

International Humanitarian Law II: The Principles of International Humanitarian Law

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ABSTRACT

The following chapter analyses the legal status and practical function of the core principles of international humanitarian law within the broader system of international law. It explains how these principles operate both as gap-filling and interpretative tools and as norms rooted in customary law as well as in treaty provisions. The chapter primarily examines the four foundational principles of the system: military necessity, humanity, distinction, and proportionality tracing their historical development, main elements and limitations. The text highlights how they structure targeting decisions, protect civilians and persons hors de combat, and guide legal assessment where treaty rules are ambiguous or incomplete. Their flexible character ensures their continued applicability as guiding norms, particularly in modern forms of warfare.

KEYWORDS

international humanitarian law, principle of military necessity, principle of humanity, principle of distinction, principle of proportionality

1. Introduction: The Legal Status of Principles of International Humanitarian Law

International humanitarian law (IHL) is the branch of international law that regulates the conduct of armed conflicts. The previous chapter presented the body of law, which is centred on key international agreements, including the Hague Regulations of 1899, the Geneva Conventions of 1949, and the Additional Protocols of 1977. As all civilizations deemed it necessary to develop some set of rules for minimising violence, customary law was the first to develop. This IHL customary law was not completely replaced by treaty law. As treaties bind only the parties, customary law keeps its influential position.¹ Alongside the foundational documents, numerous other sources

1 Hanckaerts and Doswald-Beck, 2012, p. 10.

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contribute to the framework of humanitarian law. These, besides customary international law, include specialised conventions addressing specific issues and weapons types, decisions from international tribunals, writings from leading scholars, statements from organisations, such as the United Nations General Assembly, as well as the principles of international humanitarian law, which will be analysed below.²

The principles of international humanitarian law, including their position in the system of international law, are to be analysed from two opposing perspectives. On the one hand, their character has to be derived from the classical theory of general principles of law, understood as one of the main sources of international law. On the other hand, these principles are to be also distinguished from the cited general principles of law, referred to in Article 38 of the Statute of the International Court of Justice. The first perspective presents the similarities of the IHL principles, having the same function as the general principles of law. The other perspective observes them as part of customary international law, which have been codified later into the treaty form.³

Generally, principles, including IHL principles, represent the integration instruments of the structure, as they bridge actual or potential legal gaps, known under the term *lacunae*. In international law, legal principles have been many times the subject of heavy scholarly debates grounded on the various interpretations ascribed to the term and the theoretical issues they present.⁴ Scholars understand principles in the axiological and material sense as values that are vital in the theory of law. In any case, principles can also be reflected in a concrete form in the individual provisions. In the relevant provisions, they create various deeper and more specific values. Accordingly, given their deeper and more abstract nature, principles have a longer duration than the provisions in which they are reflected. It is often justified by their content, which is also moral and ethical. However, if such principles have existed over several centuries and within several legal systems, they seem to gain strong prestige and authority and become almost undeniable and irrefutable. That is, some principles seem to achieve legitimacy in themselves. Existence, validity, and power are at the same time tools for their general recognition and standardisation.⁵

Legal principles are rules of a relatively high degree of universality which are explicitly or implicitly or as a “*communis opinio doctorum*” immanent to a given law, branch of law, or legal institute.⁶ The principles provide a basis for further law-making and a guide to the interpretation of an individual more specific provision. Their origin can be generally derived from natural law, and they enjoy major abstraction. Arguably, legal principles represent a general rule of conduct reflected in normative provisions in a more specific form. They express the general objectives and moral values of the given law. Meanwhile, they regularly harmonise specific normative

2 Rogers, 2004, pp. 2–3.

3 Darcy, 2014, p.140.

4 See: Kohen and Schramm, 2013.

5 Jonas, 1985, p. 143.

6 Boguszak, 2003, p. 241.

orders and prohibitions as far as possible. We may observe that they abstractly articulate the aim or goal of numerous provisions.⁷

There are different understandings of the concept of “general principles” in international law. Several general principles of international law can be useful in supplementing and implementing IHL. Just to mention some, the principle of good faith or the concept of common heritage of mankind. These general principles of law promote inter-systemic cohesion by bridging the gap between international law and national legal systems. This function of principles is linked to the nature of principles, as they represent the fundamental values of the international community, which inspire the international legal order. Thus, they bridge the gaps and harmonise differences in law.⁸ On the other hand, the principles of IHL are not based on or derived from the national legal systems. Rather, they are independently established as the foundational elements of humanitarian law itself.

IHL expert, Jean Pictet wrote, that behind the rules in IHL treaties, there are a number of principles which inspire the entire substance of the documents that are expressly stated in the Conventions, clearly implied or derived from customary law.⁹ The theory, including study materials, in the matter is generally inconsistent. Some of the scholars create their own specific scope of “principles of IHL” and some even avoid to deal with notions of principles of IHL. Nevertheless, most of the esteemed scholars distinguish the four fundamental principles of IHL, claiming these to be the basic principles of the pertinent field of law. These basic principles of IHL are viewed as a part of customary international law. Moreover, numerous scholars (including the author) even claim that these principles are part of peremptory norms. However, without a doubt these principles have been codified or incorporated into the most influential treaty rules of humanitarian law.¹⁰ As the United Kingdom Manual of the Law of Armed Conflict stipulates ‘despite the codification of much customary law into treaty form during the last one hundred years, four fundamental principles still underlie the law of armed conflict’.¹¹

The relics of the great principles of customary law shine in each rule of the IHL. All provisions stem from the unchanging four principles: military necessity, humanity, distinction and proportionality. The position of these principles can be considered as specific, as they clearly transform moral values into a legal form. The development of IHL is closely linked to its fundamental principles. Yet, there are still gaps, where

7 Vršanský, 2021, p. 109.

8 Linderfalk. 2019, p. 101.

9 Pictet, 1985, pp. 59–60.

10 E.g. art. 48 of the Additional Protocol I to the Geneva Conventions, sets the obligation to distinguish between the civilian population and combatants and between civilian objects and military objective at all times; art. 51 of the Protocol prohibits attacks that are excessive in relation to the concrete and direct military advantage anticipated; art. 53 of the Fourth Geneva Convention establishes protection of civilian property with the exception where such destruction is deemed to be absolutely necessary in order to achieve the military operation.

11 Operational Law Handbook, International and Operational Law Department, United States Army Judge Advocate General’s Legal Center and School, 2012, p. 14.

treaty law remains silent. We know that there were lawyers who were ahead of their time and assumed early on that these gaps would be forever present on the battlefield. The brilliance of some omens that the codification would never be fully comprehensive to address all possible circumstances in practice. Here come to the textual fore the principles which are capable of addressing issues in an ever-changing world.¹²

2. The Principle of Military Necessity

No principle is more central to IHL nor more misunderstood, than that of military necessity. The views regarding this principle vary. The principle has manifested itself in two ways: as a justification for deviations from normative standards and as a component of the written law regulating conduct of combatants. Historical views represent somehow the worst perspective of its interpretation. In this sense, military necessity has been used both to rationalise egregious abuses during armed conflicts and also to enforce impractical and hazardous restrictions on combatants.¹³ The first aspect will be addressed briefly, as the legal understanding of military necessity as a rationale for violating IHL is well established. In terms of the latter, military necessity serves both as a specific element and a broad foundational principle. While direct mentions of military necessity in IHL are limited, the principle is woven throughout the entire legal framework by supporting individual rules. In this crucial role, military necessity works in balance with the principle of humanity, which aims to minimise suffering and destruction associated with warfare.

