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Proportionality in international humanitarian law

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Chapter 9

Chapter 9: Conclusion of Part III

“[C]enturies of discussions by philosophers and jurists about the meanings of necessity and proportionality in human affairs do not seem to have produced general definitions capable of answering concrete issues”¹

9.1 Introduction

In the previous chapters of Part III, the origins and functions of the notion of proportionality in international law are analysed, as well as its different manifestations in a number of branches of international law relating to the use of armed force and that apply during armed conflict. The central research question of Part III is the question of what the content of the principle, or legal notion, of proportionality is in international law and in its different branches. The objective of this is ultimately to assess the extent to which these different understandings of the principle of proportionality may be useful for clarifying the IHL proportionality rule. To that end, this chapter contrasts and compares the manifestations of proportionality that have been encountered in the previous chapters on the basis of the roles of principles of international law as set out in Part II of this study. This chapter suggests that on the basis of analyses of the manifestations of proportionality across the board of international law, a general proportionality principle of international law applicable during armed conflict may be derived (Section 9.2). This principle may, as an inspiration or otherwise, help to interpret the IHL proportionality rule (Section 9.3).

9.2 Proportionality as a General Principle in International Law Applicable during Armed Conflict

It was concluded in Chapter 4 that proportionality is a concept that is inherent in any legal framework and is used (1) as a tool or legal technique to interpret vague legal rules, related to equity and reasonableness; (2) to balance competing interests in order to provide reasonable and equitable outcomes and (3) to protect the rights of smaller entities from excessive interference from the larger entity. The conclusion is thus that a general proportionality principle in international law is applicable in peacetime. When compared to the roles principles of international law perform, it may be concluded that the general principle of proportionality in international law serves to fill gaps and to interpret other rules of international law. Proportionality also operates as the basis for specific proportionality rules in different branches of international law applicable in peacetime, used to balance diverging interests, without superseding these rules. The analysis in the chapters relating to the *ius ad*

1 Schachter 1992, p.39.

bellum, IHL and IHRL reveals that proportionality also plays an important role in situations where armed force is used, including during armed conflict.

The principle of proportionality in the *ius ad bellum* manifests itself in different situations. These situations usually present themselves as exceptions to the general prohibition of the unilateral use of armed force by States, as codified in the UN Charter. In general, in any *ius ad bellum* proportionality calculation, the size, duration and effect are relevant factors for determining whether an armed attack in response was proportionate. Here, proportionality plays a similar role as it does in international law in relation to countermeasures. Proportionality therefore clearly performs the function of balancing competing interests between equal entities in different legal frameworks applicable in both peacetime and during armed conflict. With regard to IHRL, it was established that there are various manifestations of proportionality in IHRL, mostly performing the function to protect the rights of citizens against interference by their authorities. Both in peacetime and during armed conflict, however, proportionality is also used to put considerable constraints on the legitimate use of lethal force under IHRL. Here, proportionality is used for balancing the right to life of a person against the arbitrary use of armed force by State agents in situations where that is absolutely necessary, and additionally, proportionality also performs a second function, requiring no more force to be used than necessary to achieve the intended result.²

The most prominent manifestation of proportionality that was identified in Chapter 6 within the legal framework of IHL is defined as follows: an attack is indiscriminate if it “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”³ Balancing the notions of military advantage and collateral damage to the civilian population, the IHL proportionality rule is used to provide reasonable and equitable outcomes. It is thus submitted that ‘the IHL proportionality principle’, is primarily a specific rule of IHL, based on other, underlying policies of IHL. Chapter 7 has moreover provided a number of examples of other notions, including, but not limited to, specific rules of IHL that also moderate the use of force during armed conflict in addition to the IHL proportionality rule that is aimed to mitigate collateral damage to civilians and civilian objects. As such, it seems that there is an important mitigating notion present in the entire branch of IHL that serves to achieve the dual objectives of IHL, and observe the balance between these notions. This mitigating notion, that seeks to provide reasonable and equitable outcomes, is based on the policies of humanity and military necessity. In turn, a

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2 A.M. Gross conducted an analysis of the convergence of the concepts of proportionality in IHRL and IHL in the situation of occupation. After surveying the practice of the Israeli High Court of Justice, Gross concludes that the Court uses the parameters of the *ius in bello* proportionality to assess the limitations that have been put on the exercise of human rights of Palestine civilians. In his view, the result of the convergence of both types of proportionality for people living in occupied territories is that “their rights can now be limited both for ‘public interest’ or the rights of others *and* for military necessity.” This illustrates that there is a danger to connect proportionality standards that apply as rules in different places of the law applicable in a certain situation of armed conflict, because a cumulative applications of these frameworks results in a virtually total denial of the rights of these civilians. A.M. Gross 2007, p. 9, italics in the original.

