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### Proportionality in international humanitarian law

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**Publication date**

2019

**Document Version**

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**Citation for published version (APA):**

van den Boogaard, J. C. (2019). *Proportionality in international humanitarian law*. [Thesis, fully internal, Universiteit van Amsterdam].

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# Chapter 8

## Chapter 8: Interrelationship of Proportionality in Armed Conflict

### 8.1 Introduction

In the previous chapters of Part III, the origins and content of the different manifestations of proportionality in international law have been analysed. It is clear that proportionality plays an important role in situations where armed force is used. This chapter analyses the way the manifestations of proportionality in the different fields of international law. To that end, the manifestations of proportionality related to the use of armed force that have been encountered in the previous chapters are contrasted and compared, particularly those in the *ius ad bellum*, the *ius in bello* (international humanitarian law, IHL) and IHRL.

### 8.2 Proportionality in IHL and the *Ius ad Bellum*

As has been explained in the previous chapters, the proportionality principle in the *ius ad bellum* is understood differently than it is in IHL. Before any relationship between the two manifestations of proportionality may be examined, it must be stressed at the outset that the basic premise is that there is a clear separation between the *ius ad bellum* and IHL.<sup>1</sup>

#### 8.2.1 The Strict Separation between IHL and the *Ius ad Bellum*

Under IHL, the strict separation between the *ius ad bellum* and IHL is generally referred to as the ‘principle’ of equal application of the law to the belligerents. This separation entails that all norms of IHL apply equally to all parties to an armed conflict, regardless of “their respective standing in the eyes of the *ius ad bellum*”<sup>2</sup> The equal application principle is codified in the preamble to Additional Protocol I.<sup>3</sup> The rationale of this concept is that it prevents armed forces from finding an excuse for violating the rules of IHL because the opposing party is perceived as the ‘bad guy’ in terms of the *ius ad bellum*. Such an excuse would obviously be contrary to the protective function of IHL, even in a situation where violating the rules would lead to a military advantage.

1 It is worth noting that the use of the terms *ius in bello* and *ius ad bellum* dates from the 1930ties, and that the pioneers of international law commonly saw the law of war as a single body of international law. Nonetheless, this field of law contained rules that we would today place in the separate fields of the *ius in bello* and the *ius ad bellum*. See Kolb 1997, p. 553-554.

2 Dinstein 2016, p. 5. See also generally Sassòli 2007, pp. 241-264.

3 “the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.”

During a number of criminal trials after the Second World War, for example in the *Justice* and the *Hostage* trials, the argument was dismissed that the aggression of Nazi-Germany would undermine the equal application of IHL.<sup>4</sup> A more recent example of conflation of the separation between the *ius ad bellum* and IHL is the *Fofana and Kondewa* case of the Special Court for Sierra Leone. The Trial Chamber reduced the sentences of the accused because the atrocities they had committed were, according to the Trial Chamber, for “a cause that is palpably just and defensible (...) [because their forces] defeated and prevailed over the rebellion of the AFRC that ousted the legitimate government (...) and that this contributed immensely to the re-establishment of the rule of law in Sierra Leone.”<sup>5</sup> The Appeals Chamber was quick to overturn the reduction of the sentences, quoting the Preamble to API and stating that “consideration of political motive by a court applying international humanitarian law not only contravenes, but would undermine a bedrock principle of that law.”<sup>6</sup>

There are many reasons to regard *ius in bello* and *ius ad bellum* as totally distinct branches of international law, because “they are logically independent of each other, operate in different ways, with different degrees of precision and different sanctions.”<sup>7</sup> The operation of *ius in bello* must be regarded separate from the nature of origin of the armed conflict because “it is impossible to visualize the conduct of hostilities in which one side would be bound by the rules of warfare without benefiting from them and the other side would benefit from them without being bound to them.”<sup>8</sup>

The following paragraph in the Nuclear Weapons Advisory Opinion of the International Court of Justice (ICJ) however became (in)famous because it seems to invoke considerations of *ius ad bellum* to regard the use of nuclear weapons as legal under IHL:

“(...) the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.”<sup>9</sup>

4 Dinstein also mentions the cases of *Christiansen* and *Zuhlke* in the Dutch courts that also followed World War II, where the courts observed the equal application of IHL. See Dinstein 2017, p. 182 and accompanying notes.

5 *Prosecutor v. Fofana & Kondewa*, Case No. SCSL-04-14-T, Sentencing Judgement (9 October 2007), para 86 and para 87.

6 *Prosecutor v. Fofana & Kondewa*, Case No. SCSL-04-14-A, Judgement, ¶¶ 529-31 (28 May 2008).

7 Greenwood 1983, p. 31. See also Cannizzaro: “The particular structure of proportionality as a normative technique applicable in *ius in bello*, in which no interest can claim absolute priority over the others, explains why, in that particular system, proportionality cannot logically be measured by reference to the ultimate goals of a military mission, but instead to the more immediate aims of each single military action. This element makes proportionality in *ius in bello* appreciably different from the analogous technique applicable in *ius ad bellum*. In the latter, international law confers upon the attacked state a superior power to take defensive action, and the proportionality requirement serves only to determine the degree to which other values can be sacrificed to that higher value. Conversely, in *ius in bello* there is by definition no higher value, as the offensive or defensive character of the military action does not count as such for assessment of the proportionality thereof.” See Cannizzaro 2006, p. 786-787.

8 Lauterpacht 1954, p. 212.

9 Nuclear Weapons Advisory Opinion, p. 266. The ICJ replied to the question in this way by seven votes to seven, by the President’s casting vote.

Dinstein holds that the Nuclear Weapons Advisory Opinion may be regarded as a “dangerous departure from the concept that IHL applies equally to all belligerents, irrespective of their status under the *ius ad bellum*.”<sup>10</sup> Sassòli states that if would be accepted that the *ius ad bellum* requirement of “extreme circumstance of self-defence in which the very survival of a State would be at stake” would influence the application of the principles of IHL (including IHL proportionality principle), “would mean the end of IHL as we know it.”<sup>11</sup> Gill agrees that the way the ICJ phrased its conclusions on the threat or use of nuclear weapons “completely and incorrectly mixes the two sets of criteria pertaining to *ius ad bellum* and *ius in bello* in a way that misinterprets and undermines the law and has grave policy implications”<sup>12</sup>

Greenwood however understands the ruling of the ICJ to mean that “[I]n determining whether the use of a particular weapon in a given case was lawful, it was (...) necessary to look at both international humanitarian law and the requirements of the right of self-defence.”<sup>13</sup> This means that the *ius ad bellum* must be understood as imposing “an additional level of constraint upon a state’s conduct of hostilities, affecting, for example, its choice of weapons and targets and the area of conflict.”<sup>14</sup> With regard to the conflation of *ius in bello* and *ius ad bellum*, Greenwood holds that the ICJ never meant to mix up the two legal frameworks, and that the ICJ merely meant to declare that the requirements of both frameworks apply cumulative.<sup>15</sup> He states that “[to] allow the necessities of self-defence to override the principles of humanitarian law would put at risk all the progress in the law which has been made in the last hundred years or so and raise the spectre of a return to theories of the ‘Just War’ and the maxim embodied in the German proverb that ‘*Kriegsraison geht vor Kriegsmanier*’”.<sup>16</sup>

It has been proposed to view the Nuclear Weapons Advisory Opinion on the relationship between *ius ad bellum* and *ius in bello* as a ‘judicial error’ and suggested to refrain from finding guidance in the Opinion on this point.<sup>17</sup> However, the ICJ seems to have repeated its conflation of *ius ad bellum* and *ius in bello* in two later cases, namely in the Oil Platforms Case<sup>18</sup> in 2003 and again in the 2007 Advisory Opinion on the Wall.<sup>19</sup>

In the Oil Platforms Case, the ICJ assessed whether the right to self-defence was violated by the United States and the Court found it relevant in that context to state that “in order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, the United States has to show (...) that its actions were necessary and proportional to the armed attack made on it, and that the platforms were a

10 Dinstein 2017, p. 183.

11 Sassòli 2007, p. 251.

12 Gill 1999, p. 621.

13 Greenwood 1999, p. 286.

14 Greenwood 1999, p. 286.

15 Greenwood 1999, p. 292. See also Gill 1999, p. 618.

16 Greenwood 1999, p. 292.

17 Gill 1999, p. 623-624.

18 Oil Platforms Case, p. 161.

19 The Wall Advisory Opinion, para 139, p. 194.

legitimate military target open to attack in the exercise of self-defence.”<sup>20</sup> One way to look at this is that the ICJ merely added a new aspect into the *ius ad bellum* requirements of necessity and proportionality, namely that “that the target of the attack in self-defence should be a military target, which should be qualified according to IHL.”<sup>21</sup> Dinstein is of the opinion that the ICJ “misread the applicable law” and he concludes that conversely, a failure to meet a requirement in *ius in bello* cannot lead to a different application “in any way” of the separate *ius ad bellum* requirements of proportionality and necessity.<sup>22</sup> It is submitted here that the remark of the ICJ is neither new, nor a violation of IHL principle of equal application of the law to the belligerents. Already in 1989, Greenwood wrote that “the concept of self-defence may impose serious restrictions upon the right of a State to attack what, in terms of IHL, is a legitimate military target.”<sup>23</sup> In addition, it is unclear why it would be undesirable that the qualification of an object as a military objective is judged by the rules of IHL, even when this is done to satisfy a requirement of the *ius ad bellum*. This does not seem to be any different than the widely held view that the legality of the use of deadly force by combatants in the context of an armed conflict must be decided “by reference to the law applicable in armed conflict”<sup>24</sup>, thus by the rules of IHL, with a view to judge whether a use of force was an arbitrary deprivation of an individual’s right to life under IHRL.<sup>25</sup> As long as the used terms are judged by reference to the correct legal framework, it is submitted that the ICJ did not conflate the two legal frameworks in the *Oil Platforms Case* in a sense that would upset the strict separation between the *ius ad bellum* and IHL and the ICJ thus ruled in accordance with the principle of equal application of the law to the belligerents.

