Chapter 6
Chapter 6: The Concept of Proportionality in International Humanitarian Law

“There is a lot of misunderstanding about the principle of proportionality”

“If the proportionality principle does fail to protect civilians, one suspect is the highly subjective and discretionary phrasing of the principle”

“As a rule of international humanitarian law, proportionality features a number of design flaws and remains extremely vague”

6.1 Introduction

The focus of this chapter is the principle of proportionality in IHL, or, more precise, the IHL rule on proportionality.

Today, with the Hague Conventions of 1907 still in force, the applicable treaty law of targeting is codified in particular, but not exclusively, in the 1977 Additional Protocol to the Geneva Convention. The definition of the IHL rule on proportionality as it stands today in treaty law reads that an attack is indiscriminate if it “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

The IHL rule on proportionality is a typical component of IHL, in the sense that it requires participants in an armed conflict to conduct the balance between humanity and military necessity. It is a crucial factor in any targeting decision taken during armed conflict. The IHL rule on proportionality is meant “as a last line of defence” for civilians and objects which do not qualify as military objectives. The rule is also included in the law pertaining to the use of landmines: article 3 of Protocol II, as well as Amended Protocol II, to the 1980 Conventional Weapons Convention, expressly prohibits the use of landmines, booby-traps and other devices laid outside military zones, that are used indiscriminately because they may be expected to be disproportional. For the purpose of understanding the origin of the provision in the Mines Protocol it may be noted that the wording of the IHL rule on proportionality features a number of design flaws and remains extremely vague.

1 Rogers 2008, p. 189
2 Fellmeth 2010, p. 8.
3 Dill 2010, p. 2.
4 See article 51 (5) (b), article 57 (2) (a) (iii) and article 85 (3) (b) API.
5 United Kingdom Manual of the Law of Armed Conflict, p. 25. See however Greenwood 1989a, note 22 on page 278: Greenwood states that the principle as codified in API is “based on purely humanitarian considerations.”
6 Kalshoven 1992, p. 42.
proportionality in the three articles of API and the wording used in Protocol II to the CCW 1980 is “deliberately identical.” Finally, the rule is also included in article 8 (2) (b) (iv) of the Statute of the International Criminal Court (ICC), in a slightly different wording. The reasons for the different formulation in the ICC Statute and whether that has any further impact on the content of the IHL rule on proportionality as embodied in API are discussed in Section 6.3.5.

The existence of the IHL rule on proportionality is without debate. But its content and application in practice is not straightforward. This chapter first clarifies the relation between distinction, precautions in attack and proportionality in Section 6.2. Subsequently, Section 6.3 contains an overview of the development of the IHL rule on proportionality, which led to its present codification in treaty law. In addition, the existence of the IHL rule on proportionality in customary law is discussed in Section 6.4.

6.2 Proportionality, Distinction and Precautions

The IHL proportionality rule does not stand on its own, but is part of a larger framework, particularly the principles of distinction and precautionary measures.

The principle of distinction is the crucial requirement in IHL protecting civilians and civilian objects. Without distinction, the IHL proportionality rule is pointless. Through the identification of the civilian population and those individuals who participate in the armed conflict, it is possible to set them apart and direct attacks only to the latter category. The IHL rule on proportionality acknowledges that civilians will be affected by armed conflict, but it has to be borne in mind that they may not be directly targeted. The fact that they may be affected is contingent to the obligation that the attacks can only be aimed at military objectives. Or, in other words, the IHL rule on proportionality supplements the principle of distinction in the protection of civilians. The IHL rule on proportionality logically has only been recognised after the principle of distinction was firmly established. The relevant provisions of the 1907 Hague Convention prohibit the attack of undefended places and encourage commanders of the attacking force to warn the authorities in order to protect civilians. In spite of the existence of the distinction rule, during the First World War, numerous land, air and naval bombardments were executed on undefended towns, where sometimes only civilians and civilian objects were hit. The existence of the distinction

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7  Sandoz et al., paragraph 2205, p. 684.
8  In the words of Fenrick: “The main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied.” See Fenrick 2000, p. 58 and the ICTY OTP Kosovo Report, paragraph 48.
11 See Garner, p. 417-433, discussing among others the attacks by naval bombardment by the German Navy of the English coast towns of Scarborough, Whitby and Hartlepool on 16 December 1914.
principle was nonetheless accepted. As Garner wrote in 1920: “there is a substantial
unanimity of opinion that belligerents should, so far as possible, confine their attacks to the
fortifications, military works, depots, etc., and do all in their power to spare private houses,
hospitals, educational and religious institutions, and the like.” Nonetheless, the civilian
population was again heavily affected in the Second World War. The principle of distinction
was reaffirmed in clear terms in the 1977 Additional Protocols, prohibiting the direct attack
of civilians.

The rules concerning proportionality and the duty to take precautions in attack are also
rules of common sense. A professional member of the military “will respect the principles
underlying articles 51, 52 and 57 [of API] simply as a matter of sound military judgement (...) [and] serve not so much to limit military effectiveness as to provide legal reinforcement
for professional military values.” As far as the relationship between the proportionality
principle and precautions in attack is concerned, the conclusion must be that there is no
clear separation. As such, the IHL rule on proportionality is by nature an obligation that
needs to be adhered to before an attack is actually executed, or whilst the attack is going
on, in order to spare the civilian population. Therefore, the IHL rule on proportionality is a
precaution in itself.

Because of the way targeting procedures work, it is necessary to conduct the
proportionality assessment several times during the planning and execution of an attack.
If it is clear, already in an early stage of a planning process of a certain attack, that the attack
will be disproportionate, continuation of the planning process would be pointless. This
is the precautionary proportionality of article 57 (2) (a) (iii) API. However, at the end of a
planning process it is necessary – as the last check before the attack is carried out – to check
on the prohibition of article 51 (5) (b) API. When it becomes clear during the execution of an
attack that the attack will be disproportionate, article 57 (2) (b) API dictates that it has to be
cancelled or suspended.

The difference between the two provisions is therefore that the IHL rule on proportionality
is phrased both as a prohibition (in article 51 (5) (b) API) and as an obligation (in article 57 (2)
(a) (iii) API). However, there is no difference in content and components of the rules found in
the two provisions. This is supported by the fact that the wording of the principle as codified
in the two articles was agreed upon during the deliberations of article 57 API, and then
copied to article 51 API. In practice, the precautionary obligations of article 57 API “support
the general prohibition in Article 51 by placing obligations on attackers.” It could also be
said that Article 57 clarifies in practice the obligations imposed by article 51 and identifies

13  Article 48 API.
14  Carnahan, p. 868.
15  For an overview of precautions in attack, see for example Quéguyer 2006, and Van Den Boogaard and Vermeer.
16  According to Rogers, the precautionary provisions are ‘expressed more as an exhortation.’ See Rogers 2008, p. 189.
what precautions must be taken and by whom before launching an attack.\footnote{Gardam 2004, p.96.} However, the proportionality assessment is always the final step. Even in the event all precautionary requirements are complied with, “there is an additional obligation not to undertake the attack if it is apparent that the civilian losses and damage to civilian objects are likely to be excessive in light of the anticipated military advantage.”\footnote{Gardam 2004, p. 98.} Conversely, a planned attack on a military objective that is not expected to be disproportionate, may still violate the rules concerning precautions, when civilian casualties and damage could have been avoided or minimised if the attacker would have taken feasible precautions.\footnote{Margalit, p. 158.}

To sum up: the IHL rule on proportionality is already for logical reasons closely connected with the IHL rules concerning distinction and precautionary measures. The following section addresses the drafting history of the IHL proportionality rule.

### 6.3 The Development of International Humanitarian Law Proportionality

#### 6.3.1 The First Codifications of International Humanitarian Law

The Lieber Code of 1863 is the first attempt to codify modern IHL rules for land warfare. It notes the fact that collateral injury and death to civilians may be the effect of hostilities. Article 15 reads that “[m]ilitary necessity admits of all direct destruction of life and limb of armed enemies, and of other persons whose destruction in incidentally unavoidable in the armed contests of war.” In the following articles, the citizens of the opponent are first defined as enemies, and as such it is considered lawful that they are “subjected to the hardships of the war.”\footnote{Article 21 Lieber Code.} The following articles however recognise that it is “more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit”\footnote{Article 22 Lieber Code.}, but this protection “was, and still is with uncivilized people, the exception.”\footnote{Article 24 Lieber Code.}

The first multilateral treaty law concerned with the way parties to an armed conflict are to conduct their operations on land, is the 1899/1907 Hague Convention.\footnote{The 1907 IV Hague Convention and the annexed Regulations on the Laws and Customs of War on Land is slightly different from the 1899 Hague Convention II Respecting the Laws and Customs of War on Land. See Scott, p. 529-532, for a juxtaposition of the articles of the two Conventions.} There is no specific rule on proportionality contained in this document, but there are a number of provisions, particularly articles 22-28, that contain the basis of the presently applicable provisions on targeting. In turn, these provisions are based on articles 12-18 of the 1874 Brussels
Declaration.\textsuperscript{25} In these articles, the protection of the civilian population and civilian objects is clearly not a priority for the belligerents. In the words of Kalshoven: “not a word is spent on the inhabitants of a defended place and their homes.”\textsuperscript{26} The War Book of the German General Staff, published in 1902, which is based on the 1899 Hague Convention, states on the subject of sieges and bombardments that “[w]ar is waged not merely with the hostile combatants, but also with the inanimate military resources of the enemy. This includes not only the fortresses but also every town and every village which is an obstacle to military progress.”\textsuperscript{27} It may well be argued that this is a manifestation of the ‘Kriegsraison geht vor Kriegsmanier’ doctrine that has been defended at some point in time, but that doctrine ‘has never had a place in international law’.\textsuperscript{28} Yet, still in 1926, McNair wrote with regard to land warfare that “the fact that non-combatants are besieged together with the combatants, and have to endure the same hardships, may, and very often does, exercise pressure upon the authorities to surrender”\textsuperscript{29} and thus perceived as a military advantage. The responsibility for collateral damage was generally placed on the defending side of the conflict, for locating military objectives too close to the civilian population.\textsuperscript{30} The reason for the absence of a rule devoted to the protection of incidental casualties and damage may also be explained by the way Western armies fought their battles at close range in open fields, with a limited civilian presence.