2.1. Short Historical Overview

The foundations of modern humanitarian law trace back to the 19th century. A pivotal early milestone was Dunant's 1862 publication, *Memories of Solferino*, which inspired the Geneva Conventions.¹⁴ Another significant document from that period addressing humanitarian law, especially the concept of military necessity, is the Lieber Code, created by scholar Francis Lieber. The Code is the origin of what has come to be known as Hague Law, called so because the principal treaties which dealt with the subject were concluded at The Hague. Hague Law is the law of armed conflict written from the standpoint of the soldier, in the sense that it takes the form of a statement of the rights and duties of the military in a conflict.¹⁵ This document established principles of human morality based on empirical realities, resulting in a binding directive that sought to humanise warfare, issued by President Abraham Lincoln. Its most lasting

12 Schmitt and Heintschel von Heinegg, 2012, p. 15.

13 Schmitt, 2010, p. 796.

14 See: Dunant, 1959.

15 Greenwood, 1999, p. 116.

contribution was formally establishing military necessity as a foundational principle of warfare, still central to armed conflict today.¹⁶

However, even the Code establishing the principle for the first time specifies in its Article 16, that the principle of military necessity does not permit acts of cruelty, revenge, torture for extracting confessions, the use of poison, wanton and unrestricted environmental devastation, or harm to the enemy beyond combat itself. The article further emphasises that military necessity must not hinder efforts to restore peace. It reminds combatants that, even in war, they remain human beings who must uphold ethical behaviour within the bounds of military necessity.¹⁷

The international community gradually recognised and accepted this principle, particularly after the 1868 St. Petersburg Declaration, which asserted,

[t]he progress of civilization should have the effect of alleviating as much as possible the calamities of war. The only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy.¹⁸

The declaration emphasises that humanity demands restraint and that military necessity should not justify indiscriminate destruction. It also asserts that states should aim solely to weaken the enemy's military strength, without unnecessary harm. The Declaration bears in mind that war is fought to be won. Nevertheless, the dictum is linked to the premise that the right of parties to choose means and methods of conduct during the fight is not unlimited.¹⁹

Both of these documents are considered to be a landmark in the development of the laws of armed conflict, defined military necessity as a belligerent's right to fight in a way that weakens the enemy as swiftly as possible. It did not mean unlimited use of military power. However, this principle was later misused in conflicts, evolving into what was perceived as an unrestricted right. This misinterpretation led to the so-called *Kriegsraison* doctrine, adopted by German forces in World War II.²⁰ Soldiers misused the principle of military necessity to justify actions that violated numerous treaties and customs, mistakenly considering these acts lawful. In reality, international criminal tribunals established after the war held them accountable for this arbitrary conduct, reinforcing that actions justified by military necessity are lawful only when they respect specific obligations set by binding conventions and customary law.²¹

16 General Orders No. 100. Instructions for the Government of Armies of the United States in the Field. "Lieber Code", 1863.

17 Ibid., art. 16.

18 Declaration of renunciation of the use of explosive projectiles, in time of war up to 400 grams in weight, opened for signature on November 29, 1968. "St. Petersburg Declaration".

19 See: Renault, 1915.

20 Kalshoven, 1971, p. 366.

21 Cheng, 1953, p. 71.

2.2. Character of the Principle (Main Elements and Limitations)

In the current understanding, military necessity has a three-fold relevance in regulating armed conflicts. First, it prohibits actions not essential to achieving military objectives. Second, it permits exceptions to certain legal provisions only for justified military objectives. Third, it is a component of the proportionality rule, balancing military success and humanitarian protection.²² This principle helps differentiate between actions deemed materially essential and thus generally permissible, and those deemed materially unnecessary and thus impermissible. While actions considered essential for a legitimate military objective might be allowed despite their moral implications, materially unnecessary actions may still be safe enough to remain permissible. Nevertheless, military necessity in the material sense significantly affects how a concrete provision of IHL is interpreted. It is frequently declared that military necessity and humanitarian considerations form the two fundamental normative grounds on which the current IHL developed.²³

When norms of IHL are being drafted, the creators cannot be oblivious to the exigencies of war impelling each belligerent state to take the steps necessary for engaging the enemy and defeating it. This principle is the reason that activates the measures to gain military advantage over the enemy during an armed conflict.²⁴ For countries like the United States, Russia, and other military powers, it justifies regulated violence under laws and customs of war, authorising measures to weaken enemy forces or compel their surrender swiftly. It allows property destruction when justified by military objectives but prohibits indiscriminate destruction of enemy territory.²⁵ Commanders, as decision-makers, are granted a significant degree of discretion. However, this doctrine does not relieve commanders from the obligation to observe the laws of war; rather, it gives flexibility within the bounds of military necessity to determine necessary measures and their potential impacts.²⁶ The boundaries set that there must be a reasonable connection between the measures taken and the aim of ultimate victory.²⁷

The limitations of the principle of military necessity rely heavily on evaluating the feasibility of a particular operation, the significance of the military target, and the potential scale and nature of the damage the mission may cause. All these factors should be assessed based on the specific conditions during the operation's planning phase, considering the commander's sincere intent. If a commander, based on available information, genuinely believed that a chosen course of action was necessary to achieve a military objective, this belief should not be judged in hindsight. Thus, it is irrelevant whether the military objective was ultimately achieved. In active conflict, the emphasis on immediate knowledge and the good faith behind the decision-making

22 Rogers, 2012, p. 9.

23 Dinstein, 1982, p. 105.

24 Dinstein, 2022, p. 9.

25 United States Rules of Land Warfare, 1940, FM 27-10, paras. 22–25.

26 Hyde, 1922, sec. 655.

27 Johanssen, 2019, p. 32.

is crucial. The commander may have to adjust the operation, redefine objectives, or identify other feasible actions while considering possible collateral damage and the proportionality of actions, often under stressful, time-sensitive conditions.²⁸

Some authorities suggest that decisions also influenced by proportionality should be viewed from the standpoint of a reasonable commander or an adequately informed combatant. As noted by the president of the Israeli Supreme Court, international courts often examine whether a reasonable commander could have made a specific decision under similar circumstances.²⁹ Judicial reviews focus on whether the action taken was one that a reasonable commander might have chosen, rather than deciding on the ideal course of action. Nonetheless, the military necessity has to be observed from the needs of the belligerent states. It cannot be analysed from the perspective of an individual soldier whatever his rank.³⁰

According to the U.S. Air Force Military Manual, four key elements shape the application of military necessity: force must be regulated, must be necessary and used promptly to achieve the stated objective, must be proportional to the pursued objective, and cannot be prohibited.³¹ These elements restrict a combat's destructive effects to what is required for a military goal or mission and influence combat methods, independent of other international law restrictions. This framework ensures that the type and degree of force used against individuals not protected from direct attack remain appropriate to achieve a legitimate military goal in the given context. Thus, any force must be essential to achieving the objective, with military considerations guiding assessments and necessary actions. Military necessity hence does not justify a subjective violation of positive rules.³²

These requirements help prevent arbitrary applications of military necessity. Commanders are obligated to evaluate each mission in terms of military necessity, not as a means of revenge. Even without strict IHL norms, the principle is inherently limited; for instance, certain prohibited actions do not meet military necessity requirements. The current constraints on this principle are mainly codified in the Geneva Conventions, particularly Additional Protocols I and II of 1977. Protocol I applies to international armed conflicts and cases of self-determination, while Protocol II addresses national armed conflicts, such as civil wars. Although Protocol II is shorter, it is sometimes broader in specific protections, including civilian protections in non-international conflicts, such as stipulating warnings. Overall, Protocol II is more succinct but, in some areas, more precise and advanced than Protocol I. It imposes several specific restrictions on military necessity, particularly in non-international conflicts, making it more restrictive in some aspects.³³

28 Hayashi, 2010, p. 96.

29 See: Barak, 2007.

30 Dinstein, 2022, p. 10.

31 United States of America, International Law - the Conduct of Armed Conflict and Air Operations. Department of the Air Force pamphlet. No. 110-31, 1976, pp. 1-6.

32 American Military Tribunal, Nuremberg, Hostage case, 1948, paras. 1253-4.

33 Protocol II additional to the Geneva Conventions, 1977, art. 11.

A good example of the limitation included in military necessity represents the rules related to the treatment of prisoners of war. Under Article 13 of the GC III prisoners of war in custody have to be treated humanely, including their evacuation to camps situated in an area far away from the battlefield. As a rule, this will be done by assigning an escort to carry out the process of evacuation, while ensuring that prisoners will not be able to escape.³⁴ However, what happens when enemy combatants are captured by small raiding groups, which have no possibility to provide guards for evacuation. The evacuation of prisoners would definitively endanger the successful achievement of their mission. Nevertheless, even if the military necessity would arguably require the most effective solution of shooting these prisoners, humanitarian law and humanitarian considerations still forbid these actions. Even in cases of extreme necessity, the protection is absolute.³⁵

A crucial aspect of applying the principle of military necessity is the nature of the military objective, which must hold clear military and strategic importance when planning an attack. While the significance of an objective may sometimes become more apparent after an action begins, the initial plan must still align with the principle of military necessity. A military objective should have strategic, operational, or tactical value within the context of the operation, and these aspects should be explicitly defined. Additionally, attacks must demonstrate that they are not driven by personal revenge, as such motives are a severe breach of humanitarian law.