3 See article 51 (5) (b), article 57 (2) (a) (iii) and article 85 (3) (b) API.

general principle of proportionality in IHL (which is not the rule on collateral damage) is the basis for a number of specific rules in IHL, among which are the rules on collateral damage, precautionary measures and the specific rules that were identified in Chapter 7.⁴ These latter rules include the rules regarding the destruction of enemy property, and the restraints on the use of methods and means of warfare against the enemy. Taken together, it appears that the character of proportionality in IHL is diverse. It serves as the basis for a variety of rules throughout the different parts of IHL, some of which are recognised as particularly important. Furthermore, it may be recalled that proportionality was identified in Chapter 3 as one of the substantive principles of IHL.

From the preceding chapters in this Part III, it follows that proportionality applies as a limitation to the use of force in all branches of international law that regulate armed force, in diverging situations or levels.⁵

This cumulative application of proportionality in the *ius ad bellum*, IHL and IHRL, as well as its application in peacetime, may be understood as the result of an underlying general principle of proportionality in international law applicable to armed conflict. When the character of this general proportionality principle under IHL is compared to the proportionality principles applicable in the other legal frameworks during armed conflict, it is striking to note that there is a strong resemblance between these rules, because the ultimate purpose of all these rules is to mitigate human suffering on the one hand, and to provide leeway to authorities to achieve their legitimate objectives on the other hand. In the words of Cannizzaro, “proportionality serves to establish a limit, mainly of a humanitarian character, to the enforcement activities that States undertake to protect their interests.”⁶

Nonetheless, in the previous chapter, it is concluded in Section 8.2.5 that the proportionality requirements under the *ius in bello* and the *ius ad bellum* need to be satisfied within their own frameworks. It follows that there is not necessarily a relationship between the two rules on proportionality in these legal frameworks. An exception is that the *ius ad bellum* proportionality rule may provide an additional layer of protection to the civilian population during armed conflict, which the IHL proportionality also aims to protect. 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. However, there are factual situations possible in which both proportionality rules must be applied cumulatively, but particularly because the applicability of the IHRL proportionality rule is subject to a large number of conditions when they apply simultaneously, these situations do certainly not occur in every military operation during armed conflict. The next section describes how a general principle of proportionality in IHL must be understood.

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4 Krüger-Sprengel, p. 195: “elle constitue dans des cas particuliers une partie intégrante des normes de protection établies par le droit international”

5 Philippe, p. 1183: “une doctrine générale limitative de la violence dans les conflits armés.”. For a similar view, David 2001, pp. 237-239.

6 Cannizzaro 2000, p. 466.

9.3 Proportionality as a General Principle in IHL

Based on the above, a general proportionality principle of international law applicable during armed conflict may be derived. This is a general principle that serves as the basis of the different manifestations of proportionality mitigating the use of armed force in international law, applicable during armed conflict. This general principle of proportionality applies as a matter of law as a substantive principle that may fill gaps in the law, but is unable to set aside other rules or principles of the different legal frameworks, such as specific rules of IHL. Neither would these manifestations of proportionality in the other legal frameworks that apply during armed conflict place an additional layer of legal obligations on top of the existing rules of IHL (including the IHL proportionality rule). On the contrary, instead of amounting to an integrated proportionality principle, it was established in Chapter 8 that the standards of proportionality restricting the use of armed force in armed conflict apply in parallel. Nonetheless, the multitude of manifestations of applicable proportionality standards demonstrates that proportionality is a general principle of international law. It thus performs the important function of interpreting the rules and principles of international law, including those of IHL in their application in practice. Furthermore, it may be recalled that proportionality was also identified in Chapter 3 as one of the substantive principles of IHL and may thus perform the crucial function as a gap-filler, through the Martens Clause, in factual situations where no specific rule of customary or treaty law is available. Within IHL, proportionality thus serves as the basis for a variety of rules throughout the different parts of IHL, some of which are recognised as particularly important. This IHL principle of proportionality is of a more general nature than the specific *rule* of proportionality in IHL that is based on the principle. The objective of this principle is to mitigate suffering of both civilians as the opposing forces and is more specific than the foundational policies (also generally known as the principles of humanity and military necessity).