In the Advisory Opinion on the Wall, the ICJ also examined whether violations of the rules of IHL, in this case rules related to the duties of an occupying power, could be justified by self-defence.<sup>26</sup> Even though the ICJ eventually concluded that this was not the case because the requirements for self-defence were not met, Sassoli comments that the ICJ “should simply have explained that as far as violations of IHL were concerned, self-defence, belonging to *ius ad bellum*, could not justify violations of *ius in bello*.”<sup>27</sup> Although this statement is correct, it is submitted that the fact that the ICJ did in fact look into the merits of the Israeli claim that article 51 of the UN Charter could be invoked to justify its actions as an Occupying Power, is insufficient to state that the ICJ sanctioned the conflation of *ius ad bellum* and *ius in bello* when it concluded very clearly that self-defence “has no relevance in this case.”<sup>28</sup> This statement however, it is submitted, must be understood not as an application of IHL, but

20 Oil Platforms Case 161-219, para 51, p. 186-187.

21 Ochoa-Ruiz and Salamanca-Aguado, p. 517.

22 Dinstein 2017, p. 184.

23 Greenwood 1989a, p. 279.

24 Nuclear Weapons Advisory Opinion, para 25, page 240.

25 See Greenwood 1999, p. 280-283.

26 Wall Advisory Opinion, para 138-139.

27 Sassòli 2007, p. 215-252.

28 Wall Advisory Opinion, para 139.

instead prove that the ICJ dismissed the applicability of the requirements of *ius ad bellum* on other grounds.<sup>29</sup>

By way of conclusion, it is submitted that although the ICJ has not always been overly cautious in phrasing the separation between *ius ad bellum* and *ius in bello*, it conversely also never claimed in clear and unambiguous terms that a conflation between the two legal frameworks must be assumed. The equality of the parties is one of the most clearly established and crucial underlying foundations of IHL. It must therefore not be disposed of only as a result of a vaguely formulated statement in the ICJ Nuclear Weapons Advisory Opinion. The equality of the parties to an armed conflict instead emphasizes the fact that for the proper functioning of IHL, its reciprocal element needs to be safeguarded, irrespective of the question who is the good, or the bad guy.<sup>30</sup> The next section will examine whether a relationship between the two legal frameworks must be accepted nonetheless to exist on the level of the principle of proportionality.

### 8.2.2 Possible Relationships between the *Ius ad Bellum* and IHL Proportionality

The previous section stressed the existence and rationale of the strict distinction between the *ius ad bellum* and *ius in bello*. This strict separation also applies on the level of the principle of proportionality. As Dinstein puts it: “[i]n any event, it must be perceived that proportionality in the context of self-defence – and in the sense of the *ius ad bellum* – has little in common with proportionality as applied and understood by IHL. Consequently, any attempt to transplant rules or caveats from one domain to the other is likely to cause confusion.”<sup>31</sup> It is clear that both legal frameworks include a proportionality requirement, which must be satisfied within those legal frameworks in order for the use of force to stay within the boundaries proscribed by these legal frameworks. However, it could similarly be argued that on the level of the application of the rule on proportionality in the respective legal frameworks, a certain relationship exists nonetheless.<sup>32</sup> The question of whether an attack is in accordance with the requirements of *ius in bello* could for example be relevant for the legality of an armed attack under the *ius ad bellum*. Conversely, factors of *ius ad bellum* “must equally be taken into account in determining whether specific types of targets may be attacked (...)”<sup>33</sup> Since the legality of the selected targets and the type of weapons and tactics that are used is determined on the

29 See Bianchi, p. 355. See also Bruha and Tams 2005 p. 89. An alternative solution could be that because the construction of the Wall cannot be defined as an armed attack in the sense of the *ius ad bellum*, it never became applicable to the situation in the first place.

30 See also Sassòli 2007, p. 249, Dinstein 2017, pp. 177-185, Greenwood 2008, p. 19-20, Bartels 2009b, p. 225.

31 Dinstein 2012, p. 233.

32 Dinstein admits in this context that “[w]hen considered *in abstracto*, there may be some merit in subdividing the *ius in bello* into several legal layers” See Dinstein 2012, p. 169.

33 See generally Gill 2016, pp. 101-119, concluding that factors of *ius ad bellum* “must equally be taken into account in determining whether specific types of targets may be attacked (...)”.

basis of *ius in bello*, it seems as if there is, at least, a potential interaction here between issues of *ius in bello* and *ius ad bellum*.

In military ethics, the thesis has been defended that the proportionality equations in the *ius ad bellum* and IHL are closely connected. The Canadian philosopher Hurka, for example, concludes that: “[i]t also follows that what counts as a proportionate tactic varies with the magnitude of a war’s benefits, and in particular with the moral significance of its just causes. A level of harm to civilians that would be permissible in war against a genocidal enemy such as Nazi Germany could not be permissible in the Falklands or Kosovo War.”<sup>34</sup> Similar claims have been made by politicians, for example with regard to the armed conflict in Afghanistan that emerged after the 9-11 attacks on the Twin Towers in New York. When making the distinction between fighters and civilians is difficult, “there is a temptation to (...) insist that as the terrorists and their supporters caused the war, the blame for all its destruction must lie with them, a temptation to which US Secretary of Defence Donald Rumsfeld occasionally succumbed.”<sup>35</sup> Similarly, in the eyes of the general public, “the tolerance of collateral damage would be very different for an invaded nation in the desperate state of survival compared to a state participating in war for economic gain.”<sup>36</sup>

In legal terms, it may, first, be argued that if a military operation has been initiated with the purpose of defending, or even saving the civilian population, it seems contrary to the (*ius ad bellum*) purpose of that operation to apply the IHL proportionality rule that permits civilian casualties that are not excessive. Whether this is the case is explored in the following section. A second area where a relationship between IHL and *ius ad bellum* proportionality seems possible, is in the hypothetical situation in which a very large operation is launched that leads to huge, and extensive civilian damage, which is however not excessive compared to the military advantage that is sought with that operation. The expected devastation caused by this attack may however lead to the conclusion that the attack is disproportionate under *ius ad bellum*. An example could be a massive counter attack in response to a rather minimal initial attack.<sup>37</sup> A number of legal difficulties are connected to the latter situation, including the fact that there is a different definition of the term ‘armed attack’ in the two legal frameworks, and also the divergence of opinion among experts of whether the question of proportionality under the rules of the *ius ad bellum* is still relevant after the armed conflict has started. This is the subject of Section 8.2.4.

■  
34 Hurka 2008, p. 135.

35 Bellamy, p. 180.

36 Reynolds, p. 88.

37 Cannizarro 2006, p. 785.

### 8.2.3 Proportionality in the *Ius ad Bellum* Influencing IHL Proportionality in Operations to Protect Civilians

In the situation in which the goal of a military operation is to protect the lives of civilians, it seems counter-intuitive to allow for incidental civilian casualties, or damage to civilian structures. It would seem that in these types of situations, not only the proportionality principles of the *ius ad bellum* and IHL apply, but also the proportionality principle in IHRL plays a role.<sup>38</sup> After all, it is disproportionate disregard for the (human) right to life of the suffering civilian population that may invoke other States to instigate a humanitarian intervention on behalf of these civilians. Leaving aside the question whether such an operation would be lawful under the *ius ad bellum*, the intervening forces are confronted with the dilemma that IHL would permit them to cause collateral civilian casualties even though the protection of these same civilians was the ultimate goal and purpose of the operation, instead of the usual goal of warfare, which is to overcome the enemy. It is precisely this different purpose of the operation that could theoretically call for a different application of the IHL proportionality rule, arguably because the military necessity component of the regulatory framework is different, in the sense that the purpose of the operation is not a military defeat of the enemy,<sup>39</sup> but rather the protection the civilian population. That different purpose is at odds with the usual military necessity policy underlying IHL, which is usually balanced against that of humanity. It may be argued that when the military necessity policy component is different, this would also lead to a different balance between the foundational policies, and thus to different rules and principles. There were indeed critical comments on the application of IHL proportionality rule during the NATO air campaign in Kosovo in 1999, which caused significant damage to civilian infrastructure and civilian casualties.<sup>40</sup> Even among the NATO allies and Members of the UN, disagreement emerged during the intervention because of “the destruction of civilian infrastructure and bridges, and damage to the environment.”<sup>41</sup>

In an extreme case, it seems pointless to oust an abusive government from a certain territory, or urge it to stop its violations of human rights, if the operation leads to the non-excessive, but nonetheless widespread, perhaps even virtually total, destruction of the main cities, means of economic development, cultural heritage and other objects that are important to the survival of the civilian population. In that case, one may wonder which was

38 See for example Francioni: “Closely linked to proportionality [to use force for the purpose of a non UNSCR mandated humanitarian intervention] is the condition concerning the respect of humanitarian law applicable to armed conflicts. It is axiomatic that recourse to military force in the name of advancing the moral and legal ideal of the rule of law and human rights cannot be practiced in disregard of the principles of humanity and of the rules of *ius in bello*. Adherence to these principles and rules must, thus, be considered a yardstick to measure the authenticity of the intent of the intervening state to improve the rule of law with respect to the international protection of human rights.” See Francioni 2005, p. 286.

39 St. Petersburg Declaration, preamble: “That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy”.

40 See for example Laursen: “if Operation Allied Force is legally justified as a humanitarian intervention, i.e. to save the Kosovar-Albanian population, it would be hard to justify an allocation of the risk of casualties onto the Kosovar-Albanian population in order to avoid losses among NATO pilots.” See Laursen, p. 811

41 Francioni 2005, p. 289-290.

the bigger evil. It could be argued that this would mean that the IHL proportionality rule in this type of operations should be understood to proscribe that the planned attack could only go ahead if no collateral damage at all is expected to result from it. It is submitted that this additional restraint would distort the traditional, and delicate balance in IHL between considerations of humanity and military necessity. In addition, requiring only one party to an armed conflict to apply a stricter IHL proportionality rule would be contrary to the principle of equal application of the law, which is crucial to the credible implementation IHL. Therefore, it is submitted, causing collateral damage in this type of operation that is not excessive under IHL, cannot in any case because of reasons outside IHL, be explained as a violation of the IHL proportionality rule, no matter the ultimate purpose of the operation.<sup>42</sup>

However, a unilateral decision of the humanitarian intervener to apply the IHL proportionality rule stricter in the situation where the armed conflict is conducted for 'humanitarian reasons', i.e. to stop mass violations of IHRL, is still possible for reasons of policy.<sup>43</sup> Similar to this is the policy choice not to allow for any, or in any case less, collateral damage during a counter-insurgency operation, where a large component of the aim of the operation is to assure that the sympathy of the civilian population is won. In a counter-insurgency operation, causing collateral damage may still be in accordance with the law, but counter-productive in terms of the purpose of the operation. It is for this reason that the leadership of the ISAF operation decided in 2006 that there would be a zero-civilian casualty policy applicable in the conduct of the ISAF operation in Afghanistan.<sup>44</sup> It must be noted that causing collateral damage that is non-excessive under IHL during an armed conflict of this type does logically not lead to a violation of the IHL proportionality rule, but it could in some instances be seen as a violation of national regulations instead.