The IHL rules on the subject of the protection of the civilian population made huge strides since then, following technological developments which increased the distance from which enemies engaged each other. One major cause for increasing attention to this subject is the rise of air warfare.\textsuperscript{31} The expected development of air warfare was reason for a 5-year prohibition for the use of bombing from the air at the 1899 Hague Peace Conference.\textsuperscript{32} At the 1907 Hague Conference, the development of air warfare had already progressed so much, that although a new moratorium was adopted, it was not ratified by all States that had been a party to the 1899 Declaration, which had expired.\textsuperscript{33} There were attempts though to replace the 1899 Declaration by a permanent prohibition, but these were unsuccessful.\textsuperscript{34} Agreement could be reached on placing some restrictions on air warfare, and these were incorporated in

\textsuperscript{25} Scott, p. 145. For the text of the articles of the Brussels Declaration, see Schindler and Toman, pp. 24-25.
\textsuperscript{26} See Kalshoven 2007, p. 434.
\textsuperscript{27} Grossgeneralstab, p. 34.
\textsuperscript{28} Garraway 2010, p. 215.
\textsuperscript{29} McNair, p. 283.
\textsuperscript{30} Parks 1990, p. 21.
\textsuperscript{32} Declaration IV.1 (signed 29 July 1899), to Prohibit, for the Term of Five Years, the Launching of Projectiles and Explosive form Balloons, and Other Methods of a Similar Nature. See Schindler & Toman, p. 309.
\textsuperscript{33} Declaration XIV (signed 18 October 1907) Prohibiting the Discharge of Projectiles and Explosives from Balloons. See Schindler & Toman, p. 309. See also Garner, p. 466, and Ronzitti, pp. 4-5.
\textsuperscript{34} Although the 1907 Declaration XIV remains in force until today, it is regarded as “having no legal significance.” See Parks 1990, p. 17.
article 25 of the 1907 Hague Convention on Land Warfare, by adding the words “by whatever means” to the existing text which prohibits the attack or bombardment on undefended towns. There can be no doubt therefore, that this article also applies to air warfare.35

Simultaneously to the law on aerial warfare, the law pertaining to bombardment from the sea developed. The 1907 Convention on naval bombardment also contains a prohibition to attack undefended ports and towns.36 Additionally, article 2 of the Convention provides that the commander “incurs no responsibility for any unavoidable damage which may be caused by a bombardment” of both military and civilian naval installations that are present in undefended ports and towns, but that may be used for military purposes.

An early reference to the proportionality rule as it is today is included in the Hague Rules on Air Warfare of 1923. Article 23 (4) reads: “[i]n the immediate vicinity of the operations of the land forces, the bombardment of cities, towns, villages habitations and buildings is legitimate, provided there is a reasonable presumption that the military concentration is important enough to justify the bombardment, taking into account the danger to which the civil population will thus be exposed.”37 The Hague Rules on Air Warfare never entered into force, but the content may still be seen as part of the development of the law on targeting. At the time, however, the provisions were criticized, even labelled “unrealistic”.38 Parks notes that the proposed article 24, which requires care for collateral civilian casualties, was a “180-degree change of course in then-existing bombardment philosophy.”39

Another reference to proportionality before World War II started can be found in a resolution adopted by the League of Nations Assembly on aerial warfare in 1938.40 It prohibits the “intentional bombing of civilians” and reiterates that “[a]ny attack on legitimate military objectives must be carried out in such a way that civilian populations in the neighbourhood are not bombed through negligence.”41

In summary: the codification efforts of the Hague Peace Conferences and other developments before World War II reflect an increased acceptance of distinction. A rule on proportionality increasing the protection of the civilian population was however still far away, although an awareness that some care had to be taken for the civilian population against the effects of the hostilities was emerging.

35  Garner, p. 467.
36  Convention IX (signed 18 October 1907), concerning Bombardment by Naval Forces in Time of War. See Schindler & Toman, p. 1079.
37  For the text of the Hague Rules on Air Warfare, see Schindler & Toman, pp. 315-325.
38  Rogers 2008, p. 194. Rogers also notes that if the Hague Rules on Air Warfare would have been binding law, the area bombing practice during World War II would have been illegal. Parks labels the Hague Rules as “an immediate and total failure.” See Parks 1990, p. 31-36.
39  Parks 1990, p. 32.
41  See Fenrick 1982, p. 96. Fenrick points to the fact that the resolution could also be read as an absolute ban on casualties among the civilian population. For the text of the resolution, see Schindler & Toman, p. 1079.
6.3.2 Legal Doctrine before World War II

Still, the principle of proportionality had in the meantime also surfaced in legal doctrine. Spaight emphasizes the principle of distinction, but he goes further than that. He comments in 1930 that “even a military objective in an urban area may not lawfully be bombed if, by reason of its restricted area or its situation in a densely populated district, the natural and reasonable probable result of an attempt to bomb it will be widespread and wholly disproportionate loss of non-combatant life throughout the district. Subject to this reservation (...) the bombing of military objectives must be held to be lawful even if the incidental result is loss of innocent life.” Spaight is less concerned about civilian property, and argues in favour of a new rule that would allow the bombing of civilian property, subject to some restrictions.

Royse was of the opinion that the civilian population was already normally a lawful military target. He concludes in 1928 that “in the realm of war, populations whether actively engaged in combat or whether remote from all hostilities are subject to whatever force the enemy can apply.” Royse regards as “an unavoidable incident of warfare.” The general attitude towards air warfare in the period between the two World Wars paid little consideration to the effects of air warfare on the civilian population. The development of air warfare was feared, and its potential devastation effects to civilians were recognised, even anticipated as soon as the next war would break out.

Hall is very clear about the protection of civilians under the law of air warfare. According to him the civilian population of a country engaged in armed conflict is “exposed to all the injuries to person and property resulting from military or naval operations directed against the armed forces of their State.” That does not mean however that direct attack of the civilian population is permitted. Hall discusses the possible bombardment of London and concludes that the indiscriminate bombardment of the city as such is prohibited, but adds that there are certainly military objectives present in London that could be legally targeted. However, the “difficulty is to get sufficiently close to such objectives to obtain any reasonable

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42 Spaight 1930, p. 201. Emphasis in original.
43 Spaight 1924, p. 257-259 and Spaight 1933, p. 239-259.
44 Royse, p. v.
45 Royse, p. 241.
46 One commentator on air warfare notes in 1930: “[h]itherto the non-combatants’ part has been to pay up, work hard at what is given them to do, try to keep smiling, draw their belts, disbelieve enemy propaganda, and replace casualties. But now, and in the future, the non-combatants’ role is quite different, for the avowed object of each contestant is to cripple the economic life of each other.” See Charlton, p. 168. Mumford notes that “Europe had progressed beyond civilian massacre for many centuries before the invention of the aeroplane; that invention, used nationally, has restored the curse.”
47 Mumford, p. 66. Writing in 1936, Mumford anticipated “diabolic death and disastrous destruction undreamed of by Ghengis Khan or Alexander the Great.”
48 Hall, p. 77.
chance of hitting them, but the difficulty of this and the consequent danger to innocent people in the neighbourhood does not make such attacks illegal.\textsuperscript{49}

The general feeling towards air warfare was that at the time, the rules of international law regulating it were inadequate.\textsuperscript{50} The application of the principles of the law of warfare on land to air warfare was contemplated, but there was no unanimity on the subject at that time.\textsuperscript{51} The situation had apparently changed in 1940, when according to Lauterpacht: “Although the Hague Rules on Air Warfare have not been ratified (…), air warfare, while calling for rules of its own regulating in detail the specific situations to which it gives rise, is subject to the general principles of a customary or conventional character which underlie alike the law of war on land and at sea.”\textsuperscript{52}

When World War II started, there were certainly a number of rules of customary IHL applicable that protected civilians. However, the rule of proportionality was not among them, considering the practice of aerial bombardment during World War II. As for the reason why this was so, Rogers concludes that there was no balance between military necessity and humanitarian considerations, because the latter were not contemplated at all during World War II.\textsuperscript{53} Spaight writes in 1944, that “nothing was done [to regulate air warfare], and the omission was, in part at least, the result of a determination that nothing should be done.”\textsuperscript{54} The applicable rules of IHL with regard to the regulation of the conduct of hostilities could be summarised as a prohibition to attack the civilian population directly, and an obligation to take some care to spare the civilian population when military objectives were attacked.\textsuperscript{55}

Nonetheless, the heated debate between Churchill and Eisenhower with regard to the choice between two separate bombing plans aimed at paralysing the movements of German troops in Belgium and Northern France just before D-Day shows that there was at least some sensitivity towards preventing civilian damage and civilian casualties in the conduct of air operations.\textsuperscript{56}

\textsuperscript{49} Hall, p. 80. The issue was discussed in the newspaper ‘The Times’ in the early part of 1914.
\textsuperscript{50} See the overview in Rogers 2008, pp. 195-202. See also Royse, p. 237.
\textsuperscript{51} There had however been cases, such as Coena Brothers vs. Germany, decided in 1927 and Kiriadolou vs. Germany, decided in 1930, both by the Greco-German Mixed Arbitral Tribunal, that had applied article 26 of the 1907 Hague Convention on Land warfare to German air operations in Greece. See Lauterpacht 1935, p. 417. Royse however, argues that there cannot be such an extension to air warfare. See Royse, p. 241.
\textsuperscript{52} Lauterpacht 1944, p. 410.
\textsuperscript{53} Rogers 2008, p. 203.
\textsuperscript{54} Spaight 1944, p. 19.
\textsuperscript{56} See generally Gaughan, pp. 229-285.
6.3.3 After World War II: the Red Cross Draft Rules

After World War II, the principle of proportionality enters the scene in the Red Cross Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War.\textsuperscript{57} The Red Cross Draft Rules, including a commentary, were drawn up by the ICRC with help of experts of national Red Cross and Red Crescent societies, after a number of expert meetings held in Geneva in 1954.\textsuperscript{58} The Red Cross Draft Rules were published in 1956, with a view to be discussed at the XIXth International Red Cross Conference to be held in New Delhi in 1957.\textsuperscript{59} The incentive to draft these rules was “the fact that recourse has been had very generally to the system of indiscriminate bombing [which] seems to have led to its becoming, as it were, an accepted practice, and given right to a kind of fatalism.”\textsuperscript{60} The Red Cross Draft Rules were meant not to replace the rules already codified in the Hague Conventions, but to bring detail to the existing rules.\textsuperscript{61}

Article 8 of the Red Cross Draft Rules, that deals with precautions in attack in the planning of an attack, states: “The person responsible for ordering or launching an attack shall, first of all: (...) take into account the loss and destruction which the attack (...) is liable to inflict upon the civilian population. He is required to refrain from the attack if, after due consideration, it is apparent that the loss and destruction would be disproportionate to the military advantage anticipated.”