The existence of such a proportionality principle in IHL is recognised by some authors, courts and States. For example, Phillippe argues that proportionality is a ‘central’ principle of IHL.⁷ Gardam wrote in 1993 that the ‘theory of proportionality’ is a “central element of the modern law of armed conflict.”⁸ Also, Melzer states with regard to an obligation to ‘capture rather than kill’, that the argument that this applies could be based, except on the military necessity principle in IHL and on IHRL-proportionality, also on “a wider proportionality requirement, which would constitute a general principle of international law”.⁹ The ICRC Interpretative Guidance (primarily also written by Melzer) states that “[i]n conjunction, the principles of military necessity and of humanity reduce the sum total of permissible military

7 Philippe, p. 1187: “Le principe de proportionnalité occupe donc un place enviable en droit international humanitaire et sous-tend l’ensemble du droit des conflits armés.” Philippe proposes to integrate an explicit proportionality criterion in any decision making process during armed conflict, to prevent the principle to be only an ideal, but a reality instead. See Philippe, p. 1192.

8 Gardam 1993, p. 11.

9 See Melzer 2010b, p. 299 and Melzer 2006, 87-113.

action from that which IHL does not expressly prohibit to that which is actually necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances”.¹⁰ Another ICRC legal adviser, Cordula Droege, wrote that “[t]here is a growing position that even under humanitarian law the ability to use lethal force is limited not only by a principle of proportionality protecting incidental loss of civilian life or damage to civilian objects, but also by other limitations inherent to humanitarian law, in particular the principle of military necessity and the principle of humanity.”¹¹ The Israeli *Beit Sourik* case of 2004 states that “[p]roportionality is recognized today as a general principle of international law”. With regard to this case, Pertile states that “the view that the principle of proportionality, although never finding explicit recognition, operates in the application of [IHL] can be safely shared. The principle is the normative tool that reconciles the opposing values of humanity and military necessity. However, contrary to what the reasoning of the Court seems to imply, it is submitted that the reasons of military necessity are not recognised by every norm applicable to the case at hand and that the balancing operated through the principle of proportionality is possible only when reference to military necessity is explicitly admitted in a derogatory clause.”¹² When proportionality is interpreted as a broad concept that is present in many different branches of international law, it can be regarded as a general principle of the entirety of international law. When applied to the law pertaining to situations of armed conflict, it could be interpreted as “*une doctrine générale limitative de la violence dans les conflits armés.*”¹³

Some of the practice that has been collected by the ICRC in the customary law database with regard to the IHL rule on collateral damage also relates to a more general statement of moderation in the use of force during armed conflict.¹⁴ In addition, the UK is on the record stating that “[a]ll our military planning is conducted in full accordance with our obligations under international law to employ the minimum necessary use of force to achieve military effect *and* to avoid injury to non-combatants or civilian infrastructure.”¹⁵ This seems to indicate that the UK views its proportionality obligations under IHL to be broader than the IHL proportionality rule. The 2015 US Manual on Law of Armed Conflict (LOAC), updated in 2016, also refers to a general principle of proportionality. It states on the subject that IHL “requires that even when actions may be justified by military necessity, such actions not be

10 See Melzer 2009, p. 79.

11 Droege 2008, p. 526.

12 Pertile, p. 679-680.

13 Philippe, p. 1183. For a similar view, David 2001, pp. 237-239.

14 See for example the Military Manual of the Philippines: “The use of force to accomplish authorized missions should be reasonable in intensity, duration and magnitude.” See also Kenya’s LOAC Manual, which states that “one of the main principles which places constraints on the conduct of hostilities is “the principle of proportionality which calls for the avoidance of unnecessary suffering and damage and therefore prohibits all forms of violence not indispensable for the overpowering of the enemy.” See https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule14.