Therefore, to conclude, even though it seems that there is a relationship between the manifestations of proportionality in the *ius ad bellum* and in IHL, this must certainly not be understood as an alteration of the IHL rule on proportionality. For that reason, the relation between these two manifestations of proportionality cannot be understood as an inspiration or interpretation of the IHL rule on proportionality. With regard to the *ius ad bellum*, it must be noted that it seems possible that extensive civilian collateral damage during a humanitarian intervention type of operation leads to a different outcome of the *ius ad bellum* proportionality calculation if that collateral damage is in direct contrast to the overall goal of the operation under the *ius ad bellum*. The next section explores the influence of the IHL proportionality rule on the proportionality requirement under the *ius ad bellum*.

42 See also Kretzmer: "Use of force may be disproportionate under *jus ad bellum* even if all forcible measures are compatible with *jus in bello* in general, and the proportionality principle in *jus in bello* in particular." See Kretzmer 2013, p. 240.

43 Bartels 2009a, pp. 223-226. According to Bartels, this could be done by using a restrictive definition of the concept of a military objective, by restricting the acceptance of collateral civilian damage and "force protection tactics should be weighed against this rationale".

44 See Petraeus, Counterinsurgency Handbook: U.S. Army Field Manual No. 3-24, 15 December 2006: "An operation that kills five insurgents is counterproductive if collateral damage leads to the recruitment of fifty more insurgents." Available online: <https://www.hsdl.org/?view&did=468442>. See pp. 1-25.

### 8.2.4 The IHL Proportionality Rule Influencing the *Ius ad Bellum* Proportionality in Terms of the Magnitude of the Permissive Collateral Damage

As discussed in Chapter 5, it is controversial whether the *ius ad bellum* proportionality requirement must be met not only at the outset of a defensive action, as Dinstein argues<sup>45</sup>, or also throughout the ensuing military operation.<sup>46</sup> Greenwood argued in 1983 that the modern *ius ad bellum* not only applies to the act of commencing hostilities, but also in an overall context during the course of hostilities.<sup>47</sup> It is submitted that the latter view is more convincing because the magnitude of the armed force actually used does play a role in the requirement of proportionality under the *ius ad bellum*, thus it has logically to be applied not only before the actual start of the war, but also continuously during the course of it.<sup>48</sup> This entails that the proportionality requirement applies throughout the use of force in self-defense, balancing the objective to stop the hostile actions of the intervener against the armed force employed to achieve that result. In this situation of concurrent application of the *ius in bello* and *ius ad bellum*, it may be argued that the application of the IHL proportionality rule plays a role in determining whether the use of armed force in self-defence is still proportionate under *ius ad bellum*.

In contrast to the IHL proportionality rule, the *ius ad bellum* proportionality requirement must take into account the total damage, including both the damage to the military capabilities of the opponent *and* to civilian objects as well as civilian casualties.<sup>49</sup> This is valid for the purpose of the *ius ad bellum* both before the launch of an operation or an actual attack, as well as after the operation is concluded. For that reason, it seems that Greenwood was right when he wrote that “the concept of self-defence may impose serious restrictions upon the right of a state to attack what, in terms of IHL, is a legitimate military target”<sup>50</sup>, including, again in terms of IHL, non-excessive civilian damage that may result from an attack on a valid military target under IHL.<sup>51</sup> But that fact does as such not alter the separate outcome of that IHL proportionality calculation. Proportionality operates under the *ius ad bellum* both for the destruction of military objectives as it does for civilian objects, regardless of the question whether that civilian damage was caused during a direct attack on a civilian object, or on a military objective, and the civilian damage was non-excessive under the IHL proportionality rule.

45 Dinstein 2012, p. 262.

46 Gazzini, p. 147, see also Gardam, 1993, p. 404.

47 Greenwood 1983, p. 16.

48 Gardam 1999, p. 277.

49 See for example Dinstein 2012, p. 216: “Unlike the *ius in bello*, the *ius ad bellum* does not recognize a difference between attacks against lawful targets (...) and unlawful targets”.

50 Greenwood 1989a, p. 279.

51 See also Gill 2016, pp. 101-119.

A situation during which this can manifest itself is when a very large operation is launched that leads to huge, and extensive civilian damage, which is however not excessive, compared to the military advantage that is sought with that operation. In theory, the situation is possible that the initial attack leads to a counter-attack in self-defence, which is planned to achieve a militarily very advantageous objective, for example to annihilate all military headquarters and senior military leaders of the opponent. Such an attack could lead to corresponding substantial civilian damage and casualties, because of the massive expected military advantage of that attack under IHL. Therefore, the IHL proportionality principle under is observed, but the sheer magnitude of the attack may nonetheless lead to a violation of *ius ad bellum* when the armed force employed in response exceeds what is necessary to stop the initial armed attack and the further threat. Greenwood notes that “[p]articularly in a conflict that is still at a very limited stage, an attack upon a military target that causes serious loss of life and damage may again represent an unjustifiable escalation of the armed conflict.”<sup>52</sup> Greenwood subsequently provides the example of the sinking of the Argentine cruiser *General Belgrano* during the Falklands conflict, maintaining that this was a necessary measure of self-defence in the context of that conflict.<sup>53</sup>

One important difference is the applicability *ratione tempore* of the two rules. By definition, the IHL proportionality rule applies *ex ante* as well as throughout that attack, or series of related attacks. The proportionality rule under the *ius ad bellum* may be understood as applying throughout the use of armed force in self-defence, or even in retrospect.<sup>54</sup> The application of the IHL proportionality rule *ex post* makes no sense as far as the rule is concerned, except for the fact that in cases where indeed collateral civilian damage has occurred that seems excessive at first sight, this may prompt the further investigation into the attack at hand. Relevant factors that need to be addressed in that investigation would then be the information that the commander who ordered the attack reasonably had to take into account. This also entails that the level of authority that may made a decision on proceeding with an attack may be different for the two legal frameworks. The military commander who decides to launch an actual attack is mostly on the tactical level, whereas the decisions on the proportionality of the overall operation under the *ius ad bellum* are taken on a more strategic level. As Lubell puts it: “[t]he *ius ad bellum* proportionality test is one that must be applied in a wider context, measuring the overall scale of the response in light of the legitimate aims, rather than focusing on specific military attacks.”<sup>55</sup>

52 Greenwood 1989a, p. 279.

53 See Greenwood 1983, p. 18.

54 Schachter, 1984, p. 1637.

55 Lubell in a post on the EJILtalk weblog: see <http://www.ejiltalk.org/comments-on-david-kretzmers-the-inherent-right-to-self-defence-and-proportionality-in-jus-ad-bellum/>

In her critique on the Goldstone Report of the Israeli operation 2008-2009 *CastLead* in Gaza, Blank explains that the drafters of the Report misunderstood the way the proportionality principles in *ius ad bellum* and *ius in bello* may interact. She states that the Goldstone Report “uses conclusions about attacks purportedly violating the *jus in bello* principle of proportionality to conclude that Israel’s overall use of force was a disproportionate response under the *ius ad bellum*”.<sup>56</sup> Blank furthermore states that in the *ius ad bellum* proportionality requirement, “civilian casualties play no role.”<sup>57</sup> That last statement may be invalid, because there is no reason why the damage to civilian objects and civilian casualties would not be included in the estimation whether the attack it caused exceeds what is necessary to stop the initial armed attack of the intervening side.<sup>58</sup> Blank however correctly adds that even if certain specific attacks were disproportionate under *ius in bello*, this has not necessarily any influence on the legality under *ius ad bellum*, because the factors that need to be balanced under *ius ad bellum* are manifestly different from those that are under consideration in the IHL proportionality equation.

It is submitted that, it is certainly possible that *ius ad bellum* proportionality considerations impact on the legality of the conduct of hostilities by a State under IHL.<sup>59</sup> In particular, it seems that in operations that have as their purpose to protect the civilian population, such as a humanitarian intervention operation as described in Section 8.2.3, the fact that there is excessive collateral damage under IHL, does make a difference for the outcome of the *ius ad bellum* proportionality calculation.<sup>60</sup> After all, since the *ius ad bellum* proportionality equation relates to the overall aim of the operation, which is protecting those civilians rather than defeating the opponent, causing collateral civilian damage will always impact on the legality of the operation under the *ius ad bellum* in a negative sense. This impact will obviously be larger when the collateral damage is excessive under the IHL proportionality rule, but that does not mean that there is necessarily a relation between the two proportionality calculations. If an attack causes excessive collateral damage on a tactical level under IHL, this is always illegal conduct under IHL, but not necessarily under the *ius ad bellum* proportionality requirement. If an attack is likely to cause non-excessive collateral damage on the tactical level, but is disproportionate on the level of the *ius ad bellum*, it is only a violation of the latter legal framework. As a result, the situation is also possible that an attack is illegal under both legal frameworks, or under neither, depending on the factual situation.

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56 Blank 2010, p. 381.

57 Blank 2010, p. 382.

58 See for example Dinstein 2012, p. 216: “Unlike the *ius in bello*, the *ius ad bellum* does not recognize a difference between attacks against lawful targets (...) and unlawful targets”.

59 Greenwood 1999, p. 286.

60 See also Gardam 2004, p. 25.

### 8.2.5 Sub-Conclusion

Cannizzaro states that the humanitarian implications of the use of armed force by States must be considered in order to determine the standard of security international law allows them to pursue by that armed force. He then concludes that the proportionality rule “must be regarded as part of the proportionality test under *ius ad bellum*.”<sup>61</sup> It is however submitted that this conclusion goes too far. Instead, since both proportionality requirements need to be satisfied within their own frameworks, the conclusion is that there is not necessarily an integrating relationship between the two rules on proportionality in the frameworks of the *ius ad bellum* and IHL, but that they operate in parallel. The result of this conclusion is therefore that not only the rules of IHL matter for the actual conduct of hostilities, but in addition also considerations of the *ius ad bellum* may impact on the overall legality of actual operations, albeit only under the *ius ad bellum*.<sup>62</sup> This perhaps asks more from decision makers on the strategic level than they may realise.<sup>63</sup> In particular, it may result in a conclusion that they need to realise that it is their responsibility to sometimes prevent their armed forces from executing certain attacks even though these would be perfectly legal under IHL, for example because they only attack military objectives, and expect to cause no excessive collateral damage to the civilian population. Here the *ius ad bellum* proportionality rule provides an extra layer of protection to the civilian population, but this protection is not based on IHL, but on the *ius ad bellum*. A last remark that may be relevant to indicate how the two types of proportionality analyses interrelate, is that in IHL, the analysis needs to be conducted not only on a tactical level, but also on a grand strategic level. It could be said that on that latter level, the analysis gets nearer to the *ius ad bellum* proportionality analysis, except for the fact that the *ius ad bellum* takes not only damage to civilian objectives into account, but all damage.<sup>64</sup>

### 8.3 IHRL and IHL Proportionality

An alternative possible interaction may be found between the concepts of proportionality as they apply in the legal frameworks of IHRL and IHL respectively. As was explained above in Chapter 5, IHRL applies in both peacetime as during times of armed conflict, while (the

61 Cannizzaro 2006, p. 792.

62 Cannizzaro disagrees with this conclusion: “this conclusion is not entirely persuasive. Indeed, the strict application of the standards of one system may prevent the purposes of the other from being fully realised. This consequence derives from the different historical origins and from the different logical structures of the two systems.” Therefore, Cannizzaro proposes that “the two groups of rules may be considered as sub-systems of a coherent and complete normative system regulating the use of force. In this context, proportionality must be applied as a unitary standard that takes into account the purpose of the military action as well as countervailing humanitarian interests.” See Cannizzaro 2000, p. 471.