However, selecting an inappropriate military objective does not necessarily render an action illegal; it may simply prevent the principle of military necessity from being applied. Acts of destruction or seizure of enemy property that serve no genuine military purpose cannot be justified under military necessity, as the Hague Conventions explicitly forbid the destruction or seizure of enemy property without a valid military reason. Therefore, the principle cannot be used as an exception in these cases.³⁶

The Hague Convention underscores military necessity as an exception in Article 26, which states that a commander planning an aerial bombardment must warn authorities to allow for civilian evacuation and prevent unnecessary civilian casualties. The only condition under which a commander may forgo this warning is if military necessity explicitly demands it. Here, one primary aim is to minimise risks to attacking aircraft while still achieving the military objective. Subjective elements, such as the supervision by an officer or the absence of friendly civilian populations at risk, are also relevant. Ensuring that operations are conducted primarily for military purposes is essential, as otherwise, a belligerent party could misuse military necessity to justify geopolitical, demographic, ideological, or economic goals as legitimate military aims.³⁷

34 Geneva Convention (III), 1949, arts. 13–19.

35 Greenwood, 1999, p. 38.

36 Hague Convention IV, 1907, art. 23(g).

37 Stone, 1954, pp. 622–623.

In some cases, an initially appropriate and materially relevant course of action may unexpectedly result in disproportionate damage. If such damage becomes apparent during the attack, the principle of military necessity must give way, requiring the combatant to either modify the operation, abandon it, or take corrective actions to minimise harm.³⁸ Commanders must diligently gather information and thoughtfully assess it with their best abilities and in good faith to apply the principle of military necessity responsibly. The unpredictable nature of combat often demands flexibility in assessing evidence, necessitating that a combatant make quick, well-considered decisions based on anticipated outcomes. Additionally, the principle involves a combatant's awareness, formal capability, and moral integrity, highlighting the importance of their ethical values in applying military necessity appropriately.³⁹

A military objective is a critical factor in evaluating the boundaries of military necessity. Some scholars, including H. Meyrowitz, argue that the concept of a military objective is no longer sufficient for assessing military necessity, as it may lead to excessive destruction. The scope of war objectives often expands on one or both sides during combat, potentially allowing for indefinite devastation. As combat develops, parties adjust their tactics and objectives; however, the indiscriminate application of military necessity to any target may lead to arbitrary destruction without yielding genuine military advantage. To achieve a balance, belligerents should consider both their political aims and legal duties.⁴⁰

Generally, the requirements of legal actions which fulfil the principle of military necessity are the following:

- Actions primarily executed for a specific military objective
- Actions necessary to reach a military aim
- Actions which constitute an advantage
- The military target complies with IHL
- The method of implementation complies with IHL

The principle does not apply to measures which are taken for no purpose. If an area was devastated purposelessly, the taken measures were not necessary. Additionally, the necessity does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill.⁴¹ Any unnecessary measures applied to citizens, such as evacuation for the sake of evacuation, cannot justify any military

38 Gehring, 1980, p. 55.

39 Hayashi, 2010, p. 63.

40 Carnahan, 1998, p. 227.

41 United States Military Tribunal at Nuremberg, 1948, The Hostages Trial (United States of America v. Wilhelm List et al.), Case No. 47, Judgment of 19 February 1948, para. 757, pp. 1253-1254.

necessity.⁴² Moreover, international courts have raised questions even regarding destruction of the environment or cultural heritage used as tactics during combat.⁴³

As society and law evolve, humanitarian law and principles such as military necessity are shaped by various modern sources, including “soft law” from sources like official state declarations. Although non-binding in the strict sense, such declarations can indirectly influence the law’s development. Public statements from states on humanitarian considerations may be seen as diplomatic, but they still impact the legal framework to some extent.⁴⁴ International organisations and their binding legislation exert additional, often direct, pressure on states regarding humanitarian law, creating minimum requirements that can eventually become part of customary law.⁴⁵ However, special regional customary law in these cases applies only within limited contexts, and a shared legal practice (*opinio juris*) between concerned states is essential to establish the existence and scope of such regional laws.⁴⁶

Humanitarian considerations are continuously evolving, but modern IHL maintains the need to define a normative boundary between military necessity and humanitarian protection in any conflict. Military necessity remains crucial in shaping new rules, adapting existing rules, and reinforcing the Martens Clause, a principle that underpins essential conduct rules in hostilities. Key examples include prohibitions on unnecessary suffering and destruction, the principle of distinction, the definition of military objectives, and protections for civilians and civilian property.⁴⁷

Some scholars argue that military necessity is outdated and does not meaningfully constrain commanders, applying only when no other humanitarian law norm governs a situation. According to this view, the principle fills gaps where neither established customary law, nor other norms apply. General legal principles can bridge these gaps, especially when proportionality is difficult to define, resulting in varied interpretations among scholars. The principle also binds states even if they have not formally agreed to it, as ratifying conventions implies acceptance of all provisions.⁴⁸

This viewpoint is contentious. If valid, it would mean that military necessity has little influence beyond the Hague Conventions, Geneva Conventions, their protocols, and other key humanitarian treaties. Yet, these treaties contain precise, wide-ranging rules, arguably rendering military necessity almost irrelevant in recent years. The principle and its limitations are essential to the nature of conflict; without military necessity, conflict itself would lose its rationale. General principles of law, due to

42 International Criminal Tribunal for the former Yugoslavia, 2001, Prosecutor v. Radislav Krstić, Case No. IT-98-33-T, Judgment of 2 August 2001, paras. 524-527.

43 See: Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), 2013, I.C.J. Rep. 2013; Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America), 1996, I.C.J. Judgment.

44 Henckaerts, 2007, p. 477.

45 See: Benvenisti, 2012.

46 Draft conclusions of the International Law Commission on the identification of customary international law with comments; International Law Commission, 2018, Conclusion 16, p. 154.

47 Hague Convention II on the Laws and Customs of War on Earth, 1899, para. 235.

48 Oppenheim, 1908, p. 12.

their flexibility, may sometimes be more applicable than specific rules, as their broad nature makes them adaptable and reflective of foundational moral values not always captured by written laws.⁴⁹

States are generally reluctant to give up anything that could give them a military advantage. Hence, there is a constant search for a common ground where such measures are applied, which give some kind of protection for the victims of war. Although we have to be honest that practically the results are often disappointing, every little effort helps. Even from the critical standpoint it is obvious, that even minor limitations on the battlefield and tiny humanitarian advantages are worth pursuing.⁵⁰

Overall, the principle of military necessity is restricted by the principle of humanity. Humanitarian law, with proportionality as a crucial element, aims to balance these principles, harmonising the rights of combatants and non-combatants. The essence of military necessity can be viewed as a framework for planning attacks, justifying certain actions, permitting exceptions in extraordinary cases, and an integral component of proportionality in balancing rights in armed conflict.

3. The Principle of Humanity

Humanity implies a moral force. The term “humanity” is generally perceived as a moral high ground. Every person belongs to one human species, regardless of their differences. The principle of humanity enhances the complete scope of international protection of human rights in one simple notion. Various branches of law, including international humanitarian law, international human rights law, and asylum law, incorporate the principle of humanity within their specific provisions. This principle also informs the interactions between public authorities and individuals under national or international jurisdiction, underscoring the importance of humane treatment across different contexts. Additionally, the principle is reflected in the laws governing international organisations, particularly within the United Nations framework. Due to its universal nature, the principle of humanity can be seen as both a sector-specific and a general principle of law.⁵¹

The principle of humanity represents one of the fundamental and binding principles of IHL. Thus, it potentially has a broad scope of application. It can act as an interpretative rule to interpret other provisions included in international treaties, as all rules of IHL must be interpreted in light of the principle of humanity. Additionally, the principle may have a complementary or even replacing function.