The commentary to article 8 states that the experts drafting the Rules sought to underline the general principle found in doctrine that there must be a balance between the anticipated military advantage and the risks for the civilian population.\textsuperscript{62} It adds that what is new in this proposed article is the obligation to conduct the proportionality calculation in all circumstances.\textsuperscript{63} It therefore seems that the principle of proportionality was already seen as a “general doctrinal principle” which was also underlined by the experts who had prepared the Red Cross Draft Rules.\textsuperscript{64} The Commentary to the Red Cross Draft Rules makes it clear that the drafters viewed the calculation between the military advantage on the one hand and the harm to civilians and damage to civilian objects on the other hand to constitute “the principle of proportionality in the laws of war”\textsuperscript{65}

\begin{itemize}
\item \textsuperscript{57} Hereinafter: the Red Cross Draft Rules.
\item \textsuperscript{58} See Rogers 2008, p. 203 and International Review of the Red Cross, Supplement IX, 1956, p. 164. For the commentary, see International Review of the Red Cross, 1956, pp. 623-650 and 695-710.
\item \textsuperscript{59} International Review of the Red Cross, Supplement IX, 1956, p. 164.
\item \textsuperscript{60} International Review of the Red Cross, Supplement IX, 1956, p. 164.
\item \textsuperscript{61} International Review of the Red Cross, 1956, p. 558.
\item \textsuperscript{62} “La proportion dans l’attaque entre l’avantage militaire recherché et les risques pour la population est un principe généralement admis en doctrine et que les ‘Experts de 1954’ ont tenu à souligner.” (translation by the author) See International Review of the Red Cross, 1956, p. 700.
\item \textsuperscript{63} International Review of the Red Cross, 1956, p. 701.
\item \textsuperscript{64} See also Rogers 2008, p. 203.
\item \textsuperscript{65} “le principe de la proportionnalité dans les lois de la guerre.” See International Review of the Red Cross, 1956, p. 702.
\end{itemize}
The resolution containing the Red Cross Draft Rules that was discussed during the International Red Cross Conference in New Delhi “does not call for a formal approval of the Draft Rules.”66 There was extensive discussion on the Draft Rules themselves during the Conference, however much of that debate was allocated to issues that were of particular importance at that time, such as nuclear weapons.67 The reaction of the major powers to the Draft Rules was “adverse”.68 As a result, there was simply no reaction to the Draft Rules from States.69 Sandoz noted later that this was because the Draft Rules “directly addressed the question of nuclear weapons.”70

But at least as far as the proposed article on the proportionality rule was concerned, that does not mean that the Red Cross Draft Rules were a pointless effort. On the contrary, its inclusion in the Draft Rules was noted.71 Even though the text of the proportionality rule as it would later be adopted in Additional Protocol I has a different wording than the one proposed in the Red Cross Draft Rules, the basic significance of the provisions on the proportionality principle is not fundamentally different. Both require the balance between the expected military advantage and the civilian costs that were expected from the planned attack. The text of the article on proportionality and its commentary in the Red Cross Draft Rules may be seen as the first explicit reference to the IHL rule on proportionality as it would be adopted about twenty years later.72

6.3.4 Additional Protocol I

The IHL rule on proportionality is mentioned in three separate, yet closely related articles in Additional Protocol I: articles 51 (5) (b), article 57 (2) (a) (iii) and 57 (2) (b). In addition, article 85 (3) (b) refers to the violation of the rule of article 57 (2) (a) (iii) as a grave breach when committed wilfully and causing death or serious injury to body or health.

During the international conference that lead to the adoption of API, “it was a widely held view that a general affirmative obligation on the part of combatants to consider in advance...”

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66 Final record of the 1957 Red Cross Conference, p. 10.
67 For the report of these discussions, see Final record of the 1957 Red Cross Conference.
68 Aldrich 1984, p. 130.
69 See the introductory note in Schindler and Toman: “As there was virtually no response from governments, no further action was taken with a view to adopting a convention on the basis of this draft.” Schindler & Toman, p. 339. See also Parks 1990, p. 66.
70 Sandoz 1997, p. 7. During the negotiations leading to the adoption of Additional Protocol I and II, discussion of nuclear weapons was deliberately avoided, by restricting the deliberations to conventional weapons.
71 For example by Kunz, p. 324.
72 Rogers notes that the official United States Army manual on the law of land warfare of 1956 also includes an explicit rule of proportionality (see Section IV, paragraph 41 at page 14 of FM 27-10 (1956)), and suggests that this may be a result of the attendance by the American representative in the meetings that drafted the Red Cross Draft Rules. See Rogers 2008, p. 203.
the relationship between incidental civilian losses and expected military advantage, would inure to the benefit of civilians and provide increased protection.”

Some delegations to the international conference that lead to the adoption of API had their doubts about including the IHL rule on proportionality in the treaty. They feared it could lead to abuse and that it would blur the clear and unambiguous principle of distinction. However, given the fact that the conduct of hostilities inevitably will cause injury, loss of life and damage to civilians and civilian objects, “[t]he view prevailed that it was preferable that the law should reflect this reality and be used to enjoin constraint, rather than be silent on the matter and leave it entirely to the practice of the belligerents.”

6.3.4.1 Draft Article 46 (the present article 51 API)

The text of article 46 of the draft Protocol I, as proposed by the ICRC, has a different wording than the text that is now codified in article 51 API. The formulation of the draft-article was clearly derived from the Red Cross Draft Rules, promulgated by the Red Cross Movement in 1956. Draft article 46 (3) (b) provides that in particular it is forbidden “to launch attacks which may be expected to entail incidental losses among the civilian population and cause the destruction of civilian objects to an extent disproportionate to the direct and substantial military advantage anticipated.”

In the draft version of Protocol II, the IHL rule on proportionality was embodied in draft article 26, which dealt with the protection of the civilian population. Draft article 26 (3) (b) provided that it is forbidden in particular “to launch attacks which may be expected to entail incidental losses among the civilian population and cause the destruction of civilian objects to an extent disproportionate to the direct and substantial military advantage anticipated.”

In the General Discussions in the Plenary Meetings in 1974, the discussions were hardly concerned with the principle of proportionality. A number of delegates mentioned the need to enhance the protection of the civilian population, but the focus was in this regard on the enhancement of the principle of distinction. See for example the statement of the Government of Sweden, who mentioned the increasing civilian casualties caused by war, ranging from 5 per cent in the First World War, 50 per cent in the Second, 60 per cent in the

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73 Reed, p. 26.
74 Blix, p. 148.
Korean War and 70 per cent in the Vietnam War. Additionally, the statement mentioned the “heavy casualties” caused by air warfare.\footnote{78}

The draft-provisions containing the proportionality principle were discussed in Committee III. Explaining the proposed article, the representative of the ICRC said that “[t]he Red Cross was conscious of the fact that the rule of proportionality contained a subjective element, and was thus liable to abuse. The aim was, however, to avoid or in any case restrict the incidental effects of attacks against military objectives.”\footnote{79}

In the subsequent discussions on the matter, there was a clear difference between the opinions of the ICRC and of a number of Western States\footnote{80} on one side, and some Eastern European States\footnote{81} and a number of States from the Middle East (Egypt, Iraq, Syria) on the other side. The former supported the inclusion of a rule of proportionality in the new Protocol I, the latter were opposed to that idea. In the words of the representative of the German Democratic Republic: “because it considered that protection of the civilian population could not be improved if the concept of proportionality was retained. To permit attacks against the civilian population and civilian objects if such attacks had military advantages was tantamount to making civilian protection dependent on subjective decisions taken by a single person, namely, the military commander concerned.”\footnote{82}

To illustrate the substance of the debate, the interventions of the representative of the United States of America and of Hungary may be compared:

According to the representative of the United States of America, the “rule of proportionality [as proposed] was based on existing international law. (…) Collateral damage to civilians and civilian objects was often unavoidable and it was unrealistic to attempt to make all such damage unlawful: the rule of proportionality was as far as the law could reasonably go.”\footnote{83}

On the other hand, the representative of Hungary said that “a rule well established in international law should be reflected in practice and should produce the intended effects. Yet the number of civilian victims had increased alarmingly over the past few years: accordingly, either the rule was not well established and hence not binding; or it existed and could not be applied in armed conflicts; or it was applied, but the results of its application provided the best argument against it.”\footnote{84}

\footnote{78}{See statement by mr. Lidbom, on 7 March 1974, Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Volume V, Plenary Meetings, First Session, p. 143.}


\footnote{80}{Canada, Federal Republic of Germany, United Kingdom, France and others.}

\footnote{81}{Romania, Hungary, Czechoslovakia and the Democratic Republic of Germany.}

\footnote{82}{Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Volume XIV, p. 56.}

\footnote{83}{Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Volume XIV, p. 67.}

\footnote{84}{Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Volume XIV, p. 68.}
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Being unable to reach consensus on the article, the matter was thus referred to the Working Group, which discussed article 46 of draft Protocol I. The Report to Committee III of the Working Group summarised the issue of article 46 (3) (b) as follows: “The principle of proportionality ... received a mixed reaction. Some delegations considered it a necessary means of regulating the conduct of warfare and of protecting the civilian population. Other delegations rejected that principle as a criterion and asserted that in humanitarian law there should be no condonation of casualties among civilians. Some who took the latter view considered that it would be desirable to delete subparagraph 3(b) as a whole, while others of the latter view proposed the deletion of the words “to an extent disproportionate to the direct and substantial military advantage anticipated”.” Eventually, paragraph 3 (b), containing the IHL rule on proportionality, was “drafted only after article 50 [of draft Protocol I, on the subject of precautions in attack] had been settled, since both concerned the same issue.” Eventually, article 46, as amended, was agreed upon, and adopted by consensus during the Second Session of Committee III, on 14 March 1975. Subparagraph 3(b) of article 46 only referred to article 50. The question of whether there would be a cross-reference between the two articles, in which of the articles the text of the IHL rule on proportionality would appear (or indeed in both as it is today), was referred to the Drafting Committee.