63 For an illustration, see Gardam 2004, p. 21.

64 See for example Bohlander and Rothe 2011, pp. 245-261, for an overview of the history of the targeted killing of leadership, arguing that this would be a situation of “overlap” between *ius in bello* and *ius ad bellum*. See Bohlander and Rothe, p. 248.

by far largest portion of) the rules of IHL only apply in the latter situation. Therefore, both legal frameworks apply concurrently and both frameworks deal with the question whether lethal armed force may be used in a particular tactical situation. Although this chapter refrains from an analysis *in extenso* of the exact relation between IHRL and IHL,<sup>65</sup> this section provides a short overview of the majority views and some alternative views that matter for the discussion at hand, which is the possible relation between the manifestations of proportionality in the two legal frameworks.

### 8.3.1 The General Relationship between IHL and IHRL

A preliminary question before a meaningful analysis of the manifestations of proportionality in IHL and IHRL may be conducted is the relation between these two legal frameworks in more general terms.

A first factor of note here is the fact that historically, the two legal frameworks have developed separately.<sup>66</sup> The first major codifications of the rules of IHL<sup>67</sup> took place in the years 1863-1868 with the adoption of the Lieber Code in 1863, the first Geneva Convention of 1864 and the St. Petersburg Declaration of 1868. IHRL was first codified in the aftermath of the Second World War with the conclusion of the Universal Declaration of Human Rights. Before its codification, human rights were mostly found exclusively in domestic law, as an exclusively internal affair of States.<sup>68</sup> The first signs of a closer relationship between the two legal frameworks came to the surface during the 1968 Tehran International Conference on Human Rights.<sup>69</sup> By that time, the majority of the basic rules and principles of both legal frameworks had already been adopted. However, subsequent treaties show the first signs of similar rules crossing over.<sup>70</sup>

The type of legal relationship that IHL and IHRL regulate is inherently different on the conceptual level. The former is based on the basically horizontal situation in which two parties to the conflict acquire rights and obligations towards each other, both on the grand strategic level of States, and on the tactical levels of individuals. The rules of IHL thus regulate predominantly the relationship between two equal entities, as is exemplified by the principle of equal application of the rules of IHL to the parties to the conflict. The legal framework of

65 For an extensive study on the relation between IHRL and IHL, see Pouw 2013. See also Sassòli and Olsen, pp. 599-627, Gill 2014, pp. 335-350, Lubell 2007, 648-660, Krieger 2017, pp. 267-293, Hampson 2013, pp. 185-213, Droege 2008, pp. 501-548 and Prud'homme 2007, pp. 356-395.

66 See however Van Dijk, unveiling a much closer link between the historic development of IHL and IHRL.

67 It must be noted that the codification of maritime *ius in bello* had already started earlier, through the adoption of the 1856 Paris Declaration Respecting Maritime Law, see Roberts and Guelff, p. 47-52.

68 Droege 2007, p. 313.

69 Respect for Human Rights in Armed Conflicts. Resolution 2444 (XXIII) of the United Nations General Assembly, 19 December 1968, reprinted in Schindler and Toman, *The Laws of Armed Conflicts*, pp.345-350.

70 See for example the codification of article 75 of API on fundamental guarantees that are inspired by IHRL and the reference to the rules of IHL in article 38 of the 1989 Convention on the Rights of the Child.

IHRL, on the other hand, regulates the relation between a State and the individuals under its jurisdiction. This relation may be characterised as a vertical relation between unequal entities: the relation between the State and the persons under its jurisdiction.<sup>71</sup> In addition, as mentioned above, IHRL is designed to be applicable at all times, whereas IHL, with a few exceptions, only applies during armed conflict.

A substantial difference between IHL and IHRL is the stark contrast between the ground rules of the two legal frameworks. IHRL is built on the right to life and tailored to protect individuals,<sup>72</sup> whereas IHL takes the right to kill as its basic starting point, in a balance between the protection of civilians and the military reality of armed conflict. Another difference is that many IHRL instruments may be derogated from in times of emergencies, including during armed conflict. IHL does not provide for such a possibility: once it is applicable, States can not disregard the rules through a formal procedure.<sup>73</sup> Even though the differences play a role to define the relationship between the two legal frameworks, there are clearly also important similarities between IHL and IHRL. The most basic similarity between both legal frameworks is their shared ideal, in the sense that they both aim to enhance the protection of human dignity.<sup>74</sup> For IHRL, this is evidenced in the preambles of the ICCPR and ICESCR.<sup>75</sup> In IHL, both the general Martens Clause (see above, Chapter 3) and multiple specific provisions demonstrate this basic purpose of IHL.<sup>76</sup>

### 8.3.2 *Lex Specialis* and Complementarity

As was mentioned in Chapter 5, it is now without debate that the start of an armed conflict does not mean that the rules of IHRL cease to be applicable, even if simultaneously the rules of IHL become applicable.<sup>77</sup> This is proven by the fact that most, but not all, IHRL instruments contain a system of derogation that may be used in times of armed conflict.<sup>78</sup> It would make no sense to allow States to derogate from their obligations under IHRL if these obligations

71 Some commentators are in favour of attributing IHRL obligations to non-State entities. See for example Clapham 2006, pp. 491-523, Fortin 2017 and Pouw, p. 331.

72 See also Sivakumaran 2010, p 524, explaining that the IHRL right to life is “fundamental to international human rights law, the supreme human right on which all others are built.”

73 Even if States would renounce their treaty-based obligations, rules of customary IHL continue to apply.

74 Droege 2007, p. 312. See also Sivakumaran 2010, p. 525.

75 “Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Recognizing that these rights derive from the inherent dignity of the human person”

76 See for example common article 3(1)(a) and (c) of the Geneva Conventions I-IV and article 75(1) and (2) of API.

77 See for example the ICJ Nuclear Weapons Advisory Opinion, the Wall Advisory Opinion, the ICJ Case Concerning Armed activities on the territory of the Congo, The UN Human Rights Committee, General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the ICCPR. See also the 2006 Report of the International Law Commission Study Group on the Fragmentation of International Law, para 104. See also Droege 2007, Hampson 2008, Kleffner 2013 and Gill 2014.

78 See for example art 4 ICCPR, art. 15 ECHR, article 27 ACHR.

would not be applicable in times of armed conflict in the first place. In addition, both article 72 API and the preamble to APII directly refer to IHRL. The simultaneous applicability of both legal frameworks thus follows both from the rules of IHL as it does from the rules of IHRL. As Droege puts it: “It also flows from the very nature of human rights: if they are inherent to the human being, they cannot be dependent on a situation.”<sup>79</sup> However, this does not mean that the application of IHRL during armed conflict “is a lock-stock-and-barrel exercise”.<sup>80</sup> Instead, the analysis must focus on the specific rights and situations in which the applicability of IHRL during armed conflict is analysed, and it includes the question of “whether particular [IHRL] provisions are in common sense terms amenable to reasonable application in armed conflicts.”<sup>81</sup>

The ICJ has pointed to the issue that in the event of the simultaneous applicability of IHRL and IHL to a certain situation, three scenarios are possible: “some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law, yet others may be matters of both these branches of international law.”<sup>82</sup> In matters where only one, but not the other legal framework provides legal rules, the simultaneous applicability of both legal frameworks poses no difficulties. An example is the detailed IHL provisions to protect prisoners of war and medical personnel and installations. IHRL is silent on most of these matters. However, if a right is grounded in, and governed by, both the rules of IHL and IHRL, the concurrent application of both IHL and IHRL must be resolved to assess whether the IHL or IHRL rule takes precedence, or whether the concurrent rules complement each other. Examples of rights that are regulated by both bodies of law include the rules on torture and other cruel, inhuman, or degrading treatment of detainees.

It has been argued that there are generally more than one way to solve the legal problems that may arise from the concurrent application of the legal regimes of IHL and IHRL.<sup>83</sup> The first is to maintain that IHL applies in armed conflict and IHRL in peacetime. Although this has been the prevailing view during preceding decades, this approach is presently the minority view.<sup>84</sup> A second view, that also represents the majority view, is the view that there is a complementary relationship between IHRL and IHL.<sup>85</sup>

The view that the rules of IHL and IHRL complement each other, it is submitted, is not only the most logical and intuitive solution to the concurrent application of the two legal framework, but in particular the legally sound solution, in accordance with

79 Droege 2007, p. 324.

80 Bethlehem 2013, p. 187.

81 See Bethlehem 2013, p. 187, and p. 191, where Bethlehem concludes that very few ICCPR provisions “are amenable to reasonable application in situations across the board. As a rule of thumb, the closer one gets to the battlefield the less amenable to reasonable applications are most provisions of the ICCPR.”