In legal theory, the pursuit of just and good objectives is fundamental, representing the human values at the heart of law. The principle of humanity thus embodies the core foundations of law and stands as a general legal principle that should be

49 Hassanová, 2023, p. 70.

50 Jocnick and Normand, 1994, p. 64.

51 See: Coupland, 2001, p. 969.

universally applied. The inherent content of humanity reinforces the argument that the principle of humanity should be recognised as a general principle of law.

3.1. Short Historical Overview

The treaty and customary IHL evolve to accurately reflect the changing nature of armed conflicts and the values held by those involved. Fortunately, since the 19th century, it has advanced steadily on route towards humanity. It may be observed even in the shift regarding the name of the field, from the law of war, through the term law of armed conflict to the most known international humanitarian law, incorporating the notion of humanity into its headings. The trend is clear, humanity has become the leading notion when attempting to regulate conduct during wars.⁵²

The notion “laws of humanity” were first referred to in the Preamble of the St. Petersburg Declaration of 1868, and in what is now known as the Martens Clause:

‘Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of public conscience.’

Together with the rule prohibiting weapons of a nature that causes superfluous injury or unnecessary suffering, the clause named after its creator Friedrich Martens, being part of the Preamble of the Hague Conventions, is the lasting legacy of this instrument. In the years since its formulation, the Martens Clause has been invoked in important courts such as the Nuremberg Criminal Tribunal, the International Court of Justice, as well as in human rights bodies. The clause appears repeatedly, albeit many times in an altered form, in many treaties dealing with humanitarian law, such as the Geneva Conventions (GC) and the Preamble to the Convention on the Prohibition of Restrictions on the Use of Certain Conventional Weapons. The Martens Clause was also paraphrased in Resolution XXIII of the 1968 Tehran Conference on Human Rights and is cited or otherwise referenced in several national military manuals, including those of the United States, the United Kingdom, and Germany. For more than a century, this legacy of Friedrich Martens remains relevant and valid.⁵³

The clause represents the core source of the principle of humanity. The clause and its modern interpretations emphasise that customary international law remains applicable in armed conflict, even when relevant treaty law is absent. However, the wording in Additional Protocol II does not explicitly affirm this principle. The clause can also be understood to require that individuals who lack formal legal protection be treated in accordance with the principles of humanity and the dictates of public

52 Schmitt, 2010, p. 806.

53 Hague Convention II, 1899; Hague Convention IV, 1907.

conscience, assuming that these dictates align with humane principles. In summary, it is derived from the usages established among civilized nations, laws of humanity and dictates of public conscience. Hence, its purpose is to textually present the continuity and necessity of customary law on the battlefield spiced with the moral value of humanity.⁵⁴

3.2. Character of the Principle (Main Elements and Limitations)

Humanity is a sentiment or attitude of someone who shows himself to be human.⁵⁵ The principle of humanity is understood as a counterweight to the principle of military necessity. It puts a brake on missions which would be otherwise justified by the principle of military necessity. The principle of humanity is reflected in various treaty provisions, particularly those mandating humane treatment of prisoners of war, civilians, and others no longer participating in hostilities. It also aligns with the overarching goal of minimising the effects of armed conflict and restricting the use of excessive force. Nonetheless, the exact scope of the principle beyond specific rules remains continuously unclear.⁵⁶

In 1956 Jean Pictet wrote that the principle of humanity stands out on its own in the doctrine of the Red Cross, and all other principles hang from it.⁵⁷ Thus the principle has a broad scope of application, extending to various contexts, including both armed conflict and peacetime, and governing interactions between public authorities and all individuals under a state's jurisdiction. Its impact is particularly profound in situations involving vulnerable or marginalised individuals, as evidenced by treaty provisions that uphold even international human rights protections.⁵⁸

Notably, the UN Charter reflects the principle of humanity through its provisions addressing humanitarian concerns and promoting respect for human rights.⁵⁹ It mandates the General Assembly to initiate investigations and make recommendations to support the realisation of human rights. The Charter also emphasises the need to foster conditions of stability by encouraging universal recognition of human rights and fundamental freedoms, regardless of race, sex, language, or religion, as a basis for peaceful and friendly international relations.⁶⁰ The principle is further embedded in other UN instruments, forming a foundation for the international protection of individuals. It operates across various legal fields, including IHL, international human rights law, and international refugee law, which reinforce its application

54 Darcy, 2014, p. 155.

55 Pictet, 1966, p. 459.

56 Lauterpacht, 1948, p. 351.

57 Pictet, 1956, pp. 14–31.

58 Migrant Workers Convention, 1990, art. 17:1; Convention on the Rights of the Child, 1989, art. 37:b.

59 Charter of the United Nations, 1945, art. 1. para. 3.

60 Ibid., art. 55(c); Azud, 1986, p. 138.

through overlapping provisions. Judicial assessments of the principle often address issues arising from one or more of these fields, reflecting its multifaceted nature.⁶¹

While the principle of humanity is often primarily associated with IHL, where it plays a crucial role, particularly in the protection of civilians and those hors de combat, its relevance extends beyond this domain. For example, the humane treatment of both civilians and combatants is the cornerstone of the Geneva Conventions, such as the 1949 treaties addressing the condition of the wounded and sick in armed forces.⁶²

The principle also draws on enduring concepts of natural law and human conscience, which are enshrined in both treaty and customary international law. It underscores the need to treat individuals humanely in all circumstances, forming part of the legal framework for the international protection of human rights. Its application spans global institutions, such as the UN, and regional organisations, such as the Council of Europe, and it serves as a bridge between IHL and international human rights law, ensuring universal relevance and enforcement.⁶³

The case law of modern international courts affirms the existence and binding nature of the principle of humanity as a fundamental principle of international law. The courts often invoke the principle in situations of ambiguity or when other legal sources are lacking. The International Tribunal for the former Yugoslavia (ICTY) in the *Tadić* case highlighted the importance of humanity and common sense in advocating for the application of the Hague Rules to non-international armed conflicts.⁶⁴ The ICTY invoked the principle of humanity in the *Martić* case as well as a basis for prohibiting attacks on civilian populations and as a general principle limiting the means and methods of warfare.⁶⁵ According to the Trial Chamber, these norms derive from “elementary considerations of humanity,” which underpin the entire framework of international humanitarian law applicable to all conflicts.⁶⁶ The ICTY has also addressed the principle of humanity in its later judgements. In the *Mucić* case, the tribunal emphasised that both IHL and international human rights law share a common objective: the protection of human dignity.⁶⁷ The tribunal further defined inhuman treatment as either intentional or unintentional conduct, including omissions that result in significant mental or physical suffering or harm. Such actions, it held, constitute a severe violation of human dignity.⁶⁸ Nevertheless, the most far-reaching use of the principle of humanity occurred through the Martens Clause, in the ICTY’s analysis of belligerent reprisals in *Kupreškić*. Although customary international law

61 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004, para. 106.

62 Henckaerts and Doswald-Beck, 2005, p. 23.

63 Commission for Human Rights, General Comment. No. 31. 2004, para. 11.

64 Interlocutory Appeal on Jurisdiction, para. 119.

65 *Prosecutor v. Milan Martić*, 2006.

66 Trial Chamber Rule 61, para. 13.

67 *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landžo*, 2001, para. 149.