6.3.4.2 Draft Article 50 (the present article 57 API)

The proposed article on precautions in attack contained a number of references to proportionality. Article 50 of the draft Protocol I reads:

1. Constant care shall be taken, when conducting military operations, to spare the civilian population, civilians and civilian objects. In the planning, deciding or launching of an attack the following precautions shall be taken:

   (Proposal I) those who plan or decide upon an attack shall (Proposal 2: those who plan or decide upon an attack shall take all reasonable steps to ...)

   • ensure that the objectives to be attacked are duly identified as military objectives within the meaning of paragraph 1 of Article 47 and may be attacked without incidental losses in civilian lives and damage to civilian objects in their vicinity being caused or that at all events those losses or damage are not disproportionate to the direct and substantial military advantage anticipated;

   • those who launch an attack shall, if possible, cancel or suspend it if it becomes apparent that the objective is not a military one or that incidental losses in civilian lives and damage to civilian objects would be disproportionate to the direct and substantial advantage anticipated; (…)


2. All necessary precautions shall be taken in the choice of weapons and methods of attack so as no cause losses in civilian lives and damage to civilian objects in the immediate vicinity of military objectives to be attacked.\textsuperscript{87}

In explaining the draft of article 50 of draft Protocol I, on precautions in attack, the representative of the ICRC held that "there was always a risk that any attack, even when directed against a clearly determined military objective, might affect the civilian population: it could arise from such factors as the configuration of the terrain (danger of landslide, or of ricocheting); the relative accuracy of the weapons used (relative dispersion according to trajectory, firing range, ammunition used, condition of the equipment); meteorological conditions (the effect of the wind, of atmospheric pressure, of cloud); the specific nature of the military objectives (ammunition stores, fuel tanks, army nuclear stations); or the combatants’ mastery of techniques (the standard of technical training and technical ability in handling weapons).\textsuperscript{88}

This article repeats the formula of proportionality that was proposed in article 46 of draft API. The ICRC proposed the article with the ideal in mind of the “complete elimination, in all circumstances, of losses among the civilian population.”\textsuperscript{89} However, the ICRC recognised that an explicit rule to that extent would be impracticable and it was unrealistic to expect it to be credible or effective. Therefore, the ICRC proposed a limited rule to formulate that ideal, “offering a balance of the various factors involved” and with “the advantage that it could be observed.”\textsuperscript{90}

It took the Working Group to Committee III many heated discussions to work out paragraph 2(a) of draft article 50 of draft Protocol I.\textsuperscript{91} It was eventually agreed upon after inserting two paragraphs containing additional precautions and after the term ‘disproportionate’ was deleted from the text. In the new draft of the article, the rule referred to “excessive in relation to the concrete and direct military advantage anticipated”. According to Frits Kalshoven, it was his proposal to use the word ‘excessive’ which eventually solved the deadlock and therefore became the standard that is now applied as the IHL rule on proportionality.\textsuperscript{92} Additionally it was supplemented by paragraph 50 (5) of the draft article “to make clear that it


\textsuperscript{91} See also Brown, p. 138.

\textsuperscript{92} As Frits Kalshoven claimed during a meeting of the Kalshoven-Gieskes Forum on International Humanitarian Law on 27 November 2012, following a presentation on the principle of proportionality of the present author.
may not be construed as authorization for attacks against civilians.”

Article 50 was adopted by Committee III on 14 March 1975.

In the end, it appears that in the report Working Group there is nothing more about the reasons why the principle is phrased as we know it today than the remark that it “required much time and effort”. At the time the codification of the IHL rule on proportionality was indeed seen as important, because it filled the gap between the prohibitions to attack civilians directly and the prohibition to attack military objectives without distinction.

6.3.5 The Rome Statute of the International Criminal Court

There is a small difference in the wording of the war crime of violating the IHL rule on proportionality as it is codified in the ICC Statute and the wording in the other treaty provisions mentioned above. The prohibition in the ICC Statute provides that it is prohibited during international armed conflict to: “intentionally launching an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians or damage to civilian objects … which would be clearly excessive in relation to the anticipated direct overall military advantage anticipated.”

It has been debated whether the IHL rule on proportionality as it is codified in Additional Protocol I is exactly identical to the IHL rule on proportionality as it is recognised in customary international law, or that the formulation in the ICC Statute should prevail. Rogers reaches the conclusion that the formulation of article 8, paragraph 2(b)(iv) of the ICC Statute is the correct formulation of the IHL rule on proportionality, because that article “was drafted with states not party to Protocol I very much in mind and involved in the negotiations (...) and the drafters of this article took into account the various statements made on ratification of Protocol I and, by adopting a middle way, have tried to accommodate the requirements of military necessity without abandoning humanity, by allowing one to look at the bigger operational picture.” According to Dörmann, the different formulation in the ICC Statute was caused by a general feeling during the negotiations of the ICC Statute that the wording

94 Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Volume XIV, p. 183. Reminiscing about the Diplomatic Conference, the Rapporteur of the Working Group notes that essential to the resolution of a number of problems, such as the codification of the principle of proportionality, was the fact that he had established personal relations with the Soviet and Vietnamese delegations during the Vietnam peace negotiations and several agreements concluded with the Soviet Union. See Aldrich 1984, p. 134.
95 Brown, p. 155.
96 As prohibited in article 51 (2) API.
97 As prohibited in article 51 (4)(a), (b) and (c) and article 51 (5) (a) API.
98 Article 8 (2) (b) (iv) ICC Statute. (emphasis added) It should be noted that the principle is only included in the ICC Statute as a war crime in international armed conflicts.
100 Rogers 2008, p. 208.
as included into that Statute was the state of affairs in international customary law at the time. McCormack and Mtharu however call the addition of the word “clearly” an “additional requirement” for the prohibition of disproportionate attacks in order to constitute a war crime under the ICC Statute. The question of whether the adjective ‘clearly’ must be deemed to be part of the IHL proportionality rule, is discussed in Chapter 13.

6.4 IHL Proportionality in International Customary Law

If the 1977 Additional Protocol I to the Geneva Conventions would have been universally ratified instantly after their conclusion, there would be no discussion about the question whether the IHL rule on proportionality is applicable during armed conflict. However, a number of States did not, or not immediately, ratify the protocol. The universal acceptance of the 1949 Geneva Conventions therefore has not (yet) been achieved for its three Additional Protocols. Also, although the existence of the principle of proportionality was not challenged, a number of States accompanied their ratification of Protocol I by reservations or declarations that also concerned the application of the IHL rule on proportionality. The customary status of the rule is particularly relevant for the rules regulating non-international armed conflicts. There is no specific reference to ‘the principle of proportionality’ in the Geneva Conventions and its Protocol applicable to non-international armed conflicts. More generally spoken, there are only few treaty rules applicable during non-international armed conflicts. As a result, the rules of customary IHL applicable during a non-international armed conflict are the prevalent source of law for the parties to those types of conflicts. Therefore, the question whether the IHL rule on proportionality has achieved the status of customary international law remains relevant.

The representative of the United Kingdom during the negotiations of Additional Protocol I and II, Sir John Freeland, stated with regard to the status of the IHL rule on proportionality at the moment of its codification in the Additional Protocols, that it “was a useful codification of a concept that was rapidly becoming accepted by all States as an important principle of international law relating to armed conflict.” One commentator notes that the result in the applicable provisions of API “probably combines elements of codification and progressive development” while others conclude that the IHL rule on proportionality was already

102 McCormack and Mtharu, p. 196. See also See also Olasolo, p. 83-84 and R.J. Barber, p. 479.
103 See Schindler & Toman, pp. 792-818. See for example the declarations of Australia, Canada, The Netherlands and others made at the time of ratification.
104 For the relevance of customary IHL in general, see J-M Henckaerts 2005, p. 177-178.
105 Rogers quotes Aldrich with regard to the status of the principle of proportionality as a rule of customary IHL during the negotiations if the Additional Protocols to the Geneva Conventions as holding the view in 2006 that “John Freeland stated it best.” See Rogers 2008, footnote 103, pp. 214-215.
part of customary international law in 1977.\textsuperscript{107} On the other hand, Parks writes in 1990 that in the view of the United States Department of Defense, the text of the draft article of API, presented to the diplomatic conference was not a reflection of customary international law.\textsuperscript{108} In any case, it seems clear from the records of the diplomatic conference, as discussed above, that when Additional Protocol I was concluded, there was no universal agreement yet on the exact content of the IHL rule on proportionality.\textsuperscript{109} The question remains whether it may be considered as a part of customary international law today.