82 Nuclear Weapons Advisory Opinion, para 106, p. 226.

83 Gill 2014, p. 339.

84 Gill 2014, p. 339, referring to Israel and the United States as the last States that support this ‘separatist’ view.

85 Sivakumaran 2010, p. 521. Gill 2013, p. 255, Droege 2007, p. 355, Pouw, p. 99

general international law, applying complementarity as method of interpretation.<sup>86</sup> The complementary view entails that IHL and IHRL mutually reinforce each other,<sup>87</sup> allowing both legal frameworks to be interpreted “in accordance with the ordinary meaning to be given (...) in their context and in the light of their object and purpose.”<sup>88</sup> Sivukamaran notes four factors that indicate the value added of the complementary application of the rules of IHRL to IHL: the difference in substantive content; the fact that often States deny the applicability of the rules of IHL because of claims that a situation fails to amount to an armed conflict; the IHRL-based duty to investigate when loss of life has occurred, and the IHRL enforcement mechanisms that are superior to those of IHL.<sup>89</sup> Droege adds that thanks to complementarity, IHRL “can often benefit from the more narrowly applicable, but often more precise rules of humanitarian law [, and IHRL] has become increasingly specific and refined through a vast body of jurisprudence and the details of interpretation can influence the interpretation of humanitarian law, which has less interpretative jurisprudence at its disposal.”<sup>90</sup>

Nonetheless, in some instances, the concurrent applicability of IHRL and IHL leads to a conflict of norms. The ICJ has determined that for those situations, the *lex specialis* principle is one instrument to reconcile the rules of the two legal frameworks.<sup>91</sup> It does not follow from the *lex specialis* rule that the entire body of IHRL is displaced in case of applicability of IHL.<sup>92</sup> Instead, the *lex specialis* rule means that the applicable rules pertaining to the individual right need to be analysed in order to find the more specific rule.<sup>93</sup> In addition, the existence of rules in both legal frameworks entails an analysis of whether these rules provide inconsistent or competing outcomes. In case the only difference is that the more specific rule elaborates a more general rule in the other legal framework, there is no conflict of rules, but merely a situation in which the rules of one legal framework complement the rules of the other. In these types of situations, however, the specific context of the applicable rule must be taken into account,<sup>94</sup> but, “it makes sense to apply the rule which most closely relates to or was specially devised to apply to a particular situation and/or which provides the most detailed regulation of what is allowed or prohibited.”<sup>95</sup> More in particular, the context is relevant when a situation concerns the conduct of hostilities, for which IHL is specifically designed,

86 Article 31(3)(c) of the Vienna Convention on the Law of Treaties, see also Droege 2007, p. 337.

87 Droege 2007, p. 340.

88 Article 31(1) of the Vienna Convention on the Law of Treaties.

89 Sivakumar 2010, pp. 526-529.

90 Droege 2007, p. 340.

91 First in the Nuclear Weapons Advisory Opinion, para 25, p. 240 and in the Wall Advisory Opinion, para 105, p. 178.

92 Krieger, p. 271, Sivakumar 2010, p. 533, Doswald-Beck 2006, p. 900.

93 Gill 2014, p. 343: *lex specialis* “is part of a whole bundle or system of well-established legal means of interpretation, and methods of reconciling legal instruments and conflicts of obligation when they actually arise.” See also Sassòli and Olsen: “This principle seeks to establish, through an objective standard corresponding to the regulated subject matter, a preferential order for two rules that apply to the same problem but regulate it differently.” See Sassòli and Olsen, p. 603.

94 See for example the example of the definition of torture, as mentioned by Sivakumar 2010, pp. 534-535.

95 Gill 2014, p. 340.

or when the situation concerns law enforcement by State agents, for which situation IHRL was conceived to protect individuals.<sup>96</sup>

With regard to the right to life, as was examined in Chapter 5, this is a non-derogable right under the ICCPR, and under other frameworks, such as the ECHR it can only be derogated from in very limited circumstances.<sup>97</sup> It depends largely on the context of the situation whether the strict constraints on the use of armed force of the IHRL must be applied or the more lenient framework of IHL, which allows targeting on the basis of the status of combatants or the conduct of civilians who directly participate in hostilities.<sup>98</sup> Examples of situations during which the stricter rules with regard to the use of armed force of IHRL may apply include situations of occupation, peace operations, and low intensity non-international armed conflicts.<sup>99</sup> Hampson suggests that it could be necessary to distinguish between the applicability of the rules of the respective legal frameworks to a *situation* and to an *incident*.<sup>100</sup> From this would follow that even if IHL is applicable to a situation, it does not mean that it must also be applied with regard to an incident that is clearly within the law-enforcement domain, such as policing a demonstration.<sup>101</sup>

If the thesis is accepted that the applicability of the IHRL standards depends solely on the intensity of the conflict, this seems to create an incentive for State armed forces to conduct its operations during armed conflicts in the most intensive way possible, because less restrictive rules apply. This would seem to be a counterproductive effect of the applicability of IHRL to armed conflicts. On the other hand, Lubell observes the tendency of States' unwillingness to admit the existence of an armed conflict.<sup>102</sup> Moreover, in the event of an non-international armed conflict of high-intensity, the "strict human rights standards may be at odds with reality and military necessities"<sup>103</sup>

### 8.3.3 Proportionality Relationship between IHL and IHRL

In case of armed conflict, the IHL proportionality rule applies and dictates that the relation between expected collateral damage on the one hand and expected military advantage on the other hand must be analysed in order to decide whether a planned attack can be launched

96 Droege 2007, p. 344, Melzer 2010a, pp. 43-44, Gill 2014, pp. 349-349 and Lubell 2005, p. 750.

97 See article 15 of the ECHR: that allows "No derogation from Article 2 [the right to life], except in respect of deaths resulting from lawful acts of war"

98 See generally Goldman 2013, pp. 104-116.

99 Lubell 2005, p. 750.

100 Hampson 2013, p. 209.

101 Hampson 2013, p. 211.

102 Lubell 2005, p. 749, note 52.

103 Vandenhole 2014, pp. 31-60, p. 46. See also Hampson 2008, p. 564. According to her, article 2 of the ECHR "list the only permitted grounds for opening fire. They are suited to a law and order paradigm but not to an armed conflict paradigm. In order to bring into play the additional circumstances in which it is legal to open fire in time of conflict, it would be necessary to derogate."

or must be cancelled. The IHRL proportionality rule requires an appreciation of the balance between the values that must be attributed to two factors in a given situation, at a given moment in time. These factors are (1) the expected scale of the risk to human life (of the suspect) of the contemplated use of (potentially) lethal force and (2) the nature and scale of the concrete threat to the law enforcement officer who is planning to use the armed force, and third persons. IHRL “requires the taking into consideration of the concrete circumstances of a given situation irrespective of any categorical distinction between targetable combatants or fighters and protected civilians.”<sup>104</sup>

The preliminary issue with regard to a meaningful analysis of the relation between the two proportionality principles is the question of whether there is concurrent application of the two legal rules.<sup>105</sup> As we have seen, since the rules of IHRL apply at all times, this situation only exists during armed conflict, when the rules of IHL also apply. As was noted above in Chapter 5, both legal frameworks contain a proportionality principle with regard to the use of armed force. In case there is concurrent application of the norms, the next question is whether the application of the two rules in that situation would lead to different outcomes. If this is the case, the question remains which rule takes precedence.

The first point to be made is that even though the IHL proportionality rule applies during armed conflict, this does not necessarily mean that the IHL proportionality rule is relevant at all times. It has to be reminded that the IHL proportionality rule specifically needs to be applied to attacks, and not necessarily to other types of military operations. And even when an attack is planned in a situation of armed conflict, the proportionality principle, even though it applies, is still irrelevant for attacks in a context where no civilians are present, as far as the commander planning and executing the attack is reasonably aware. This leads to the conclusion that when an attack on a person is planned, the status of this person is crucial to the relevance of the IHL rule on proportionality. In cases where no civilians are present, there is thus no interplay, and thus no relation, between the proportionality rules of IHL and IHRL. Similarly, if an attack is planned on a military object where no individuals are expected to be present, the IHRL proportionality rule is irrelevant and the IHL proportionality rule only lays a role with regard to the destruction of civilian objects. The question however remains whether the IHRL proportionality rule is nonetheless relevant during armed conflict in the case the attack is directed to combatants or civilians who have lost their protection due to their direct participation in hostilities, or alternatively, the attack is aimed at a military objective, *and* may also be expected to affect combatants and civilians who participate directly in hostilities.<sup>106</sup> In that situation, the question is whether the criteria of the IHRL

104 Geiss 2010, p. 125.

105 See also Watkin 2004.

106 For the question whether IHRL would permit causing collateral civilian damage, see Henderson and Cavanagh, p. 90-93: “[i]t is unclear whether the requirement of reasonableness [under domestic criminal law] would extend to requiring a military member to do everything feasible to assess and minimise potential death or injury to civilians prior to acting in self-defence (...) [and] it is highly likely that reasonableness under the law of self-defence imposes a higher standard of care on a military member to avoid causing any injury or death to civilians.” Particularly, “domestic law of the US clearly provides that while acting in self-defence can excuse unintentional injury or even death to a bystander, self-defence does not excuse

proportionality rule, pertaining to the risk for human life and the threat these individuals pose to the attacker, still apply once IHL has become applicable. In that situation, it may possible be argued, that the IHRL proportionality rule could provide an additional restraint on the use of force against persons who are a legitimate target under IHL. This situation is further analysed in Section 8.3.3.1.

The second situation is when an attack is planned on a military objective, be it a person or an object, and civilians may be expected to be affected by the planned attack, and thus the IHL proportionality rule must be applied. The question is whether the IHRL rule on proportionality places additional restrictions on the attacker in this situation. It will thus need to be analysed whether in that situation, the IHRL proportionality rule would provide an additional restraint on the use of force against persons who are a legitimate target under IHL *and* on civilians who may be affected by a planned attack. This situation is further analysed in Section 8.3.3.2.

### 8.3.3.1 Continued Applicability of IHRL Proportionality during Armed Conflict

In case no civilian damage or civilian casualties are expected, the question remains whether the IHRL proportionality rule is still relevant *vis-a-vis* the opposing combatants or civilians who participate directly in the hostilities. As was explained above, the answer to this question depends on the context, and cannot always be determined in a general sense. Even though the situation is concerned with the protection of the life of the individual, or the right to life, the general assumption may be justified that if the situation at hand concerns a situation of intense hostilities, the *lex specialis* rule may dictate that the IHL rule takes precedence, excluding the applicability of the more restrictive IHRL rule. In cases of low intensity armed conflicts, including occupation, the situation is more problematic.<sup>107</sup>

It must first be noted that the geographical situation in which the use of armed force is planned, makes a difference. The IHL rule on proportionality applies both in situations of an international armed conflict and in a situation of a non-international armed conflict. However, as far as the applicability of IHRL is concerned, the type of conflict matters in which the rule on proportionality is applicable.