68 *Ibid.*, para. 543.

required that reprisals conform in all cases to the laws of humanity and morality, this requirement was not explicitly mentioned in the *Kupreškić* judgement. Nonetheless, the Trial Chamber observed that, while the principles of humanity and public conscience have not been elevated to the rank of independent sources of international law, the Martens Clause still mandates their application. It requires these principles to be consulted whenever a rule of international humanitarian law lacks sufficient rigor or clarity, ensuring that the rule's interpretation aligns with these fundamental principles.⁶⁹

The principle of humanity has also been frequently cited by the International Criminal Tribunal for Rwanda (ICTR). For instance, in the case of *J.-P. Akayesu*, the tribunal recognised that the concept of crimes against humanity had already been established during the Nuremberg Trials (1945–1946).⁷⁰ Furthermore, the tribunal explicitly refers to a precedent, which can be traced back to 1915, when the governments of Russia, Great Britain, and France jointly condemned the mass killings of Armenians in Turkey as 'crimes against humanity and civilization', holding the Turkish government and its agents responsible.⁷¹ In the *Furundžija* case, the Trial Chamber recognised the principle of respect for human dignity as the very *raison d'être* of international humanitarian law. Additionally, the Martens Clause was cited as evidence of the customary nature of the prohibition against torture. The ICTR extended the principle of humanity to non-international armed conflicts through the application of Common Article 3.⁷²

Furthermore, in the case of *J. Kambanda*, the International Criminal Court highlighted that genocide has consistently resulted in enormous suffering throughout history, identifying humanity itself as a victim of such atrocities.⁷³ The idea of humanity as a victim, as well as the condemnation of such crimes, has deep historical roots and is inherently tied to the principle of humanity. Additionally, the tribunal frequently underscored the significance of the Martens Clause in its judgements, reaffirming its role in shaping the application of humanitarian principles.

In all these cases, the court engaged with the concept of the principle of humanity, though its interpretation in case law is often inconsistent. This principle can be understood as the foundation for the prohibition of inhuman treatment, as articulated in Article 3, common to the four GCs of 1949. Additionally, it can extend to encompass humanity as a whole in matters of universal, shared, and direct concern. The principle

69 *Prosecutor v. Kupreškić et al.*, 2000, para. 525.

70 *Prosecutor v. Jean-Paul Akayesu*, 1998, para. 565. 'Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal character. In fact, the concept of crimes against humanity had been recognized long before Nuremberg'.

71 Clark, 1990, p. 177.

72 *Prosecutor v. Anto Furundžija*, 1998, paras. 137, 183.

73 *Prosecutor v. Jean Kambanda*, 1998, para. 15. 'But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterizes crimes against humanity'.

can also serve to enhance the specific quality and value of humanity itself. Whatever the exact interpretation of the principle is, it can be without a doubt applied to numerous specific situations. However, the strongest connection may be seen in specific vulnerable positions, such as the protection of persons *hors de combat* or prisoners of war.⁷⁴ The two specific situations will be shortly discussed below.

3.2.1. *Hors De Combat and Principle of Humanity*

The so-called persons out of combat are those combatants who, due to their injury or sickness cannot pose a further threat to the enemy soldiers or military objectives. As this position causes a highly vulnerable position IHL provided a protection through the means of treaty law via GCs for the Amelioration of the Condition of the Wounded and Sick in Armed Forces. Nevertheless, the principle of humanity can pose as a vaguer, but hence flexible help when the treaty is silent.

The conditions for a person to qualify as *hors de combat* are explicitly outlined in Article 3 of the GC. These conditions require the individual to lay down their weapons, cease any hostile actions on the battlefield, and clearly demonstrate an intention to surrender to the enemy. Once these criteria are met, they must be treated humanely and without discrimination. Assistance may also be provided by a party to the conflict, the Red Cross, or another humanitarian organisation. Such individuals must be removed from the battlefield and given appropriate care, while being protected from further attacks or harm. This is in line with the principle of humanity also enshrined in specific provisions. Since they no longer take part in hostilities and seek to be rescued, they no longer constitute legitimate military targets. This classification also applies to individuals who are unconscious or in poor health and unable to express their intent to surrender. However, if such a person regains health, they must refrain from engaging in hostilities or attacks. Therefore, *hors de combat* includes those who actively surrender as well as the sick or wounded who express a desire to surrender. A combatant who continues fighting despite being injured, however, does not fall into this category.⁷⁵

This principle also extends to situations governed by treaty law, including the Hague Conventions, the GC, and various military manuals from different states. Traditionally, surrender is indicated through gestures like laying down weapons, raising hands, or displaying a white flag, among other clear signs. However, during combat, a combatant may not always have the opportunity to display their intention to surrender. For example, a combatant forced to eject from a damaged aircraft must be given the chance to surrender and cannot be attacked while descending by parachute. Upon landing, they must clearly indicate their intention not to fight.

74 Hassanová, 2023, p. 104.

75 The first Additional Protocol no. 1 to the Geneva Convention of 12 August 1949 and relating to the protection of victims of international armed conflicts, 1977, art. 41, para. 1.

If they attempt to escape, destroy sensitive materials, or attack the enemy after landing, they lose protection.⁷⁶

3.2.2. *Prisoners of War and the Principle of Humanity*

When a combatant participates in hostilities but later surrenders to the enemy, they are classified as *hors de combat* and are entitled to prisoner-of-war (POW) status. Prisoners of war are held captive in order to prevent their continued participation in hostilities and not as punishment for their prior involvement. The protection of POWs, including their removal from the battlefield, proper treatment, provision of food, guarantees of safety and basic hygiene is also governed by the principle of humanity.⁷⁷

POWs must be protected from violence, insults, and any form of inhumane treatment. Repression or discrimination against POWs is strictly prohibited, regardless of their age, gender, or other characteristics, and their honour must always be respected. The GC also outlines rules for the treatment of POWs after the cessation of hostilities, ensuring they are neither abused nor punished once peaceful relations are restored. Importantly, POWs must be released immediately after the end of the conflict.⁷⁸

However, the practical implementation of these protections can be challenging due to the harsh and unpredictable conditions of armed conflict. Nevertheless, the obligation to ensure the safety and well-being of POWs must always take precedence over military interests. Regardless of the time, personnel, or financial resources required, POWs are entitled to humane treatment and adequate living conditions. This treatment of POWs may pose extraordinary challenges but the treaty provision and customary law reaffirms that the principle of humanity takes precedence over military necessity when dealing with POWs.⁷⁹

4. The Principle of Distinction

Armed conflicts often happen on highly populated territories and may even effect large proportions of the civilian population. The conflict hence poses a challenge in terms of differentiation between those who are involved in conflict and those who are not. This is especially the case where members of the belligerent forces live and operate freely within their communities. A common vision of the IHL is that civilians and combatants have to be clearly distinguished and as a consequence treated according to their position. As combatants may cause threat, they do not enjoy protection from external attacks. Moreover, the obligation of distinction applies to objects, where the rule sets that civilian objects cannot be directly attacked as military objects.⁸⁰

76 Oeter, 2008, p. 178.

77 Protocol I additional to the Geneva Conventions, 1977, art. 40.

78 Geneva Convention relating to the Treatment of Prisoners of War. (III.), 1949, art. 118.

79 Oppenheim, 1952, p. 367.

80 Hayashi, 2021, p. 86.

The principle of distinction imposes on the belligerent parties an obligation to distinguish between combatants and civilians and between military objects and civilian objects. Logically, the main aim is to ensure the respect towards civilians and their needs. The methods and means chosen by the military are hence not unlimited.⁸¹

4.1. Short Historical Overview

The principles and rules of humanitarian law would be rendered meaningless without a clear distinction between armed forces and civilians, i.e. combatants and non-combatants. This distinction is central to key conventions and declarations, such as the St. Petersburg Declaration, which emphasises the need to protect individuals not participating in hostilities. Oppenheim, in his 1940 work, also highlighted the importance of distinguishing combatants from civilians, asserting that private individuals, who are not part of the armed forces are not actively engaged in fighting and, therefore, should not be targeted. He further noted the ethical and legal advancements that led to the creation of such protective rules. Historically, however, wars often involved entire populations, including women, children, and the sick as well, blurring the proper distinction.⁸²

The distinction between combatants and civilians lies at the heart of humanitarian law and was enshrined in numerous conventions. As mentioned above it can be implicitly derived from the St. Petersburg Declaration of 1868 (Section 83) and the Hague Conventions (Article 25), as well as explicitly outlined in the Additional Protocol to the Geneva Conventions (Article 48). It is further incorporated into the Convention on Certain Conventional Weapons⁸³ and the Ottawa Convention on the Prohibition of Anti-Personnel Landmines.⁸⁴ The rules concerning indiscriminate or imprecise attacks (discussed below) were part of early legal frameworks, such as the opinions of the Imperial Defence Committee in 1919 and the Hague Aviation Rules of 1923. These documents addressed bombing methods, emphasising that attacks should not endanger civilians. Although these documents provide significant guidance on the issue, they are not legally binding instruments. Nevertheless, they reflect the evolving norms prohibiting actions without distinction.⁸⁵