6.4.1 Challenges in Establishing a Customary IHL Proportionality Rule

The existence of rules of customary IHL is sometimes not straightforward.\textsuperscript{110} This is because there is no unanimity among scholars, courts and States about the method to identify rules of customary international law.\textsuperscript{111} As a result, it is unclear what the exact required level and character of the State practice and opinio juris is to conclusively determine the customary status of a rule of IHL.\textsuperscript{112} Even though these two components of customary law are widely acknowledged, the importance of the one factor over the other is subject to debate.\textsuperscript{113} The authors of the ICRC Study on customary IHL had to deal with this issue when they compiled the collection of 161 rules of customary IHL. Although the Study is an impressive piece of work, its methodology has received both criticism as well as acclaim.\textsuperscript{114} The experience of its drafting process illustrates the difficulties that are encountered in the identification of customary rules of IHL.\textsuperscript{115} The methodology which the International Tribunal for the former Yugoslavia has used to identify rules of customary international law was similarly

\begin{itemize}
  \item Bothe 1982, p. 276, Penna, p. 220.
  \item Parks 1990, p. 174. Fellmeth states that “International practice has proven impervious so far not only to all attempts to identify the content of the rule of proportionality in any detail, but to assessing the status of the principle itself as a binding custom.” See Fellmeth 2010, p. 2.
  \item Fenrick notes that “there was some debate” on the customary status of the principle of proportionality at the time of the conclusion of API. See Fenrick 1982, p. 125. Greenwood regards the principle of proportionality part of customary IHL prior to 1977, but feels that the principle is “expressed in the Protocol in more precise language than that was used hitherto.” He concludes “that Article 51(5)(b) should be treated as an authoritative statement of the modern customary rule. See Greenwood 1991, p. 109. Meron, writing in 1989, affirms the customary status of the principle and adds that it is “perhaps also a general principle of law”. See Meron 1989, note 178 on p. 65.
  \item Part of the discussion in this section was published in the book chapter ‘Fighting by the principles: principles as a source of international humanitarian law’, See Van Den Boogaard 2013, pp. 13-16.
  \item See for example Shaw 2014, pp. 51-66 and the accompanying notes.
  \item See for an overview: Ronen, pp. 482-495. See also generally Wood, pp. 727-736.
  \item See article 38 (3)(b) of the ICJ Statute: “international custom, as evidence of a general practice accepted as law”. See also Shaw 2014, pp. 53-54.
  \item This subject has been debated, for instance, during the launching events of the ICRC Humanitarian Law Study that have taken place worldwide. A summary of the proceedings of a number of these events is available: http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/section_ihl_customary_humanitarian_law?OpenDocument.
\end{itemize}
criticised. The specific character of IHL makes the methodological problems even more prominent. IHL is a preventive framework, meant to regulate the hostilities as soon as they begin. The rules of IHL are the user’s manual for the use of the arms that the parties to the conflict deploy in their operations, as well as for the methods they may use. The problem in terms of the creation of State practice is that it is difficult to get access to the practice during the operations for reasons of operational security. Also in terms of the creation of opinio juris, there is no reason to pay attention to those instances when just nothing happens since an attack has been cancelled. Therefore, States will normally only express their opinion if something has gone wrong. The State that is under attack, however, for propaganda reasons, will be likely to declare an attack during which there has been damage to civilian objects or death or injury to civilians as grossly disproportionate.

The existence of State practice can be determined on the basis of the “duration, consistency, repetition and generality” of State behaviour. However, this leaves uncertainty concerning the question of which behaviour constitutes State practice. Legal scholarship concerning the methodology to establish customary international law revolves around the question whether actual State practice applying a rule is required to constitute a customary rule, or that other types of practice could suffice to satisfy the requirement of State practice. According to some writers, only actual physical acts, through the agents of a State, count as State practice. The State practice one would therefore typically search for in order to identify a rule of customary law is the battlefield practice, such as the actual targeting behaviour of States during armed conflict. This practice could, for example, be derived from After Action Reports containing the deliberations of the military commanders demonstrating their argumentation before the attack, including both the reasons for proceeding with and cancelling an attack. Conclusive proof of the practice should draw from a large collection of these types of reports from various States and conflicts, providing proof as to how various factors were weighed in the decision-making process and the subsequent behaviour of operational planners and commanders. Preferably, the After Action Reports should also include Collateral Damage Assessments of those planning, ordering and executing the attack and how the different factors under the specific circumstances of the attack were evaluated, before a decision to attack was taken. Unfortunately, in practice, these assessments are not

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116 For example Kalshoven and Zegveld 2011 extend criticism to the way the ad-hoc tribunals for Rwanda and the former Yugoslavia have identified customary international law and conclude that the tribunals should actually have been referring to principles: “In particular, this more recent extension of the scope of customary law of armed conflict appears to rest on the assumption that for this type of armed conflict, general opinion about preferred behaviour outweighs the requirement of demonstrable practice seen as law. To the extent that this ‘general opinion of preferred behaviour’ reflects accepted principle, we would prefer to call it that”. And with regard to the ICRC Customary Law Study: “in particular with respect to internal armed conflict not all of these rules may rest on the type of actual field practice traditionally required of rules of customary law. Yet they may well reflect existing principles and thus deserve to be promoted under that heading”. See Kalshoven and Zegveld 2011, p. 5; See also Baker 2010, Ratner 2017 and Stahn.

117 Shaw 2014, p. 54.

118 See for example D’Amato 1971, p. 88.

always publicly available, if they are made in written form at all. There are a number of reasons for this, the most important reason being that those who would be best placed to conduct a thorough assessment of targeting decisions are not among those with a particular interest in the outcomes of the assessment. With regard to the application of the IHL proportionality rule, it has been suggested that on every occasion that civilian casualties occur as a result of a specific attack, an inquiry should always be conducted into the possible disproportionate use of force. These inquiries could be helpful, if they would be published in full, to assess whether, and how the proportionality rule is applied in practice. This does however not seem to be an obligation which would be welcomed by the parties to an armed conflict. Parties to an armed conflict are generally reluctant to “expose the decision process to public view [because] it could enable current or future adversaries to predict the military organization’s strategy and tactics, undermining its effectiveness and exposing its personnel to danger”. Other authors however claim that actual behaviour is not necessary to identify State practice, and that “it is artificial to distinguish between what a State does and what it says.”

The second component of customary law is that of opinio juris sive necessitates, which is also known as the psychological component of customary law. It may be defined as the “belief by a state that that behaved in a certain way that it was under a legal obligation to act that way.” Different indications of State practice or opinio juris have to be used in determining the customary character of rules of IHL, for example military manuals. Of course, how States

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120 That does not mean, of course, that there is no oversight at all. For example, there was a practice of relatively independent oversight in the armed forces of the Kingdom of the Netherlands by the Royal Military Constabulary (Koninklijke Marechaussee) and the office of the Public Prosecutor of the Arnhem District Court with regard to instances where the members of the military used armed force during the deployment of Dutch troops in the Afghan province of Uruzgan from 2006 to 2011. Another example is the investigation into the bombing of two stolen fuel tankers on 4 September 2009 in Kunduz, Afghanistan. It was investigated by the German prosecutor and by the German Bundestag; See for the report of the Bundestag: http://dip21.bundestag.de/dip21/btd/17/074/1707400.pdf.

121 Fellmeth mentions four reasons: the fact that the concept of sparing the civilian population in armed conflict emerged only rather recently; the fact that the way military operations are conducted is usually contingent on confidentiality restrictions; the fact that “few states are eager to publicize their own crimes” and, finally, the fact that most armed conflicts nowadays have a non-international character, and States regard the treatment of their own civilians as a “matter of sovereign internal control”. See Fellmeth 2010, pp. 2-3.

122 Shamash 2005, p. 146.


124 Fellmeth 2010, p. 3.

125 Akehurst, p. 3. See however Van Steenberghe 2017, p. 897: “the material or verbal nature of any State manifestation does not impact its description as State practice; it may only influence the weight to be attributed. Moreover, although one normally must be more cautious when grounding a customary rule on State speeches rather than on State material behaviours, some declarations, particularly those taking the form of international or internal legal acts, carry more weight because States commit themselves to abide by what they said. In addition, material acts are often deprived of much weight unless they are associated with a legal explanation, usually in the form of a declaration which enables an understanding to be had of the legal significance of the conduct.”

126 Shaw 2014, p. 53. See also the ICJ in the Nicaragua Case, pp. 108-109, and the Continental Shelf cases, ICJ Reports 1969, p. 44.

127 Particularly in the ICRC Customary Law Study, see Henckaerts and Doswald-Beck 2005b, Volume II, Practice. See also above, Chapter 3, Section 3.3.1, in which it was noted that 7 out of the 8 military manuals that were assessed, included a reference to the principle of proportionality.
instruct their military is certainly relevant for the practice in the context of the conducting of hostilities in armed conflict. It seems to be more logical, however, to classify the way States have phrased the obligations for their militaries in their military manuals as an expression of *opinio juris* rather than State practice. Military manuals indicate how States would *want* their armed forces to conduct their operations, or what they regard as legal behaviour. But often, military manuals express no opinion at all, but merely restate the States’ treaty obligations, and should be considered as nothing more than that.\(^{128}\) This is particularly the case for the military manuals of States that have not been involved in armed conflict for a long time. In case of incidents involving (alleged) violations of the rules, the reaction of States to that incident may also be regarded as *opinio juris*.\(^{129}\) But then many factors are still unclear, such as the question whether the practice of non-State actors should be taken into account.\(^{130}\)

In the author’s view, a variety of indicators and methods may be considered to assess the customary status of a rule of customary IHL.\(^{131}\) The following sections assess the customary status of the IHL rule on proportionality through a number of sources. As a starting point, the outcome of the updated ICRC Customary Law Study will be discussed. Next, a selection of cases is discussed in which the customary character of the IHL rule on proportionality is addressed. Furthermore, it will be assessed how the customary character of the IHL rule on proportionality is regarded in a number of other sources.

### 6.4.2 The ICRC Customary Law Study

The ICRC Customary Law Study, published in 2005, identifies the IHL rule on proportionality as a rule of customary IHL.\(^{132}\) Rule 14 reads:

\[
\text{Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.}
\]

It may be noted that the rule is formulated identical to the treaty provision in API. The same is true for most of the formulation in Rules 15, 17 and 18, which deal with precautions to be taken before and during attacks in order to respect the IHL rule on proportionality.

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\(^{128}\) See for example Schmitt 2007, p. 133.

\(^{129}\) Schmitt 2007, pp. 132-133.

\(^{130}\) See Fellmeth and Sylvester for a study of the practice during the Colombian civil war, concluding that *opinio juris* that the proportionality rule was upheld during the conflict by the Colombian Army was “has been lacking”. See Fellmeth and Sylvester, p. 556.