15 Mr. Adam Ingram, Minister of State for the Armed Forces, see House of Commons, Official Report, 2 April 2003, column 738W (emphasis added), as quoted in the Chilcot Report, available on www.iraqinquiry.org.uk, para 51 on p. 180.

unreasonable or excessive.”¹⁶ This definition of proportionality is clearly a different, more general, notion than the proportionality rule on collateral civilian damage, since it refers to proportionality as a means to balance the more general principle of military necessity¹⁷ on the one hand and unreasonableness and excessiveness on the other hand. It is not entirely clear whether the US understands this proportionality principle as a more general notion that entails legal obligations for US soldiers. In the further elaboration of proportionality, the principle is explained by referencing to the military concept of the economy of force, the IHL “standard applicable to persons conducting attacks” (i.e. the collateral damage rule, JvdB), the rule on precautions against the effects of attacks and with reference to the prohibition on the use of weapons that are calculated to cause superfluous injury and unnecessary suffering.¹⁸ It thus seems that the US Manual on LOAC adequately acknowledges that manifestations of proportionality apply in different rules of IHL. However, it seems that in the reference to the principle of proportionality requiring that even actions justified by military necessity must not be disproportionate, proportionality works as a general principle that serves to connect the separate rules of IHL into a coherent system.¹⁹

Although it is submitted in this study that a general principle of proportionality does exist, there are also writers who maintain that no normative guidance may be derived from the principles of IHL. A general proportionality principle would in Kleffner’s view not have an independent normative value that would apply directly to the battlefield. He states: “[t]o approach the law on the conduct of hostilities from the opposite permissive starting point – that parties to an armed conflict are allowed to use those methods and means which are not expressly prohibited – is more in tune with the nature of the law of armed conflict as a law that governs a state of exception rather than normality. Hence, there are good reasons for maintaining that, in the area of the law governing the conduct of hostilities, any restriction on what parties to an armed conflict may do when using force against military objectives in their quest to overcome the adversary must derive from an express restriction stipulated in a rule or principle of positive international law.”²⁰ Dinstein similarly states that “[i]t is sometimes maintained (for instance, by the Supreme Court of Israel, in the *Beit Sourik* case of 2004) that ‘[p]roportionality is recognized today as a general principle of international law’.

16 US DoD Manual, p. 51.

17 Military necessity is defined as the ‘principle’ that “justifies certain actions necessary to defeat the enemy as quickly and efficiently as possible”. See US DoD Manual, p. 51.

18 US DoD Manual, p. 60-62.

19 The accompanying footnote however refers to Vattel and Grotius; and also to the Caroline Case, where proportionality is explained to mean that even actions taken in self-defence should not be “unreasonable or excessive” since such actions “justified by the necessity of self-defense, must be limited by that necessity and kept clearly within it”. If this phrase is meant to introduce a military necessity justification to use armed force based on the *ius ad bellum*, even when that would not be in accordance with the rules of IHL, it must be rejected. If this notion of proportionality is however meant to refer to a legally binding principle of IHL that is legally restricting the use of armed force during armed conflict, the references in the footnotes make no sense. US DoD manual, note 67 on page 60.

20 Kleffner 2012, p. 40. Compare however Kleffner 2018, p. 43.

This is a completely untenable proposition. Indeed, proportionality is not even a general principle of IHL: it is patently excluded insofar as combat operations are concerned.²¹

As may however be concluded from the analysis in this part of the study, proportionality is both a rule and a principle in IHL. The different standards of moderation in IHL moreover prevent excessive effects from the use of armed force during armed conflict. These standards are the result of the general principle of proportionality in international law that also applies in IHL. This general principle of proportionality in IHL influences the rules of IHL (including the IHL proportionality rule) to a certain extent in terms of interpreting them and to fill gaps. It is suggested that based on the potential for principles as a source of international law, that this general proportionality principle may apply either as a principle or as a rule of international customary law.²²

The question that remains is what the identification of a general principle of proportionality in IHL means for the application of the IHL proportionality rule. This question can only be answered after an in-depth analysis of the IHL proportionality rule and how it must be applied in practice. This is the subject of Part IV.

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21 Dinstein 2013, p. 74.

22 Cottier et al., p. 671: “[a]s a “fundamental rule of international law”, the principle of proportionality is “able to apply in its own right.” ... The normative difference between customary international law and a legal principle of law is important as the latter does not operate on its own but informs and supports the process of application and interpretation of specific rules.”