4.2. Character of the Principle (Main Elements and Limitations)

The principle of distinction is considered as a cornerstone of international legal regulation dealing with conduct in combat operations. It is normatively embedded in the Article 48 of the AP I under an apt title Basic rule. Nevertheless, it was for long part of customary law. Additionally, the principle may be derived from several

81 Hague Regulations, 1907, art. 33.

82 Oppenheim, 1940, p. 168.

83 Protocol II to the Convention on Certain Conventional Weapons, 1980, art. 3, para. 2.

84 Ottawa Convention on the Prohibition of Anti-Personnel Landmines, 1997, Preamble.

85 Hanke, 1993, p. 24.

provisions of IHL stipulating the protection of civilians and the objects necessary for their livelihood.⁸⁶

The principle of distinction is intrinsically tied to the concept of a combatant. Today, a combatant is defined as a member of the armed forces taking part in the armed conflict, excluding medical and religious personnel.⁸⁷ Combatants actively participate in battles and may be considered as legitimate military objectives. Targeting civilians is prohibited. Nevertheless, those civilians, who directly engage in hostilities lose their protection. Indirect contributors, such as factory workers producing weapons or drivers transporting supplies, are not considered combatants, even though their work supports the war effort. While the facilities they operate in may be lawful military targets, any harm to civilians within them must adhere to the principle of proportionality (further analysed below). For example, attacking a civilian driver transporting military supplies in a vehicle is lawful under humanitarian law, but targeting the same individual outside the vehicle would constitute a grave violation of IHL.⁸⁸

Combatants typically serve as soldiers in the armed forces of a state involved in an armed conflict, operating within a hierarchical system where orders are given and obeyed based on rank. This structure prioritises military discipline, often overriding individual autonomy. While this approach may appear inconsistent with human rights norms, it is a legitimate aspect of military operations. However, challenges arise when orders conflict with IHL, such as prohibitions on targeting civilians or violating principles like humanity. In such cases, lower-ranking combatants may face dilemmas, which are equally present in the scholarly world.⁸⁹ According to Article 33 of the Rome Statute of the International Criminal Court (ICC), individuals can be held accountable for unlawful acts, even if carried out under orders, underscoring the limits of obedience in the face of legal and ethical obligations. On the other hand, Article 28 sets the responsibility of commanders for the acts of their subordinates.⁹⁰

The principle is strongly linked to the notion of a military objective, as it is essential for determining whether the target of an attack qualifies as a legitimate military object. According to the obligation the only legal targets are those of military nature. This can only be accomplished through proper planning and directed attacks. Thus, a commander conducting an attack must be fully informed about the details of the military objective, including the presence of civilian populations nearby or cultural monuments that could be affected. Additionally, it is important to distinguish between

86 Kalshoven and Zegveld, 2012, pp. 45–46.

87 The first Additional Protocol No. 1 to the Geneva Convention of 12 August 1949 and relating to the protection of victims of international armed conflicts. 1977. Section II. art. 43: ‘Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by art. 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.’

88 Parks, 1990, p. 134.

89 See: Gaeta, 1999.

90 Rome Statute, 1998, arts. 28, 33.

indiscriminate attacks, which violate the principle of distinction and are prohibited, and attacks carried out absolutely blindly. Planned attacks must also adhere to the principle of proportionality; if an attack is expected to cause excessive civilian casualties or damage to cultural landmarks relative to the anticipated military advantage, it is unlawful. Similarly, indiscriminate attacks that result in substantial and unjustifiable harm are categorically forbidden.⁹¹

The principle demands a distinction. However, what happens when there is no detailed planning in military operations? Indiscriminate attacks, as outlined in the Geneva Protocol, highlights challenges stemming from ambiguities in the structure of Article 51, which addresses this issue. While the first and second paragraphs emphasise the principle of distinction, the third paragraph introduces the principle of proportionality in a way that creates potential confusion. This lack of clarity in defining indiscriminate attacks appears to arise from theoretical ambiguities embedded within the Convention itself.⁹² Indiscriminate attacks are always prohibited, even if they satisfy the principle of proportionality (i.e. when the military advantage gained significantly outweighs civilian losses). However, some experts argue that the principle of proportionality must always be considered, suggesting that if it is not violated, the attack may not necessarily be deemed indiscriminate. Although Article 51 does not explicitly permit such attacks under the principle of proportionality, some interpretations suggest that this possibility could be partially inferred from its fourth paragraph.⁹³

Protocol I of the GC adopted a positive definition of a military object, stating that any object that does not meet the required criteria must be considered as a civilian object. A military object must meet two criteria:

- ‘(a) by its nature, location and purpose or use it makes an effective contribution to the military actions of the adversary.
- (b) its total or partial destruction, occupation or neutralisation in the circumstances provides a clear military advantage.’⁹⁴

The relatively broad generality of this provision can, however, be seen as a disadvantage. Generality inevitably also entails uncertainty and opens up room for various interpretations, including deliberate misinterpretations. A commander would

91 See: Rule 12. Definition of Indiscriminate Attacks; Cassese, 2008.

92 Rauch, 1982, p. 68.

93 The first Additional Protocol No. 1 to the Geneva Convention of 12 August 1949 and relating to the protection of victims of international armed conflicts. 1977. art. 51. para. 4.: ‘Indiscriminate attacks are prohibited. Indiscriminate attacks are: (a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.’

94 Additional Protocol I to the Geneva Conventions of 12 August 1949, 1977, art. 52.

certainly prefer a more specific definition. The ICRC have presented several draft definitions of the term military objective, which included the dispositive list of concrete examples. However, it was proven that this approach is generally impractical, as during an armed conflict there are special unexpected situations. Reality has hence led to a more universal definition.⁹⁵

There exist two main categories of military objects. The first are those which fulfil the requirements of being military by nature and, the second are those that assume the status of military objective. The first category includes objects such as: enemy combatants, weapons and ammunition, military equipment and all military material. In case of enemy combatants, they represent a clear-cut military object even when they do not perform some kind of military operation. The logic behind this is obvious, as it is principally easier to attack a relaxed or even sleeping combatant than one actively present on the battlefield. The same stands for ammunitions and military equipment, which is not directly used during combat. The stockpiled weapons are definitely an easy target, which can have a significant advantage for the enemy when destroyed. The second category of objects are those, whose status can change according to the situations on the battlefield. Fights often take place in villages and cities near civilian objects. When these objects are not being used by civilians and are used by the military, their status can change instantly. E.g. civilian houses without civilians but used for housing combatants, lose their status of civilian protection. Similarly, the civilian who takes up arms and starts to attack, loses the protection. Thus, the principle of distinction has to be applied according to the actual circumstances at hand.⁹⁶

As mentioned briefly in the previous paragraph, if a combatant adheres to the rules of humanitarian law and clearly distinguishes themselves from civilians through their appearance and behaviour, applying the principle of distinction becomes straightforward. However, challenges arise with volunteers who plan or carry out attacks without formally joining the armed forces. Such individuals often form groups, and if a group has a commander issuing orders and actively engages in hostilities, its members may be classified as combatants — except for mercenaries, who are not granted protection under international law. Activities beyond the command structure or involving mercenary groups are prohibited, and the party they support is obligated to prevent their actions. If an independent, politically influential, and organised group emerges, it may become a legitimate party to the conflict and hence lose protection. We may observe the principle indirectly in Article 13 of the AP II to the GC, which declares that civilians enjoy protection from attacks unless they take direct part in hostilities, thus, making a distinction between those who are active fighters and those who are not. In non-international armed conflicts, the legality of direct participation in hostilities is however determined by national law.⁹⁷

95 Mencer, 1983, p. 122.

96 Fuchs, 2007, p. 58.

97 Additional Protocol I to the Geneva Conventions, 1977, art. 13, para. 3; art. 47, para. 2.

The significance of the principle of distinction in defining combatants has been reinforced through landmark cases in international courts. For instance, the *Kasseman* case before an Israeli military court affirmed the principle as a fundamental rule of IHL, emphasising the necessity of distinguishing civilians from those actively engaged in hostilities.⁹⁸ Similarly, in the *Legality of the Use of Threat* case, numerous states referenced this principle in their submissions. The International Court of Justice (ICJ), in its advisory opinion, recognised the principle of distinction as one of the cardinal rules of IHL and an essential component of customary international law.⁹⁹

5. The Principle of Proportionality

Finally, yet not less importantly, one of the basic principles is the principle of proportionality. Even though seemingly rather theoretical, this principle has a tremendous influence in practice.¹⁰⁰ The military, during the decision-making process, has to take the limitations of their actions seriously, influenced heavily by proportionality. The explicit wording of the principle is relatively new, however already understood as a cornerstone of IHL.

