence of the Federal Republic of Germany, VR II 3, August 1992, p. 11.

<sup>133</sup> Pictet 1966, p. 25-26.

<sup>134</sup> Compare Dinstein 2016, pp. 4-15: Dinstein finds two “major premises” as “antecedent” to the study of IHL: the notion that means and methods are restricted and the “legal equality” of the parties to the conflict. Furthermore, Dinstein qualifies

coherent legal framework that regulates behaviour of the parties to an armed conflict. The role of the principles of IHL as a supplier of coherency in IHL as a whole is crucial. The different types of principles of IHL together safeguard that IHL is a consistent legal framework that provides guidance for any specific situation during armed conflict. Thus, for this role, the understanding of principles of IHL is broader than the IHL principles in a strict sense.

### ***The educating role***

Principles of IHL, understood in a broad sense, are indispensable in educating members of the parties to the conflict. Soldiers, as the main users of the rules of IHL, are not lawyers. Complete knowledge of every single rule of IHL by soldiers is both unattainable and undesirable. The Geneva Conventions note in the articles about dissemination, that the ‘principles’ of the Geneva Conventions must be instructed to the members of the military as well as to the civilian population. It is submitted that the use of the term ‘principles’ for the purpose of education members of the military and the civilian population as a whole is not confined to the principles of IHL in a strict sense that were identified above. It includes the most important rules (particularly the IHL rules of proportionality and distinction) and also the policies, even though these are not legally binding notions. In deciding upon different courses of action, the members of military forces must be trained to apply both humanity and military necessity, because these notions guide the members of armed forces in taking decisions on the battlefield. The principles of IHL then “serve in a sense as the bone structure in a living body, providing guidelines in unforeseen cases and constituting a complete summary of the whole, easy to understand and indispensable for the purposes for dissemination.”<sup>135</sup>

### ***The foundational role***

Furthermore, the principles of IHL form the origin of the specific rules of IHL, and they are applicable to all parties to an armed conflict. The addressee of the norm in general international law may thus be individual soldiers on the battlefield, because ultimately, it is their behaviour, and targeting decisions, that dictate whether the State is acting in conformity with international law, or not. The principles of IHL, particularly the policies of humanity and military necessity are the basis of the principles and rules of IHL. According to Draper: “[a]t least since the time of Grotius the law of war has rested on an uneasy balance between military needs, flowing from the nature of the activity to be subjected to law, and

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military necessity and humanity as “the two driving forces” of IHL and distinction and the prohibition of unnecessary suffering as the “two cardinal principles” of IHL.

<sup>135</sup> Pictet 1985, p. 59.

those of humanity”<sup>136</sup> These foundations are important to interpret the rules of IHL, however the extent to which IHL itself allows these two policies to play a role in the interpretation of its rules differs. The notion of military necessity is restricted to those situations in which the rule itself expressly allows for invocation of reasons of military necessity.<sup>137</sup> Invoking considerations of humanity as an interpretative tool for the rules of IHL is not expressly regulated, but must nonetheless remain in sync with the considerations of military necessity.<sup>138</sup>

An example of how the principles may operate could be the absence of combatant status in the conventional and perhaps also customary IHL applicable during a non-international armed conflict. It may be true that, for understandable reasons, States have not been willing to award the *de facto* fighter in non-international law the protection of prisoners of war, which comes with ample provisions on its treatment. However, that does not mean that those individuals cannot be targeted for such time as they are taking a direct part in hostilities, as they belong to the armed forces of one of the parties to the conflict. The basic protection of Common Article 3 to the Geneva Conventions is complemented by the principles of IHL, whether on the basis of a rule of customary law, or in absence of such a rule, on the basis of the principles themselves. This includes the rule of distinction, which provides that the armed members of the parties to the conflict should distinguish themselves from civilians in the conduct of their operations, and that they may be targeted, but other civilians may not. Also, the principles dictate that that upon arrest, these persons should be awarded the protection that results from the principle of humanity. Precautionary measures need to be taken to safeguard the well-being of this person. Distinction provides that he may no longer be attacked. In short: where conventional and customary IHL provide no clear guidance, the principles of IHL step in to fill the gap.

### 3.6 Conclusion

The conclusion of Part II of this study is that the IHL principle of proportionality is firstly a rule of international law. This means that it is referred to as a principle because it is deemed to be a particularly important rule of IHL. However, proportionality may potentially also play the role of a broader, substantive principle of IHL: as a principle of IHL in a strict sense. What that means in practice is further analysed below. First, the notion of proportionality itself requires deeper analysis, because proportionality as a legal notion manifests itself also in other branches of international law. Part III of this study therefore analyses proportionality as a legal notion in international law, including IHL.

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136 Draper, p. 141.

137 Dinstein 2016, p. 10.

138 See also Van Den Boogaard 2018a, pp. 205-206.