\(^{131}\) See on the methodology to establish rules of customary IHL the discussions that were the result of the first edition of the ICRC Customary Law Study: Henckaerts & Doswald-Beck 2005a, vol. I, pp. xiii-xliv, Henckaerts 2007, pp. 178-184, Meron 2005, Dinstein 2006, pp. 3-8, Bothe 2007a, pp. 143-178, the critical remarks of the US Government as voiced by Bellinger and Haynes 2007 and the response by Henckaerts, see Henckaerts 2007; See also generally Penna 1984, pp. 202-209.

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The State practice that the ICRC has collected to support the statement that the rule is indeed of a customary nature includes treaty texts and other official instruments, military manuals, national legislation, official statements by States, submissions by States to international courts, and the reported practice of States. The collected practice also includes practice of States not a party to Additional Protocol I, such as India, Israel, Pakistan, the Philippines and the United States. In addition, some other types of practice are mentioned, for example resolutions of international organisations like the United Nations and the Council of Europe.

The list of military manuals containing the IHL rule on proportionality is impressive: thirty military manuals contain the principle. In the military manuals of many of these States, the principle “has been copied verbatim, or by adopting its essence, according to which civilians are not to be attacked, unless they are taking a (direct) part in the hostilities.”

It may however be assumed that many, but not all, of these thirty States have incorporated the IHL rule on proportionality in their military manual because the relevant State ratified API. The ICRC study has been criticised for its methodology and the types of practice that was used, but for the IHL rule on proportionality the amount of State practice and other indicators seems to be quite comprehensive.

6.4.3 Case Law on the IHL Rule on Proportionality

Case law is a subsidiary source of international law, but does not constitute State practice by itself. Case law may however serve to clarify and assist in the interpretation of the primary sources of international law, such as customary IHL. Especially when rulings of (international) courts receive general agreement by States and in legal doctrine, its findings may provide “persuasive evidence” of the customary character of a rule. Although case law often mentions the IHL proportionality rule, cases in which the rule is actually applied are sparse. Since the principle was not codified before 1977, jurisprudence on the subject prior to that date is virtually non-existent. Nonetheless, a number of international and national

133 The practice that the ICRC has relied on to identify the customary status of the rules has been published in an updated online database. For Rule 14, see http://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14.
135 See above, Section 6.4.1.
136 Akehurst, p. 11.
137 Henckaerts 2005, p. 179. See also Prosecutor v Kupreskic, Trial Chamber Judgement, ICTY Case nr. IT-95-16, 14 January 2000, (hereinafter: the Kupreskic Case), paragraph 542.
138 In 1927, there were judgements by the Greco-German Mixed Arbitral Tribunal on the basis of the Treaty of Versailles with regard to an aerial attack by Germany on Greece (destroying “certain stores of coffee” in Salonica) and on Bucharest. The Tribunal applied the provision applicable to land warfare to the aerial attack, and ruled that “[i]t was one of the generally recognised principles of international law that the belligerent ought to respect, as far as possible, the life and the property of the of the civilian population.” Germany was held liable for the damage, but on the basis that it had not warned, not because the damage to the civilian property had been out of proportion. Proportionality was not considered in this case.
Courts have mentioned the IHL proportionality rule. The following Sections provide an overview of those cases, which were adjudicated both before national and international courts. Cases in which the IHL proportionality rule is actually applied are discussed in Chapter 12.

6.4.3.1 The Shimoda Case (1963)

In the case of Shimoda vs State, concerning the bombing of the Japanese cities of Hiroshima and Nagasaki in 1945, the Japanese District Court ruled that an indiscriminate attack on an undefended city is prohibited under customary international law, on the basis of the Hague Rules on Air Warfare of 1926. The Court acknowledged that the bombardment from the air of a military objective will also lead to destruction of civilian property and casualties to non-combatants, but that this is “not unlawful as long as it is an inevitable result incidental to the aerial bombardment of a military objective. Nevertheless, (...) aerial bombardment without distinction between military objectives and non-military objectives (the so-called ‘blind aerial bombardment of an undefended city’) is not permissible (...)” The Court held that the aerial bombardment using nuclear weapons was in essence a blind aerial bombardment because of the “tremendous destructive power” of the atomic bomb and therefore contrary to the applicable rules of IHL in 1945.

As such, the Shimoda Case does not contain a specific reference to the IHL rule on proportionality. Of course, at the time, the rule had not been codified yet, and the applicable
law to the case was the law as it stood in 1945. Yet, the case does seem to make an attempt to strike a balance between the presence of military objectives and the damage to civilians and civilian objects that could be expected from bombardment by atomic bombs on the two cities. The Court concludes, basing its ruling on customary law, that the attacks were indiscriminate, but it does not express whether this conclusion is based on excessive civilian casualties and damage (due to the means of warfare that was used) or on the basis of a lack of distinction.

6.4.3.2 The Nuclear Weapons Advisory Opinion (1996)

The IHL rule on proportionality was considered again in relation to nuclear weapons in the Nuclear Weapons Advisory Opinion of the International Court of Justice. The case was instigated by the World Health Organisation and the United Nations General Assembly, which asked the ICJ to consider the legality of nuclear weapons. In its Advisory Opinion of 8 July 1996, the Court did not make any direct reference to the IHL rule on proportionality, but a number of judges noted in the explanation of their vote that they considered the IHL rule on proportionality to be a part of customary law. Additionally, proportionality is addressed by some of the States who intervened in the case. Judge Schwebel provides two examples where nuclear weapons may be used without violating the IHL rule on proportionality, namely when used against military objectives in the middle of the ocean, or the desert. Judges Higgins and Guillaume note that in order to use a nuclear weapon, the military advantage that arises from the attack will necessarily have to be very huge, to outweigh the anticipated collateral damage form the attack.

Judge Higgins also states in a widely quoted statement that “the law of armed conflict has been articulated in terms of a broad prohibition - that civilians may not be the object of armed attack - and the question of numbers or suffering (provided always that this primary obligation is met) falls to be considered as part of the “balancing” or “equation” between the necessities of war and the requirements of humanity. Articles 23 (g), 25 and 27 of the Annex to the Fourth Hague Convention have relevance here. The principle of proportionality, even

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143 For a general description of the case, see for example David 1997.
145 For example by the United Kingdom, as stated during the oral pleadings and quoted in the Dissenting Opinion of Judge Schwebel on page 321 of the Advisory Opinion. See also the Written Statement of The Netherlands, paras. 13, ICJ Reports (1996), p. 587. See also Henckaerts & Doswald-Beck 2005a, note 14 on p. 48, listing also Egypt, India, Iran, Malaysia, New Zealand, Solomon Islands, Sweden, United States and Zimbabwe.
146 Dissenting Opinion Judge Schwebel, page 320-322 of the Advisory Opinion. These examples are also mentioned in the Written Statement of the United Kingdom, paragraphs 3.70 and 3.71 on pages 53 and 54. See also Henckaerts & Doswald-Beck 2005a, note 14 on p. 48, listing also Egypt, India, Iran, Malaysia, New Zealand, Solomon Islands, Sweden, United States and Zimbabwe.
if finding no specific mention, is reflected in many provisions of Additional Protocol I to the Geneva Conventions of 1949. Thus even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack.

The Court notes that the use of nuclear weapons would be “scarcely reconcilable” with the principles of IHL, but it does not draw the conclusion that the use of nuclear weapons would always be disproportionate. Rather, it concludes, though the views of the judges diverge on this point, that under the circumstances of a particular attack, the use of nuclear weapons could be lawful. In conclusion, it is fair to say that the Nuclear Weapons Advisory Opinion underscores the existence of the IHL rule on proportionality as a rule of customary IHL.

6.4.3.3 ICTY Case Law (1995-present)

It is clear that the ICTY regards the IHL rule on proportionality as part of international customary IHL. ICTY Trial and Appeals Chambers have addressed the IHL rule on proportionality in a number of cases. However, as Bartels notes, the ICTY judges would usually mention the rule without actually applying it to the facts of the case. The ICTY Trial Chamber provides “the first actual application of this principle by the ICTY to date” in the Gotovina Case, however, the decision was overturned by the Appeals Chamber.

Of particular significance is the Kupreskić Case. The Trial Chamber holds that the rules of API that contain the IHL rule on proportionality, “it would seem, are now part of customary international law, not only because they specify and flesh out general pre-existing norms, but also because they do not appear to be contested by any State, including those which have
not ratified the Protocol."\footnote{Kupreskic Trial Chamber Judgement, paragraph 524.} This statement, that has been characterized as “sweeping”\footnote{See Boivin, footnote 151, p. 41.} does not come accompanied by a lengthy analysis detailing the line of argumentation in support of the statement.

In the \textit{Galić Case}, the IHL rule on proportionality is discussed by the Trial Camber in relation to 23 different incidents.\footnote{Olasolo, p. 179.} The proportionality principle is also discussed by the Chamber evaluating the attack on a football match in Sarajevo.\footnote{See the Trial Chamber Judgment in the Galic Case, paragraph 387. See also Kravetz, p. 532-533 and Olasolo, p. 180-182.} In these incidents, however, it seems that the Trial Chamber used the incidents to prove that there was an ongoing “campaign of sniping and shelling against civilians”\footnote{Galic Trial Chamber Judgement, paragraph 594.} rather than prosecuting the accused for violation of the IHL rule on proportionality.