From the previous paragraphs it follows that the principle has a strong connection both with the principle of military necessity and the principle of humanity. Combatants are obliged to ensure that their targets are military objectives, meaning they should only be combatants or military assets. Therefore, their strategies must take into account the potential side effects of their actions. Several weapons do not guarantee absolute certainty regarding planning; however, those attacks that may cause excessive incidental harm to civilians are prohibited. Here comes the principle of proportionality, which defines the excessive harm in relation to the specific and direct military advantage anticipated.¹⁰¹

5.1. Short Historical Overview

From a historical perspective, we may observe some of the already mentioned historical declarations of IHL. The first, i.e. the Lieber Code of 1863, mentions proportionality twice, although indirectly. In its Article 15 it enhances the rules via the prism of the principle of military necessity, when it declares that: ‘Military necessity allows all direct destruction of life or limb of armed enemies, and of other persons

98 *Kasseman Case*, 1969, Military Court, Israel, para. 271.

99 Here the ICJ affirmed, that while there’s no explicit prohibition, nuclear weapons must comply with this principle, and their use would likely violate the law unless in an extreme self-defence scenario where the state’s survival is at stake; *Legality of the threat of nuclear weapons*, ICJ advisory opinion, 1996, no. 679, para. 434.

100 Beard, 2009, p. 427.

101 Additional Protocol I to the Geneva Conventions, 1977, arts. 51–57.

whose destruction is incidentally unavoidable in the armed contests of the war.¹⁰² Even though the provision sets no basis for the general protection of civilians, one can assume that any avoidable destruction of others than combatants is not allowed. Furthermore, the Code in its Article 22 explicitly limits the harm that could be caused to civilians, if not necessary.¹⁰³ While the Code did not establish a true proportionality principle, an initial observation could be made.

The St. Petersburg Declaration drafted later can be considered as another weak step towards the establishment of the principle. The Declaration sets a need to fix the technical limits at which the necessities of war ought to yield to the requirements of humanity.¹⁰⁴ Nonetheless, the document had not thought about the issue of incidental damage, it established the need to create a balance between the military aim and humanity.¹⁰⁵ Several scholars claim that a significant step forward in relation to the principle were the Hague Regulations signed in 1907, where Article 23 declared that the destruction or seizure of property is limited and has to be proportional to the necessities of war.¹⁰⁶ The non-binding Rules of Air Warfare after the First World War included a further interpretation of the principle, when it stated that some military actions may be legitimate when they are important “enough”.¹⁰⁷

The principle, as observed above, was not well-established before the Second World War. Nonetheless, concerns were raised at conferences that there was no clear-cut and binding definition of proportionality. The strategy during the World War was not taking into account this rule, thus collateral and unnecessary damage to civilians or civilian objects was a regular price to pay.¹⁰⁸ Attacks were generally not directed towards civilians, nevertheless a vast amount of them were injured or killed as immense casualties. The heinous crimes committed during the Second World War influenced the debates at conferences, leading to a more comprehensive protection of civilians being incorporated into the IHL. These steps resulted in the creation of military manuals referring to proportionality but most importantly in the creation of the Additional Protocol I (AP I) to the GC, which explicitly referred to the principle of proportionality as an obligatory rule.¹⁰⁹

5.2. Character of the Principle (Main Elements and Limitations)

The principle of proportionality can be understood as a balance existing between two conflicting interests, presented by the principle of military necessity and the

102 General Orders No. 100 (Lieber Code), 1863, art. 15.

103 Ibid., art. 22.

104 Declaration of renunciation of the use of explosive projectiles, in time of war up to 400 grams in weight, opened for signature on November 29, 1868, “St. Petersburg Declaration”.

105 See: Schmitt, 2010.

106 Hague Convention (IV) Respecting the Laws and Customs of War on Land, 1907, art. 23(g); See: Kalshoven, 1992.

107 Hague Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare, 1923, art. 24; Cohen and Zlotogorski, 2021, p. 25.

108 Fenrick, 1982, p. 127.

109 Additional Protocol I to the Geneva Conventions, 1977, arts. 51–57.

principle of humanity. The principle creates the balance between the two principles horizontally, rather than vertically. Hence, the attacker needs to think ahead when planning a military strategy, including the weighing of the foreseeable incidental damage caused to the civilian population. The principle, stemming from IHL treaty and customary law, represents that although every strategy in an armed conflict has an aim, the success cannot be the only aspect taken into account. Those actions which demand unreasonable costs has to be limited. If an action anticipates excessive damage to protected subjects or objects, it may not be performed.¹¹⁰

As anticipated, the IHL takes into account that in an armed conflict there will be civilian victims as well as damages caused to civilian property. Nevertheless, these losses have to be reasonably proportionate to the planned advantage. As the modern warfare pushes the scope of battlefield to literally anywhere, the decision-makers of the military operations have to essentially keep in mind the proportionality in every operation. Needless to say, this duty of the commanders is anything but simple. It includes accurate knowledge of the battlefield area, gained only through the gathering of actual information. These precautions of attack may lead to the execution, but also to the cancellation or suspension of the planned operation. However, the law continues to be realistic, when it does not demand impossible feats, as the decision regarding the attack has to be made on the basis of the currently available information.¹¹¹ To establish whether the decision-making commander held ultimate responsibility for a proportionality violation, a court evaluates various factors. These factors would encompass the commander's rank in the chain of command relative to the officer who committed the violation, the characteristics of the military units under the commander's control (e.g., stable or mobile), the commander's movement in relation to those units, the size of the commander's staff and the scope of its responsibilities, as well as the nature of the combat situation.¹¹²

Distinction has to be made between attacks planned against a legitimate aim and attacks aimed primarily at civilians. Proportionality is just a complementary aspect in this regard and is thus does not enable derogation from prohibitions against protected subjects. The distinction between the two categories of acts is fundamental, although can be complicated. For example, partisan fighters can be hard to distinguish from civilians. Nevertheless, even if it is almost impossible to isolate combatants from non-combatants in some situations, uncertain actions against mixed groups would be considered illegal.

Generally, proportionality can be understood as the third sub-test of a legal military action. Even though the specific provisions regarding proportionality in IHL do not incorporate the three sub-tests, these sub-tests are represented through other particular provisions of IHL and its fundamental principles. The prohibition against all attacks on civilians and civilian objects can be interpreted as reflecting

110 See: Shany and Cohen, 2007.

111 Gasser, 1993, p. 551.

112 See: Goldenberg, 1971.

the suitability test, which necessitates a rational link between the means (the attack) and the aim (the intended military advantage). Additionally, the ban on direct attacks on civilians can be seen as exemplifying the second sub-test, as it aims to minimise civilian suffering, provided there is an alternative that results in less harm. Thus, it embodies an aspect of the least harmful means test.¹¹³

The term military advantage has been used in the chapter several times. However, it undoubtedly has a special place in the appropriate understanding of the principle of proportionality. The notion can be understood in two ways; either as a whole or on case-by-case basis. The case-by-case interpretation focuses on the specific tactical objective of each individual action, while the cumulative interpretation looks at how that action contributes to the belligerent's broader strategic goals. The result of the analysis questioning the legality and proportionality of the operation may rest upon the different understandings of the military advantage.¹¹⁴