The interplay between the proportionality rule under IHRL and IHL may become relevant when the targeted killing of so-called ‘terrorists’ is analysed. It is clear that there are some States that see counter-terrorist operations as operations within the realm of an armed

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knowingly or recklessly injuring or killing a bystander.” (Henderson and Cavanagh, p. 90-91. and accompanying notes). The conclusion drawn by Henderson and Cavanagh to the question whether it is lawful to cause injury to bystanders when using force is that it is “[u]nclear, but the better view is no, where such injury was reasonably foreseeable.” See Henderson and Cavanagh, p. 93. See also Leverick.

<sup>107</sup> See also the ICRC Report of the Expert Meeting on the Use of Force in Armed Conflicts – Interplay between the Conduct of Hostilities and Law Enforcement Paradigms.

conflict, usually if the attacking State has been the victim of terrorist attacks.<sup>108</sup> The use of the armed conflict paradigm could entail that the IHL proportionality test is employed, and when executed extraterritorially, displacing the IHRL-based restraints. In terms of recent practice of the United States (US), however, it is submitted that this approach is flawed because the extraterritorial execution of ‘terrorists’ takes place outside an armed conflict to which the US is a party. However, if an attack does occur during an international armed conflict, where a State uses armed force outside its own territory, the extraterritorial applicability of IHRL possibly becomes an issue. Without entering into the details of this debate,<sup>109</sup> it is fair to say that the concurrent application of IHL and IHRL proportionality may arise in (1) an international armed conflict in situations where a State operates on its own territory; (2) in a situation of a non-international armed conflict in which a State is assisting another State in its strife against one or more non-state armed groups on the territory of the latter State; (3) in a situation where State armed forces are conducting a peace operation abroad and the troops become a party to an armed conflict in the host-State<sup>110</sup> and (4) in situations of occupation.<sup>111</sup> Assuming however that both the rules of IHL and IHRL are applicable, the question is whether in a tactical situation it might be said that, “whenever the State has enough control over a particular situation to enable it to attempt to detain individuals, then such an attempt must be made before force can be used and non-lethal force must be favoured if possible. This argument seems to allow for retention of the standard law enforcement and human rights approach without creating impractical situations.”<sup>112</sup> These impractical situations to which Lubell refers seem to exist by definition in situations of intense fighting, whether during an international or a non-international armed conflict, during which the IHRL standard is “widely perceived as battlefield-inadequate, risky to implement and therefore unrealistic”<sup>113</sup> and as a result, “States are unlikely to accept that they must attempt to detain opposing combatants before using lethal force.”<sup>114</sup> It is submitted that the applicability of the IHRL standard of proportionality during this type of combat situations must be dismissed in its totality because it would neglect the long standing basic notion of IHL that “combatants lawfully may kill their enemies and are at constant risk of being killed by them.”<sup>115</sup> But that is not the end of the story, because the situation may be different in situations where there

108 Kretzmer 2005, p. 212.

109 Although the application of IHRL instruments is in principle dependent on the existence of jurisdiction, it is submitted that for the purpose of the present analysis, the exact scope of the extraterritorial application of the rules of IHRL is not necessarily dependent on the question whether a Human Rights Body has jurisdiction over a case that is brought before it, but rather on the question whether the respective human right can be applied in practice by an individual who belongs as a fighter to one of the parties to the conflict. For a critique of the extraterritorial applicability of IHRL: see Dennis. For the extraterritorial application of the ECHR, see the cases of Bankovic, Al-Skeini, Hassan, and Jaloud. See also Lawson, and Besson 2012.

110 See for example Vandenhoele.

111 See for example Doswald-Beck 2006, pp. 892-894.

112 Lubell 2005, p. 750, referring to a situation of non-international armed conflict.

113 Geiss 2010, p. 125.

114 Lubell 2005, p. 750.

115 Parks 2010, p. 830.

exists no reason why the rules applicable to combat operations would not be complemented by the rules of IHRL, and thus the IHRL proportionality rule would come into play.

In the context of the ICRC Interpretative Guidance on the notion of direct participation of hostilities, the issue whether IHL itself places additional restraints on targeting that are similar to the proportionality rule under IHRL, received ample attention. More in particular, Section IX of the ICRC Interpretive Guidance on the notion of direct participation in hostilities asserts:

“In addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.”<sup>116</sup>

Furthermore, Section IX states that “even direct attacks against legitimate military targets are subject to legal constraints, whether based on specific provisions of IHL, on the principles underlying IHL as a whole, or on other applicable branches of international law.”<sup>117</sup> Also, the Interpretative Guidance states that “[c]learly, the fact that a particular category of persons is not protected against offensive or defensive acts of violence is not equivalent to a legal entitlement to kill such persons without further considerations. At the same time, the absence of an unfettered “right” to kill does not necessarily imply a legal obligation to capture rather than kill regardless of the circumstances.”<sup>118</sup> The claim that there is a rule under international law to apply a least harmful means restriction on the use of armed force against persons who may be lawfully attacked under IHL is based on doctrine<sup>119</sup> and some case law.<sup>120</sup> The arguments in Section IX of the ICRC Interpretative Guidance on the notion of direct participation of hostilities are only derived from the rules and principles of IHL. Although the legal frameworks from which the arguments are derived for a least harmful means restriction on the use of armed force against persons who may be lawfully

116 Melzer 2009, p. 77. According to Fenrick, the consulted experts nor the ICRC addressed only IHL with regard to DPIH. See Fenrick 2009, p. 297.

117 Melzer 2009, p. 77. See also p. 80: “In classic large-scale confrontations between well-equipped and organized armed forces or groups, the principles of military necessity and of humanity are unlikely to restrict the use of force against legitimate military targets beyond what is already required by specific provisions of IHL. The practical importance of their restraining function will increase with the ability of a party to the conflict to control the circumstances and area in which its military operations are conducted, and may become decisive where armed forces operate against selected individuals in situations comparable to peacetime policing.”

118 Melzer 2009, p. 78.

119 See Melzer 2010c, pp. 904–913. See also Doswald-Beck 2006, p. 891.

120 See H CJ 769/02 Public Committee Against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v Israel and Others ILDC 597 (IL 2006) [2006] (‘Public Committee Against Torture’) para 40.

attacked under IHL, are distinct from those under IHRL, the practical outcome of both lines of argumentation is not.<sup>121</sup>

The critiques on the IHL-based least harmful means restriction have been fierce. In particular Parks claims that Section IX “offers arguments not based on treaty law, State practice or domestic or international case law”<sup>122</sup> and “selective research to support an argument rather than a thorough and objective analysis.”<sup>123</sup> These claims are however based on the legal framework of IHL, not IHRL. In a surprisingly short statement on arguments based on IHRL that may support the point of view of the ICRC in its Interpretative Guidance, Parks simply states that “the law of war is *lex specialis*”<sup>124</sup> when it comes to the conduct of hostilities. It is submitted that this statement is not at odds with the possibility that IHRL may provide additional constraints in a situation during which IHL is applicable, but during which there is no situation of active combat. In addition, as Melzer notes in his reply to Parks’ critique on the Interpretative Guidance, it must be emphasized that “questions pertaining to the interrelation between the various applicable bodies of law with regard to regulating the use of force in a particular situation are beyond the scope of the Interpretive Guidance.”<sup>125</sup> In his reply to Parks’ critique on Section IX of the ICRC Guidance, Melzer notes that the Guidance “recognizes that, in a situation of armed conflict, the international lawfulness of a particular operation involving the use of force may not always depend exclusively on IHL but, depending on the circumstances, may potentially be influenced by other applicable legal frameworks, such as human rights law (...)”<sup>126</sup> As a result, Melzer states that the Guidance “cannot possibly be interpreted as giving preference to a general norm of human rights law over a more specific norm of IHL.”<sup>127</sup>

Lubell agrees with Parks that the legal basis under IHL for the least harmful means restriction is “unclear”.<sup>128</sup> Similarly, Kleffner concludes that “[c]onsiderations of humanity and military necessity do not provide such a legal basis [for the least harmful means restriction under IHL]. Furthermore, the prohibition of methods of a nature to cause superfluous injury and unnecessary suffering could only supply a basis if one could derive from the practice of States an agreement that the prohibition should be interpreted in such a way. That agreement is presently absent.”<sup>129</sup> With regard to IHRL, however, Kleffner notes that:

121 According to Kleffner: “(...) human rights law clearly establishes a least harmful means requirement that bears considerable resemblance to that suggested in Section IX of the ICRC Guidance.” See Kleffner 2012, p. 47.

122 Parks 2010, p. 829.

123 Parks 2010, note 98 on page 805.

124 Parks 2010, p. 797.

125 Melzer 2010c, p. 898.

126 Melzer 2010c, p. 898.

127 Melzer 2010c, p. 899.

128 Lubell 2005, p. 750.

129 Kleffner 2012, p. 52.

“it may very well be argued that the rule that the law of armed conflict functions in the aforementioned way as *lex specialis* to human rights law in times of armed conflict is not absolute. In certain areas, human rights law may supply the more specific standards even in such times. This is notably the case in situations that, while occurring during an armed conflict, closely resemble those for which human rights standards have been developed with a higher degree of specificity. Operations during an armed conflict that for all sense and purposes are law enforcement operations provide a pertinent example. Accordingly, it has been argued that the use of force in relatively calm situations of occupation for the purpose of maintaining public order and safety, or in areas under the firm control of state authorities in times of non-international armed conflict, should be governed by the legal parameters that human rights law (as the *lex specialis*) provides for the use of force”<sup>130</sup>

Schmitt also critiques the statement on the least harmful means restriction embodied in of Section IX of the ICRC Interpretative Guidance, on the basis of IHL, particularly referencing the general principles of humanity and military necessity. With regard to IHRL, Schmitt states that although it is without debate that IHRL applies during armed conflict, “its application is conditioned by IHL.”<sup>131</sup> Schmitt subsequently points to the rule on *lex specialis* that would invoke the applicability of IHL rules as “the law applicable in armed conflict which is designed to regulate the conduct of hostilities.”<sup>132</sup> Schmitt’s statement that the attempt to “squeeze a plainly human rights norm into a restraint on attacks against direct participants under the guise of IHL”<sup>133</sup> seems however not to address the use of force in the situation where IHL applies, but active combat is absent. Instead, Schmitt states that restrictive rules of engagement in counter-insurgency operations are “grounded in policy and operational concerns and not in international humanitarian law.” Pouw reaches a similar conclusion for counter-insurgency operations<sup>134</sup> but contrary to Schmitt, Pouw acknowledges the possible applicability of restrictions on the use of force grounded in IHRL. Similarly, Sassoli and Olson state that “[i]f human rights are to provide an answer as to when a fighter may be killed, it would thus be imperative to know when military authorities, in a situation of armed conflict, are or should be exercising police powers.”<sup>135</sup> Sassoli and Olsen conclude that case law “gives no conclusive answer as to what human rights law requires of government authorities using force against fighters.”<sup>136</sup> They submit that it “is impossible and unnecessary to provide a ‘one size fits all’ answer; (...) the *lex specialis* principle does not determine priorities between two rules in the abstract, but offers a solution to a concrete case in which competing rules