The ICTY OTP Report on the NATO campaign in Kosovo in 1999 also considers the IHL rule on proportionality. Although the opinion of the Prosecutor can obviously not be equated to a judgement of an international court, the Report is nevertheless significant. The report notes the statement of the Kupreskic, but regards it as “a progressive statement of the applicable law with regard to the obligation to protect civilians.”\footnote{See the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (hereinafter: the ICTY OTP Kosovo report), paragraph 52.} The Report however finds that there is no doubt about the existence of the IHL rule on proportionality, but that it is difficult to assess how it should be applied.\footnote{Idem, paragraph 48.} The report reviews a number of incidents, such as the proportionality of the attack by NATO on the Radio and Television Tower in Belgrade on 23 April 1999, killing at least 10 people. The Report found that as a part of the overall attack with the objective to disrupt Serbian command, control and communications system, it did not to appear to be manifestly excessive in relation to the key military advantage expected from the disruption.\footnote{The ICTY OTP Kosovo report, paragraph 77-79. See also Olasolo, p. 129-131. On the subject of the principle of proportionality in the ICTY OTP Kosovo report, see also Benvenuti, p. 517-519, Bring, p. 44-45, Murphy, p 65-75, and Voon, p. 6-13. For further analysis, see Chapter 12.}

\section*{6.4.3.4 The Eritrea-Ethiopian Claims Commission (2000 – 2005)}

In the cases before the Eritrea Ethiopian Claims Commission (the Commission), a number of cases also dealt with proportionality issues.\footnote{For an overview of the work of the Eritrea Ethiopia Claims Commission, see Aldrich 2003. See also Van Houtte, p. 391, and accompanying notes for a short overview of the cases where the conduct of hostilities of the parties to the conflict was scrutinized. The Awards are available on http://www.pca-cpa.org/upload/files/FINAL%20FRONT%20CLAIMS.pdf.} The claims concerned the armed conflict between Eritrea and Ethiopia in the period of 1998 until 2000. Eritrea maintained that the Ethiopian bombings were, among other things, disproportionate. In these claims, Eritrea
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relied particularly upon the provisions of API. Since Eritrea is not a party to Additional Protocol I, the Commission assumed the provisions referred to by the parties to be part of customary IHL: “[a]lthough portions of Geneva Protocol I involve elements of progressive development of the law, both Parties, with one exception, treated key provisions governing the conduct of attacks and other relevant matters in the claims decided by this Partial Award as reflecting customary rules binding between them. The Commission agrees and further holds that, during the armed conflict between the Parties, most of the provisions of Geneva Protocol I were expressions of customary IHL.”

The Commission summarised the applicable provisions of API as follows:

“[t]hey emphasize the importance of distinguishing between civilians and combatants and between civilian objects and military objectives; they prohibit targeting civilians or civilian objects; they prohibit indiscriminate attacks, including attacks that may be expected to produce civilian losses that would be disproportionate to the anticipated military advantage; and they require both attacker and defender to take all feasible precautions to those ends.”

The Commission did “generally not find indiscriminate or disproportionate bombing where it was foreseeable that civilian losses would be excessive in relation to the military advantage anticipated.” The Commission does not elaborate any specific proportionality calculations it may have reviewed in order to support this conclusion. According to the Award, this is due to the fact that the claimant (in this case: Eritrea) failed to provide the necessary proof to support its statement. Generally, it is concluded, the civilian casualties and damage to civilian objects was in some cases the result of unfortunate targeting mistakes from the side of the Ethiopian armed forces. Other losses could have been avoided if the legitimate military objectives that were under attack would have been located at greater distance from civilian objects.

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166 Particularly articles 48, 51, 52 and 57 API. See Eritrea Ethiopia Claims Commission, Partial Award Western Front, Aerial Bombardment and Related Claims, Eritrea’s Claim 26, 19 December 2005, paragraph 93, p. 27.
167 Eritrea Ethiopia Claims Commission, Partial Award Western Front, Aerial Bombardment and Related Claims, Eritrea’s Claim 26, 19 December 2005, paragraph 14, p. 5. Eritrea questioned the customary status of article 54 API, since at the time of the adoption of API, it was considered to be an innovative element of IHL. The claims commission ruled however that by 2000, the provision had achieved the status of customary IHL. See paragraph 105, pp. 29-30.
168 Eritrea Ethiopia Claims Commission, Partial Award Western Front, Aerial Bombardment and Related Claims, Eritrea’s Claim 26, 19 December 2005, paragraph 95, p. 27 (emphasis added).
169 See Van Houtte, p. 391, and accompanying notes for a short overview of the cases where the conduct of hostilities of the parties to the conflict was scrutinized.
170 Eritrea Ethiopia Claims Commission, Partial Award Western Front, Aerial Bombardment and Related Claims, Eritrea’s Claim 26, 19 December 2005, paragraph 97, p. 28.
171 Eritrea Ethiopia Claims Commission, Partial Award Western Front, Aerial Bombardment and Related Claims, Eritrea’s Claim 26, 19 December 2005, paragraph 96, p. 27.
In one specific case, the attack of the Hirgigo Power Station,\textsuperscript{172} there is a reference to proportionality in the separate opinion of the President Van Houtte.\textsuperscript{173} In the text of the claim itself it is held that since Eritrea has not claimed any damages for sustained civilian casualties, and since the object was a legitimate military objective, the extent to which the attack had been proportionate did not have to be considered.\textsuperscript{174} In his separate opinion, Van Houtte concludes that the power plant was a civilian object, and therefore it had to be considered whether the attack on the Eritrean batteries that were placed there to protect the power station was proportionate.\textsuperscript{175}

In summary: the Commission did conclude that "[t]he provisions of Geneva Protocol I relevant to this Claim, which are found in Articles 48, 51, 52, 57 and 58 of that Protocol, expressed customary IHL during the 1998–2000 armed conflict between the Parties."\textsuperscript{176} The only incident in which a proportionality calculation was conducted concerned the damage to a civilian object (the Hirgigo power station), which Van Houtte found to be excessive in his separate opinion on the basis of a failure of the Ethiopian forces to comply with the obligation to take precautionary measures when attacking a military objective. The Commission did not, regrettably, provide detailed analysis for its conclusion that the bombing efforts of the Ethiopian armed forces were generally not disproportionate.

\textbf{6.4.3.5 The Supreme Court of Israel Sitting as the High Court of Justice (2005)}

In the so-called Targeted Killings Judgment of 11 December 2005, the Israeli Supreme Court treats the principle of proportionality in a more general way, summing up a number of areas of law where proportionality is applicable. As far as IHL is concerned, the Court refers to ‘proportionality \textit{strictu sensu},’ which is defined as “the requirement that there be a proper proportionate relationship between the military objective and the civilian damage.”\textsuperscript{177} The Court acknowledges the customary character of the IHL rule on proportionality, referring to the ICRC Study of customary IHL and the Kupreskic Case of the ICTY.\textsuperscript{178} The Court adds that it

\textsuperscript{172} Eritrea Ethiopia Claims Commission, Partial Award Western Front, Aerial Bombardment and Related Claims, Eritrea’s Claim 25, 19 December 2005, paragraph 106-121, pp. 31-36.

\textsuperscript{173} Eritrea Ethiopia Claims Commission, Partial Award Western Front, Aerial Bombardment and Related Claims Separate Opinion to Claim 25, pp 1-3.

\textsuperscript{174} Eritrea Ethiopia Claims Commission, Partial Award Western Front, Aerial Bombardment and Related Claims, note 28 on page 35.

\textsuperscript{175} Eritrea Ethiopia Claims Commission, Partial Award Western Front, Aerial Bombardment and Related Claims Separate Opinion to Claim 25, paragraph 10 and 11, p 3.

\textsuperscript{176} Eritrea Ethiopia Claims Commission, Partial Award Western Front, Aerial Bombardment and Related Claims, Eritrea’s Claim 26, 19 December 2005, Award, sub 2 (a), p. 30.

\textsuperscript{177} The Israeli Supreme Court sitting as the High Court of Justice, High The Public Committee against Torture in Israel et al. vs The Government of Israel et al. HCJ 769/02, 11 December 2005 (hereinafter: The Targeted Killings Case), paragraph 41.

\textsuperscript{178} The Targeted Killings Case, paragraph 42: “The principle of proportionality is a substantial part of international law regarding armed conflict (compare §51(5)(b) and 57 of The First Protocol [1977 Additional Protocol I] … That law is of customary character (see … Prosecutor v. Kupreskic, ICTY Case no. IT-95-16 (2000)). The principle of proportionality arises when the military operation is directed toward combatants and military objectives, or against civilians at such time as they
is a “value based test” and that even though “[p]erforming that balance is difficult ... there's no choice but to perform it.”

6.4.3.6 Sub-Conclusion on Case Law

The judgements of the courts, commissions and tribunals that have reviewed the customary character of the IHL rule on proportionality all confirmed the customary status of the IHL rule on proportionality. The Prosecutor of the ICC has referred to a potential prosecution for violations of the criminal law version of the proportionality rule in its Korea Report. Future prosecutions for this crime at the ICC, the ICC Prosecutor would presumably not need to make an assessment of the customary status of the IHL proportionality rule, since these prosecutions would be based on the text of the crime as embodied in article 8(2)(b)(iv) of the ICC Statute.

It is striking to note that none of the courts or tribunals provides a detailed method how to conduct the proportionality calculation in the circumstances put before them, which would have facilitated a more detailed conclusion on the exact content of the principle. As a result, the exact meaning of the components of the principle remains under debate. This is further explored in Part IV of this study, in Chapters 11 and 13.

6.4.4 Other Indicators

In addition to the conclusions of the ICRC Customary Law Study and the statements made by (international) courts, other indicators to ascertain the customary status of the IHL rule on proportionality can also be mentioned. Obviously, many expressions of State practice have already been examined by the ICRC Customary Law Study. In this section, a number of additional indicators will be reviewed.

First of all, it is important to note that also States that have not ratified API have expressly acknowledged the customary status of the IHL rule on proportionality, including Israel.

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179 The Targeted Killings Case, paragraph 45.
180 The Targeted Killings Case, paragraph 46.
182 Israel for example, acknowledges the customary status of the principle in its report on operation Cast Lead in Gaza, see http://www.mfa.gov.il/NR/rdonlyres/E89E699D-A435-491B-82D0-017675DAFEF7/0/GazaOperation.pdf, paragraph 120-
and the United States of America.\textsuperscript{183} Despite the fact that the exact content of the principle and the interpretation of its components does not seem to be universally agreed upon, this is certainly a clear indication that the rule is indeed part of customary international law.