A significant influential aspect of the lawful conduct and assessment of proportionality is the controllability of the weapon. When assessing a weapon's controllability, it is important to consider not only the immediate destruction caused by its use but also the longer-term impacts, such as environmental harm caused either to natural resources or agricultural land. Such damage is often more challenging to justify under proportionality than immediate destruction, as it has a less imminent and more remote relationship with the military advantage initially aimed for. Additionally, the unique military advantages that a weapon or technique may offer influence the proportionality assessment substantially. If a specific weapon or technique serves as a particularly effective method for achieving a certain military advantage, this could offset, in terms of proportionality evaluation, the greater potential civilian harm resulting from its usage. Therefore, it has been suggested that the principle of proportionality might even allow the use of weapons like napalm, despite the extensive civilian damage observed from its use in Vietnam and elsewhere.¹¹⁵ The aforementioned factors prompt the question of whether any weapon or warfare technique is intrinsically in violation of the proportionality principle. Nuclear weapons are the most conspicuous examples of such a classification. While a proportionality argument could potentially be made to justify the use of a tactical nuclear weapon against a significant military target situated far from civilian populations, the fallout from such an attack could still result in substantial civilian harm. Furthermore, a nuclear weapon may not necessarily demonstrate significantly greater effectiveness than conventional weapons when it comes to destroying a remote military base or target. Therefore, even if nuclear weapons are not inherently disproportionate, they would only meet the proportionality requirement in the most exceptional situations.¹¹⁶ Here, it is necessary to mention that the ICJ stipulated that generally the usage of

113 Shany, 2009, pp. 56–57.

114 Brown, 1976, p. 141.

115 Farer, 1971, p. 22.

116 Brown, 1975, p. 143.

nuclear weapons is not illegal if performed for self-defence, which is always under the conditions of necessity and proportionality.¹¹⁷

Formally, there is no explicit provision on proportionality in non-international conflicts. The Additional Protocol II only prohibits indiscriminate attacks which are directed toward civilian population. Nevertheless, the application of customary international law is based on universal principles and state practices, whereas no state has ever declared that these principles do not apply to non-international armed conflicts. Yet, the interpretation of these applications may regularly vary.¹¹⁸

Recently, increasing attention has been paid to the new modern technologies used in armed conflicts. As the current warfare introduces several new modern technological means and methods, the principle of proportionality may come as extremely handy when applied to situations which are not covered by IHL treaty or even customary provisions. Nevertheless, applying proportionality to cyberattacks can be difficult. Cyberattacks have a vast amount of immediate effects but still can cause a tremendous amount of damage observed only later. The destruction, data corruption, system damage or damage to infrastructure all have to be taken into account when considering whether cyberattacks are proportionate or not.¹¹⁹ Nonetheless, modern technology can be an aid for keeping up with the demands of the IHL. Robots, autonomous systems or drones can help gather information which is more current and actual, hence providing the combatants with real-time information. The technological development may thus help when proportionality limits the planning of an operation.¹²⁰

6. Conclusion

The specificity of humanitarian law is that it applies moral principles i.e. values that are generally included in human rights law, within the context of armed conflict, which fundamentally opposes the goals of protecting human rights. The special interaction between humanitarian law and human rights law is seen by Pictet as well, who claims that humanitarian law comprises two branches of law: the law of war and human rights.¹²¹

This interdependent relationship influences the direction and pace of IHL's evolution, as well as its application on the battlefield. Over time, the systematic development of treaty law by states creates a balance within the legal system, since states must

117 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ, 1996.

118 Henckaerts and Doswald-Beck, 2005, p. 48; See: Prosecutor v. Thomas Lubanga Dyilo, ICC, Judgment, 14 March 2012, No. ICC-01/04-01/06; Prosecutor v. Bosco Ntaganda, ICC, Judgment, 8 July 2019, No. ICC-01/04-02/06; Prosecutor v. Stanislav Galić, ICTY, Judgment, 5 December 2003, No. IT-98-29.

119 Hassanová, 2023, p. 135.

120 Pomés, 2017, p. 217.

121 See: Pictet, 1966.

consider both military and humanitarian interests. However, external pressures have gradually shifted the focus toward humanitarian considerations. While this trend might signify a form of “progress”, it also poses a risk to the fragile balance necessary for the continued effectiveness of IHL within a state-centric legal framework.

The principles of humanitarian law play a crucial role in driving significant advancements in the realm of human rights. While human rights were historically disconnected from humanitarian law, they are, in practice, inherently intertwined. A shift in the scope of application, influenced by references to the principle of military necessity, was initially confirmed by changes in the status of the state as a subject of international law. This transformation in the conventional understanding of state sovereignty began with the Nuremberg Charter, which established jurisdiction over crimes against humanity, regardless of their compliance with the national laws of the country where they occurred. The International Criminal Court has also highlighted that humanitarian law serves as a *lex specialis* compared to human rights law during armed conflicts. Human rights laws are intended for times of peace, whereas humanitarian law applies specifically during periods of armed conflict, effectively displacing more general laws as per the specialty rule. As a result, human rights laws are frequently suspended in times of conflict.¹²²

Military law enforcement operations in peacetime share many similarities with hostilities during armed conflicts. The fundamental principles of distinction and humanity apply in both scenarios. This also holds true for various other overarching principles, such as proportionality. The differences in the application of these principles within the contexts of law enforcement and conflict management are primarily interpretative in nature, meaning they do not diminish their overall applicability.

In any armed conflict, individuals are injured or killed, and property is often damaged or destroyed. To mitigate such suffering, humanitarian law has established explicit rules. These rules translate fundamental principles into clear provisions applicable to conflict situations. For these treaties and conventions to be effective, they must acknowledge the existence of armed conflicts and aim to maximise protection for civilians who are not directly involved. One way the conventions balance humanitarian needs with the practical realities of war is by recognising the possibility of incidental damage to civilian property and injury to civilians, even when military operations are aimed at legitimate military targets. A key example is the prohibition of excessive incidental harm to civilians and critical infrastructure, such as historic buildings. This prohibition implicitly acknowledges the occasional necessity of incidental losses, provided they are not excessive.¹²³

Because general principles of law are recognised as a formal source of law only within the international sphere, their application is generally confined to international case law, international organisations, and their affiliated bodies, such as the UN Special Rapporteurs. This application is a deficiency and a more widespread

122 Parks, 2010, p. 797.

123 Fenrick, 1982, p. 92.

application of general principles at the practical level would certainly bring moral clarity into practice. Moreover, the flexibility of the principles would allow for a more prompt response to the necessities of emergent situations.¹²⁴

Concepts such as military necessity, humanity, and proportionality are not fixed; they evolve as state practice clarifies the applicable law. As state practice contributes to the development of related case law and its application in combat situations, these aspects of IHL improve alongside advancements in international criminal justice. As a result, this evolution affects even the interpretation of the concept of armed conflict.¹²⁵

Some scholars argue that certain principles have become obsolete. Specifically, these claims include that the principle of military necessity has become somewhat outdated and does not impose meaningful limitations on commanders. These scholars contend that this principle is relevant only in the absence of a norm of humanitarian law that governs the situation, and can thus only be invoked in contexts of ambiguous customary law or legal gaps. Indeed, with ongoing technological advancements, significant gaps still exist within humanitarian law, indicating that the principle has potential for future evolution. However, if the principle were applied solely when no explicit rule exists, it would have limited relevance in contemporary law. The principle of military necessity has, on the contrary, a special importance in IHL. The principle is inherently linked to the nature of armed conflict; it automatically applies when a conflict arises, as its absence would negate the very existence of the conflict. Therefore, in every armed conflict scenario, this principle takes precedence over other humanitarian law principles. Nevertheless, combatants are not free to attack without restrictions; these limits are guided by the interpretation of military necessity. A combatant's actions align with this principle if they yield a military advantage and primarily target a specific military objective in accordance with humanitarian law.¹²⁶

The advancement and interpretation of humanitarian law and war crimes involves balancing military and humanitarian considerations. Combatants may prioritise military aspects over humanitarian concerns. Conversely, those who have not experienced conflict may overlook or undervalue military necessity when making statements regarding humanitarian law and war crimes. There is no doubt that the principles are one of the most important sources of law in the field of IHL. They apply to issues of civilians as well as non-combatants. The existence and binding force of these principles as general principles of IHL is also confirmed by the case law of current international courts. In cases of uncertainty or lack of sources (or *lacunae*), international courts frequently refer to principles. Therefore, they undoubtedly recognise their existence and importance.

124 Hassanová, 2023, p. 48.

125 Cullen, 2015, p. 776.

126 Hassanová, 2023, p. 142.

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