130 Kleffner 2012, p. 48-49 (footnotes omitted).

131 Schmitt 2010, p. 42.

132 Schmitt 2010, p. 43.

133 Schmitt 2010, p. 43.

134 Pouw, p. 468-470.

135 Sassòli and Olsen, p. 611.

136 Sassòli and Olsen, p. 612, referring to the *Tablada Case* and the *Guerrero Case*.

lead to different results.”<sup>137</sup> They recognise furthermore that “[s]uch a flexible solution, in which the actual behaviour required depends upon the situation, is dangerous – especially in our context, where it has to be applied by every soldier and leads to irreversible results. It is therefore indispensable to determine factors which give precedence either to the rule derived from the humanitarian law of international armed conflicts or to human rights.”<sup>138</sup>

It is submitted, that there is no one-size-fits-all answer as to the issue of whether the rules on the use of force of IHRL provide an extra layer of restraint to the concurrently applicable (but less restrictive) rules on targeting based in IHL. As Sassòli and Olsen argue: “[t]he question is rather one of degree. If a government could effect an arrest (of individuals or groups) without being overly concerned about interference by other rebels in that operation, then it has sufficient control over the place to make human rights prevail as *lex specialis*.”<sup>139</sup> The determination whether circumstances are such that there is not sufficient control over the place then includes the following factors: “the impossibility of arresting the fighter, the danger inherent in an attempt to do so, the danger the fighter represents for government forces and civilians and the immediacy of this danger.”<sup>140</sup> In case-law, this conclusion is supported by the Israeli Supreme Court ruling. Kleffner notes that “[t]he Israeli High Court of Justice reached its conclusion on the basis of the principle of proportionality under domestic law and human rights law”<sup>141</sup> Melzer however states that the Israeli High Court derives its conclusion from a wider proportionality requirement, which would constitute a general principle of international law.<sup>142</sup>

In this ‘flexible solution’, the IHRL proportionality principle continues to apply during armed conflict, albeit not in a situation of active combat, but in situations where there is government control over the place.<sup>143</sup> However, IHL “remains present in the background and relaxes the human rights requirements of proportionality and warning once an attempt to arrest has been made unsuccessfully or is not feasible.”<sup>144</sup> This entails that the applicability of the IHRL proportionality rule is affected by the concurrent applicability of the rules of IHL. Pouw notes in this regard that IHL remains applicable, and if the situation would change such that hostilities emerge, the IHL-based rules are reactivated.<sup>145</sup> As Droege puts it: “[o]ne therefore has to decide whether in a situation of armed conflict, humanitarian law or human rights law applies, because certain killings that are justified under humanitarian law are not justified under human rights law. In other words, even in armed conflict, a killing can be governed by human rights law if the concrete situation is one of law enforcement.

137 Sassòli and Olsen, p. 613.

138 Sassòli and Olsen, p. 613.

139 Sassòli and Olsen, p. 614.

140 Sassòli and Olsen, p. 614 (footnotes omitted).

141 Kleffner 2012, p. 45.

142 See below, Chapter 9.

143 Sassòli and Olsen, p. 614.

144 Sassòli and Olsen, p. 615.

145 Pouw, p. 469-470.

The difficulty to decide which body of law applies is a factual one, not a legal one. While the applicable principles of either humanitarian law or human rights law are clear, it can be a matter of dispute whether a situation was in fact one of law enforcement or conduct of hostilities.<sup>146</sup> It must be concluded that this entails by no means an unified rule on the use of armed force, but instead allows for both separate legal frameworks to play their own part in the context for which they were designed to operate.<sup>147</sup> In the words of Doswald-Beck, the restrictions imposed by IHRL “are not at all incompatible with the original fundamental spirit of IHL, namely the desire to prevent unnecessary deaths.”<sup>148</sup>

As has become clear already in Chapter 5 and also above in this chapter, the applicability of the rules of IHRL on the use of armed force during an armed conflict is not without restrictions in more general terms. Kleffner notes that “to derive restraints on the use of force contemplated in Section IX of the Interpretative Guidance from human rights law is open to a number of considerable objections.”<sup>149</sup> The first of these is the legal equality of belligerent parties under IHL, because the applicability of restraints based on IHRL to non-state armed groups is debatable.<sup>150</sup> This is indeed problematic on a conceptual level, because “the reciprocal expectation of compliance by parties to an armed conflict remains one of the central motivating factors for compliance.”<sup>151</sup> Although it is indeed an important feature of the implementation system of IHL, the principle plays no role in IHRL because the vertical relation is a basic characteristic of IHRL. It is submitted therefore that the restraints based on IHRL cannot be neglected because it would tilt the balance of the equal application of IHL to the benefit of non-State armed groups. Furthermore, it seems that in practice, the impact of this inequality under the law is limited. For example, it must be reminded that IHL itself contains similar rules that lead to an unequal position,<sup>152</sup> such as the effect resulting from States criminalizing the participation to hostilities by members of non-state armed groups under their national laws.<sup>153</sup> This similarly distorts the balance of the equal application of IHL between a State and a non-State armed group. Furthermore, regardless of the equality of the application of IHL to the belligerent parties, IHL contains a number of other rules that lead to an unequal position before the law, such as the absence of an explicit authority for non-State armed groups to detain armed government officials who participate in a non-international armed conflict. Secondly, as Kleffner notes, the disputed extraterritorial applicability of IHRL leads to problems. This, it is submitted, is also correct on a conceptual level, but provides insufficient counterweight to support the conclusion that for that reason alone restraints based on IHRL, including the IHRL proportionality rule, must be ignored. After all, since

146 Droege 2007, p. 346.

147 For a creative, but flawed, attempt to merging the rules on the use of armed force under IHL and IHRL, see Martin.

148 Doswald-Beck 2006, p. 904.

149 Kleffner 2012, p. 52.

150 See generally Fortin 2017.

151 Kleffner 2012, p. 52.

152 See also Doswald-Beck 2006, p. 890.

153 See also Sassòli and Olsen, p. 615-616.

the application of the IHRL proportionality rule is dependent on the existence of a situation of control that allows for applying law-enforcement rules in the first place, there is usually also a situation in which a State may be able to exercise jurisdiction, as required by most Human Rights mechanisms. Thirdly, Kleffner states that the “holistic understanding of the applicability of human rights law” may perhaps not “allow for a graded approach to the use of lethal force along the lines suggested in Section IX of the ICRC Guidance”.<sup>154</sup> This refers to the view that human rights obligations cannot be ‘divided and tailored’ to each situation, but apply as a total system, as was expressed by the European Court of Human Rights (ECHR) in its *Bankovic* Judgement.<sup>155</sup> The ECHR however has explicitly reversed its view on this particular topic, holding that those rights must be secured which are particularly relevant to a certain situation.<sup>156</sup> Logically, this has different consequences in different situations. As the ECHR has acknowledged in *Al-Skeini*, where there is effective control over a certain territorial area, such as in a situation of occupation, the occupying power is in a position to secure the complete range of human rights, whereas that will not be the case when the jurisdiction is more incidental with regard to its temporal and geographical extraterritorial scope.<sup>157</sup> A further issue is obviously that the case law of the ECHR does in a general sense not apply to States that are not a party to the European Convention of Human Rights. The regional division of the different IHRL treaties further complicates providing a coherent interpretation of the rights and obligations under IHRL with regard to the use of armed force.

### 8.3.3.2 Concurrent Applicability of IHRL and IHL Proportionality

As was identified in the previous section, it seems possible that the IHRL-proportionality remains applicable in situations where IHL is also applicable, even if the IHL-proportionality rule plays no part because there are no civilians likely to be affected by a planned attack. This section is concerned with such situations during which civilians are expected to be affected by a planned attack outside active combat, and where a situation of sufficient control exists for the attacking side. To recall, in this situation, it cannot be said that the legal framework of IHL, as *lex specialis*, always supersedes or sets aside the IHRL rules with regard to the use of armed force that may also apply in armed conflict. The proportionality rules of both legal frameworks may be concurrently applied when an attack is planned on a military objective,

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154 Kleffner 2012, p. 52.

155 *Bankovic*, par 75: “the Court is of the view that the wording of Article 1 [ECHR] does not provide any support for the applicants’ suggestion that the positive obligation in Article 1 to secure ‘the rights and freedoms declined in Section I of [the] Convention’ can be divided and tailored in accordance with the particular circumstances of the extraterritorial act in question”

156 See *Al-Skeini*, para 137: “whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be ‘divided and tailored’”

157 *Al-Skeini*, para 136-139.

be it a person or an object, and civilians may be expected to be affected by the planned attack, and thus the IHL proportionality rule must be applied. The question is therefore whether the IHRL rule on proportionality places additional restrictions on the attacker in this situation. It thus needs to be analysed whether in that situation, the IHRL proportionality rule would provide an additional restraint on the use of force against persons who are a legitimate target under IHL *and* on civilians when it is expected that they may be affected by a planned attack.

In the situation where the principles of proportionality under IHL and IHRL apply concurrently, the difference is that the IHRL proportionality principle provides restraints to the use of force against both the civilians present at the scene, and the combatants or civilians who participate directly to the hostilities. The IHL proportionality rule does not provide further protection to persons who constitute a legitimate military target. There is thus a relation possible between the two proportionality principles only with regard to the civilians who are present at the scene. However, when the situation is concerned with the direct attack of a civilian, IHL contains a clear-cut prohibition to directly attack civilians, provided the civilians are not directly participating in hostilities. Melzer notes in this regard that “particularly in small-scale operations, human rights law is not necessarily more protective than IHL [because] human rights law allows the use of lethal force against anyone where this is ‘absolutely necessary’ for a legitimate purpose. IHL, on the other hand, prohibits direct attacks against certain categories of persons in absolute terms, that is to say, even in case of ‘absolute necessity’ for a legitimate purpose.”<sup>158</sup>

Planners and executors of the attack will have to decide what type of operation they will pursue. In cases like this, Melzer’s theory on the paradigm of law enforcement and the paradigm of hostilities makes sense.<sup>159</sup> If the planned operation is directed against civilians, it is prohibited under IHL, provided the civilians are not directly participating in hostilities and as far as IHRL is concerned, it can only be planned as an operation to kill the civilian if the stringent restraints of necessity, proportionality and immediacy are satisfied. Given the fact that in this scenario the applicability of IHRL is assumed, the operation cannot be planned with the *a priori* purpose to kill the civilians.