Another indicator of the customary character of the principle is the reports of experts, especially if States have been consulted or participated in the process of the drafting of the report. The Manual on Air and Missile Warfare, published in 2010, is a good example.\textsuperscript{184} The Manual on Air and Missile Warfare recognises the IHL rule on proportionality as part of the existing legal framework regulating air and missile warfare. It is defined as: “[a]n attack that may be expected to cause collateral damage which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited.” The significance of this report is not only that it has been prepared by a group of prominent experts, including representatives from the ICRC, but also that States have been consulted extensively in order to enhance the acceptability of the rules contained in the Manual. The Sanremo Manual on International Humanitarian Law Applicable to Non-International Armed Conflict also confirms the IHL proportionality rule.\textsuperscript{185}

Furthermore, the Report of the International Law Association Study Group on the Conduct of Hostilities in the 21st Century, published in 2017, is composed by a group of notable experts in the field of IHL. The Report refers to the ICRC Customary law Study, acknowledging the customary status of the IHL proportionality rule: “[b]y virtue of customary international law, parties to an armed conflict are under an obligation to abide by the principle of proportionality in both international as well as non-international armed conflicts”\textsuperscript{186} Some of the experts that were part of this Study Group, were also part of the ‘Amici’ who send an Amicus Curiae brief to the ICTY Appeals Chamber in the Gotovina case before the ICTY. In this brief, the Amici confirm that “commanders who choose to target enemy objectives co-mingled among a civilian population must scrupulously comply with the IHL principles of distinction and proportionality.”\textsuperscript{187} Similarly, the Tallinn Manual 2.0,\textsuperscript{188} published in 2017, notes the IHL proportionality rule as a rule that is generally accepted as customary international law applicable in international and non-international armed conflicts.\textsuperscript{189}

\textsuperscript{131} on pages 44-48.

\textsuperscript{183} See Matheson, p. 419.


\textsuperscript{185} Sanremo Manual on the Law of Non-International Armed Conflict, p. 22-25.

\textsuperscript{186} For the report, see the ILA website (http://www.ila-hq.org/index.php/study-groups?study-groupsID=58), 19 YIHL (2016) pp. 287-336 and http://stockton.usnwc.edu/ils/vol19/iss1/12/. See p. 351. This author was part of this process, although the part on the IHL proportionality rule was not specifically drafted by this author.

\textsuperscript{187} For the text of the Amicus Curiae brief, see http://icr.icty.org/LegalRef/CMSDocStore/Public/English/Application/NotIndexable/IT-06-90-A/MSC7958R0000353013.pdf

\textsuperscript{188} The Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations, second edition, 2017, which was the result of a group of 19 renowned experts and a large number of other participants and peer-reviewers in the field of international law.

\textsuperscript{189} Tallinn Manual 2.0, p. 471.
A clear indication of the acceptance of the IHL rule on proportionality as a rule of customary IHL has also evidenced in State practice resulting from the deliberations in forums of the United Nations with regard to weapons. For example, in the context of the Conventional Weapons Convention 1980, it was established that “[t]he rule on proportionality was identified by 97 percent of Respondent States as relevant to the use of munitions that may result in explosive remnants of war.” McCormack and Mtharu therefore conclude that States regard the proportionality equation as a crucial obligation in targeting procedures for their armed forces.

Other practice originating from the United Nations acknowledging the customary status of the IHL proportionality rule can be derived from reports by UN fact finding committees and expert panels, such as the panel of experts that has reviewed the final phase of the conflict between the Government of Sri Lanka and the LTTE, the United Nations Fact Finding Mission on the Gaza Conflict (the Goldstone Report) that reported on the 2008-2009 Gaza war and the Independent International Commission of Inquiry on the Syrian Arab Republic.

Furthermore, as a subsidiary source of international law, legal doctrine may be mentioned. The opinions of international legal scholars should be reviewed with some reservations, however. Firstly, it could be that a scholar merely echoes the position of a certain government or organisation, or serves to justify that position from an academic point of view. Also, the choice of an author to present the opinions of some, and ignoring and disregarding the opinion of others is highly subjective. Thirdly, opinions of scholars often contain not only lex lata, but also traces of the way the author would like the law to become. However, with regard to the customary status of the IHL rule on proportionality, the opinions of authors who have written on the subject are uniform in accepting the IHL rule on proportionality as customary IHL.

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193 See http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf. The reference to the proportionality rule is in para 362, on p. 92.
In addition, organisations like Human Rights Watch, and Amnesty International also regard the IHL rule on proportionality as part of the IHL. However, some reports of non-governmental organisations such as Human Rights Watch and Amnesty International have received criticism in the past, and have been accused of applying the applicable standards incorrectly when reviewing the behaviour of parties to an armed conflict in their reports.

6.4.5 Customary Law both in IAC and NIAC?

As for the question of whether the IHL rule on proportionality would also be applicable in non-international armed conflicts (NIACs), the ICRC Customary Law Study is very clear. It concludes that the principle is also part of customary international law in non-international armed conflicts. Logically, it would be absurd if, in a civil war, the ‘own’ civilians would not benefit to the same extent of the protection of the IHL rule on proportionality as ‘enemy’ civilians would in an international armed conflict. However, this logic conclusion is problematic because of “the primary assumption in international relations, and indeed international law, (...) that the relationship between a state and its own citizens is a matter exclusively for the domestic legal order.” On the other hand, since IHL generally applies between the parties to the conflict, this assumption in unpersuasive to discharge applicability of the IHL proportionality rule during NIACs.

The IHL proportionality rule is not included in common article 3 of the Geneva Conventions, nor is it codified in Additional Protocol II. However, in their commentary on the 1977 Additional Protocols, Bothe, Partsch and Solf state that the IHL rule on proportionality was deleted from the draft text of APII by Committee III [of the CDDH] before the simplification process that stripped APII of most provisions on the conduct of hostilities. However, in their opinion, “[n]evertheless, (...) the principle of proportionality is inherent in the principle of humanity which was explicitly made applicable to Protocol II under the

197 See for example Amnesty International’s Report on the war between Israel and Hezbollah, AI Index MDE 18 July 2006, published August 2006, p. 5. Amnesty acknowledges the principle, but notes there is a difference of opinion in their interpretation and the interpretation of the Israeli Government.
199 See generally for the typology of armed conflicts: Vité.
200 As the ICTY noted in the famous Tadić Case: “What is inhumane, and consequently proscribed, in international wars, cannot be inhumane and inadmissible in civil strife.” See ICTY, Prosecutor v. Tadić, IT-94-1-1, Appeals Chamber Decision, 2 October 1995, paragraph 119.
201 Wells-Greco, p. 409.
202 There was an article (draft-article 26(3)(b)) containing the principle of proportionality in the draft Protocol II that the ICRC prepared for the diplomatic conference that adopted the Additional Protocols in 1977. The provision was however deleted, together with most other draft articles on the conduct of hostilities. See Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Volume XV, p. 321.
fourth clause of the Preamble. Thus, the IHL proportionality rule cannot be ignored in applying Protocol II.\textsuperscript{203} The Sanremo Manual on International Humanitarian Law Applicable to Non-International Armed Conflict confirms that “the relative absence of express mention of proportionality in instruments governing non-international armed conflicts should not be construed as meaning that it is inapplicable in such conflict.”\textsuperscript{204} Furthermore, the IHL proportionality rule is included in a number of other treaty rules applicable in NIACs, more particularly in the Amended Protocol II to the Conventional Weapons Convention of 1996 and the 1999, Second Hague Protocol for the Protection of Cultural Property in the Event of an Armed Conflict.

State practice of the United States of America points in the same direction, as evidenced in declaring the principle applicable in all types of conflicts in “longstanding policy, through directives, instructions, and operational rules of engagement (…). Proportionality from the U.S. perspective, among other States, is customary international law regardless of designation of the armed conflict as international.\textsuperscript{205} This conclusion is also supported by a number of authors.\textsuperscript{206} For example, Corn states with regard to the IHL rule on proportionality that “[i]t is universally accepted as a customary norm of the \textit{jus in bello}, applicable to all armed conflicts.”\textsuperscript{207}

\textbf{6.4.6 Sub-Conclusion: the Customary Character of the IHL Rule on Proportionality}

Even though the type of practice that was found is not always of the most telling character, it is my conclusion that there can be no doubt about the existence and applicability of the IHL rule on proportionality as a rule of customary international law. It is a rule that is well-established in treaty law, State practice, international case law, legal doctrine and other indicators. The quantity and character of the presented practice on Rule 14 of the ICRC Customary Law Study is certainly widespread, and given the additional indications of the existence of the principle, the applicability of the rule in customary IHL in any type of armed conflict today is established with certainty.

As argued in Part II, the IHL proportionality rule is one of the basic principles of IHL, and is thus also applicable in those situations where the rules of conventional and customary IHL would not be applicable. As such, the principles of IHL work as a safety net to ensure that the use of armed force amounting to an armed conflict is not unregulated, as confirmed by the Martens Clause. Also in these types of situations, the principle of proportionality shall apply with a view to curtailing disproportionate civilian casualties and damage to civilian objects.

\textsuperscript{203} Bothe et al., p. 677-678.
\textsuperscript{204} Sanremo Manual on the Law of Non-International Armed Conflict, p. 22-25.
\textsuperscript{205} Maxwell and Meyer, p. 10.
\textsuperscript{206} See for example Byron, p. 208, Turns, p. 145 and Meron 1996, p. 243-244.
6.5 Conclusion

This chapter demonstrated that the IHL rule on proportionality has known a gradual development, but is currently considered to constitute a rule of customary IHL that applies similarly in international armed conflicts, as it does in non-international armed conflicts. It is remarkable how a rule that was virtually non-existent in 1945 has acquired such a widespread acceptance in IHL today. That being said, the exact content of the IHL rule on proportionality is still today not entirely clear. There continues to be much debate about the exact meaning of the different components of the IHL rule on proportionality, and also how these components need to be balanced. An inquiry into actual targeting behaviour in a significant large number of incidents in different armed conflicts by different types of armed forces would possibly provide the final proof of the existence of the rule, and also of its exact content. The question remains open to what extent the content and application of this rule is influenced by the types of proportionality as found in other areas of international law that regulate the use of armed force. But the IHL rule on proportionality is certainly not the only norm within IHL that requires the parties to an armed conflict to exercise restraint in the conduct of their operations. The next chapter deals with a number of these other standards of moderation in IHL.

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208 Bothe concludes that there remains controversy not about the rule, but about “the yardstick of proportionality,” see Bothe 2007a, pp. 167.

209 Fellmeth 2010, p. 5 and see Fellmeth and Sylvester 2017 for an analysis of the application of the IHL proportionality rule during the internal armed conflict in Colombia.