An example is the situation when it becomes known to the regional military commander during a non-international armed conflict, that the commander of the non-state armed group is present during a certain limited period of time in the house of his brother. The house is located in a town the government has under its control and where there is a functioning law-enforcement apparatus of the local police. It is assumed that the rebel commander is a military objective who has lost his protection under IHL as a civilian, because his position in the armed group presupposes that he is continuously participating in the hostilities due to his (continuous combat) function, being in charge of the armed operations against the government forces. It is also known that the brother of the commander is present, and his son. Both the brother and his son are civilians, being a baker and a shop-owner. According

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158 Melzer 2008, p. 384.

159 See for example Melzer’s discussion in Melzer 2010a, pp. 33-49.

to the legal framework of IHL, the military commander may be directly attacked, because he has lost his protection as a civilian. The two civilians present in the house, as well as the house itself, would count as collateral damage in case the house would be directly attacked as a whole, for example using a bomb dropped from the air, or a small team of Special Forces. Whether the expected collateral damage is excessive in this situation compared to the military advantage of killing the rebel commander arguably depends on more aspects of the proportionality calculation than the scenario provides. It is however presumed that the attack may be deemed to be proportionate in this scenario, on the basis of IHL. However, since the government has control over the area, it has been submitted in the previous Section, that the rules of IHRL also apply in this law-enforcement situation. The rules on the use of armed force under IHRL proscribe that the stringent restraints of necessity, proportionality and immediacy must be applied to this situation, with regard to any plan to capture or, if the commander proves to pose a threat to the government forces during the attempt to arrest him, possibly kill the commander. In addition, IHRL also protects the civilians present in the house. It may be argued therefore with regard to the rebel commander in this scenario that the IHRL proportionality rule provides an additional layer of protection to him, as explained in the previous section. With regard to his brother and nephew, the applicability of IHRL implies that they are not only protected by the IHL proportionality rule, but also by the IHRL proportionality rule. The question in this situation where concurrent applicability of the IHL and IHRL proportionality rules exists, is which rule prevails, or whether they must both be applied, providing further restrictions on the military commander planning an operation against the rebel commander. If the protection provided by the IHL proportionality rule is analysed in this scenario, it appears that whether his brother and nephew are successfully protected by the IHL proportionality rule, depends mainly on the question of how military advantageous it is to kill the rebel commander. In particular, the customary IHL rules with regard to precautions in attack apply here in the sense that it may prevent the attack to be carried out in accordance with IHL using an air-delivered bomb that would destroy the house and kill the persons in it. But with regard to the IHL protection of the brother and the nephew of the commander, it is clear that their protection under IHL is not particularly dependent on themselves, notwithstanding their civilian status and protection, but on other factors, particularly the military value of the rebel commander. It must be noted in this regard that the military advantage under IHL is presumably larger when he is arrested instead of killed, based on the presumption that he may be able to provide the military commander with valuable information about the rebels' operations. The protection for the two civilians in this scenario on the basis of IHRL proportionality, on the other hand, is based on the question of whether a situation of 'absolute necessity' exists to using armed force that would affect them. That means that the magnitude of the force that may be used in order to arrest the rebel commander is additionally restrained by the protection on the basis of the IHRL proportionality rule for the two civilians who are present.

To summarize, the military commander planning an operation against the rebel commander in the scenario described above, has an obligation to attempt to capture him, rather than to kill him, as long as the situation remains under his control and remains within the realm of a law enforcement situation. This obligation is based:

1. on the IHRL proportionality rule that protects the rebel commander;
2. on the IHRL proportionality rule that protects the two civilians;
3. on the IHL proportionality rule that protects the two civilians who are present;
4. and on the basis of the underlying policies of IHL and IHRL, which dictate that the most protective regime (for the civilian population) must be applied, and the use of force would thus become dependent on the (imminent) threat.

With regard to the third factor, it must be noted that the IHL-based proportionality rule certainly provides no conclusive prohibition to attack the house in this scenario. However, as an additionally restraining factor, the IHL proportionality rule must be taken into account by the commander when he plans his operation. This is also important because if the attempt to arrest the commander would factually shift from a law-enforcement situation into a conduct-of hostilities situation, the concurrent application of the IHRL proportionality rule would lose most of its relevance. Thus, for example if the rebel commander resists his arrest, causing danger to the safety of the members of the attacking forces, the *lex specialis* rule would in that case give prevalence to the IHL proportionality rule, ending effectively the protection of the rebel commander on the basis of the IHRL proportionality rule, and reducing the protection of the two civilians to only the protection on the basis of the IHL proportionality rule.

One case in which the concurrent application of the IHL and IHRL proportionality restraints arguably played a role is the ECHR case of *Özkan v Turkey*.<sup>160</sup> The case regards an operation launched by Turkish security forces on a village in order to “carry out a planned search operation for members of the PKK reportedly staying in or near to Ormaniçi, as well as for a wanted person who was believed to be in Ormaniçi.”<sup>161</sup> When two men were spotted running towards the village during the approach of the security forces, “two warning shots were fired by the 2nd Commando Team, which were met by some shots fired from the village.”<sup>162</sup> The Turkish security forces responded by “intensive firing, including the use of RPG-7 missiles and various grenades that were fired at perceived points of fire in the village.”<sup>163</sup> In addition, “further intermittent exchanges of fire occurred”<sup>164</sup> during the subsequent approach of the village by the security forces. During the firing by the Turkish security forces, one civilian was severely wounded. The ECHR decided, after concluding that at the time a situation of

160 *Özkan v Turkey*, Merits and just satisfaction, App No 21689/93, [2004] ECHR 133, 6th April 2004, European Court of Human Rights.

161 *Özkan v Turkey*, paragraph 298.

162 *Özkan v Turkey*, paragraph 298.

163 *Özkan v Turkey*, paragraph 298.

164 *Özkan v Turkey*, paragraph 299.

armed conflict existed,<sup>165</sup> “taking due account of all (...) circumstances, that the security forces’ tactical reaction to the initial shots fired at them from the village on 20 February 1993 cannot be regarded as entailing a disproportionate degree of force.”<sup>166</sup> It must be assumed that the ECHR is pointing to the IHRL-based proportionality rule in this scenario. However, according to Melzer, “[t]he judgment also shows that, during the conduct of hostilities, the interpretation of the requirement of proportionality shifts from evaluating the injury inflicted on the targeted person (law enforcement paradigm) to that incidentally inflicted on peaceful civilians (paradigm of hostilities) and that, therefore, Article 2 ECHR tolerates ‘collateral damage’ in the conduct of hostilities. Nevertheless, in a situation where collateral damage is likely, the quality and quantity of force used must be absolutely necessary ‘for the purpose of protecting life’.”<sup>167</sup>

Melzer concludes that “the direct application of human rights law to the conduct of hostilities does not import the rules and principles of law enforcement into the conduct of hostilities but that, instead, the factual occurrence of hostilities requires an interpretation of human rights law in accordance with the paradigm of hostilities.”<sup>168</sup> However, it is submitted that if Melzer is suggesting that in the two situations above, a merger occurs of the two applicable legal regimes, this approach may only be useful for the purpose of adjudicating a case before a human rights court. A paradigm-shift does not affect the concurrent and complementary applicability of the two legal frameworks, including the two different proportionality rules. The facts of a situation will dictate for the planners and executors of an operation during which both proportionality rules are applicable, which protections apply to which persons. The result of a paradigm shift is that the IHL-based proportionality rule, which is much less restrictive for security forces than the IHRL rules, becomes dominant as a result of the *lex specialis* rule when the situation develops from a law-enforcement situation into a situation of hostilities. Assuming that the two frameworks have merged and merely using the rules from one legal framework to interpret the applicable rules from the other legal framework is incorrect, because it denies the concurrent applicability of the rules of the entire legal framework.

### 8.3.3.3 Sub-Conclusion

To conclude, a complete merger in all situations of the application of the principle of proportionality in IHRL and IHL is an illusion. The only solution to this would be if the restrictive application of the principle of military necessity would be accepted to be equal

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165 *Özkan v Turkey*, paragraph 305: “there were serious disturbances in south-east Turkey involving armed conflict between the security forces and members of the PKK”

166 *Özkan v Turkey*, paragraph 305.

167 Melzer 2008, p. 387.

168 Melzer 2008, p. 392.

to the application during armed conflict of the principle of proportionality in human rights law. Therefore, it still seems obvious that the doctrine of the *lex-specialis* must be applied in order to solve the matter.<sup>169</sup> Military personnel thus will have to be able to shift between the rules of these two legal frameworks, although in practice these rules will have been clarified in their rules of engagement.

From the above sections, it follows that the principle of proportionality as it manifests itself in IHL and IHRL are clearly separate in content and application. Nonetheless, there are factual situations possible in which both proportionality rules must be applied. Particularly because the applicability of the IHRL proportionality rule is subject to a large number of conditions, these situations may perhaps not occur in every military operation. The relationship between the two rules seems however not to be one of a merging rule, but of the application of the two separate rules cumulatively.

#### 8.4 Conclusion

In this chapter, it has been concluded in Section 8.2.5 that the proportionality requirements under IHL and the *ius ad bellum* need to be satisfied within their own frameworks, and thus that there is no integrating relationship between the two rules on proportionality in these legal frameworks. Rather, their relationship is that they work in parallel to the same situation. Parties to an armed conflict thus need to realise that it is their responsibility to sometimes prevent their armed forces from executing certain attacks even though these would be perfectly legal under IHL, because the *ius ad bellum* proportionality rule provides an extra layer of protection to the civilian population.

With regard to the proportionality rules under IHL and IHRL, it was concluded in Section 8.3.3.3 that they are clearly separate in content and application. Nonetheless, there are factual situations possible in which both proportionality rules must be applied cumulatively. However, particularly because the applicability of the IHRL proportionality rule is subject to a large number of conditions, these situations do not occur in every military operation during armed conflict. The next chapter explores whether the application of proportionality rules cumulatively is possibly the result of the application of a general principle of proportionality in general international law applicable to armed conflict. In addition, it is analysed in the next chapter whether the other manifestations of proportionality are useful, as an inspiration or otherwise, to increase the understanding of the IHL proportionality rule.

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<sup>169</sup> See Nuclear Weapons Advisory Opinion, paragraph 25.