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Publication date

2020

Document Version

Final published version

[Link to publication](#)

Citation for published version (APA):

van den Boogaard, J. (Author). (2020). Reimagining IHL Principles Part I: The Wrong Principles. Web publication or website, Articles of War - Lieber Institute. <https://lieber.westpoint.edu/reimagining-ihl-principles-part-i-wrong-principles/>

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Reimagining IHL Principles Part I: The Wrong Principles

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December 8, 2020

by [Jeroen van den Boogaard](#) | Dec 8, 2020



Part I: We Have Been Using the Wrong Principles

Most textbooks and State military manuals on the law of armed conflict, or international humanitarian law (IHL), contain a chapter entitled “the principles of IHL.” Authors and States list varying principles they see as “fundamental” for this branch of the law. Among the most cited as IHL principles are: military necessity, humanity, distinction, proportionality, and honor and good faith (or chivalry). These five are also listed in the last update of the military IHL manual of the Royal Netherlands Army in 2005 (full disclosure: as a captain in the military lawyers’ branch of the Royal Netherlands Army, the author was involved in the drafting of this manual from 2000-2003). As a result, these five principles are the basis for IHL education and training within the Netherlands armed forces. Other States use similar, or even the same, principles, such as the United States, as evidenced in Chapter II of the updated U.S. Law of War Manual.

The problem is these five principles are, in my view, ineffective in fulfilling their two main functions: as a tool to educate and train military forces and as guidance for military forces in planning and executing military operations in accordance with their IHL obligations. For this

reason, I propose in this two-part post, that we should re-imagine the framework we use to determine the principles.

To this end, I suggest below in Part I that most of the five principles listed above are in fact not actually principles, but rather are norms of different characters. Military necessity, humanity, and chivalry should be re-categorized as foundations, not principles. And proportionality should be seen as a rule rather than a principle. To reach this conclusion, it is necessary to define the term “IHL principle” by introducing a useful taxonomy of IHL norms: foundations, principles, and rules.

In Part II of the post, I argue that the majority of the five principles listed above fail to provide specific guidance for situations where persons and objects have fallen into the hands of the enemy. In my opinion, this is a grave omission that must be corrected. As a result, I intend to open the debate on this important topic by recommending the adoption of a different set of IHL principles based on their character as a norm and their intended function.

3 Types of IHL Norms: Rules, Principles, and Foundations

Before listing the IHL principles, one first needs to define what we mean by “principles.” Unfortunately, legal scholars, States, and judges use the term “principles” inconsistently. At times it is used to mean a basis for rules, at other times as one of the most important norms in a branch of law, and still other times as a central concept that overrides all others in an area of law. Furthermore, principles are one of the three primary sources of international law as listed in Article 38 of the International Court of Justice Statute (ICJ Statute). Although equating IHL principles to those listed in the ICJ Statute is subject to debate, the fact that they are identified as a source of law may be understood as an indication that IHL principles could qualify as legally binding norms of international law.

In conceptualizing IHL norms, it has been argued by myself and others that the categories of norms introduced by Ronald Dworkin in his 1977 book *Taking Rights Seriously*—policies, principles, and rules—work well as a framework. Winter builds upon this structure, trading “policies” for the term “pillar,” while I use the term “foundation” rather than “policy” or “pillar.” In my view, “foundation” best explains the function this type of norm has within a legal framework—in this case IHL.

Foundations of a legal framework are norms underlying the legally binding norms. Unlike principles and rules, foundations are not legally binding, but contain the rationale for that legal framework. As such, foundations guide the interpretation of the legally binding principles and rules of that legal framework. Foundations of IHL, I suggest, are thus the starting points of the IHL principles and rules. They are not part of the IHL “building” as such, but are necessary to avoid the building’s collapse.

Principles, on the other hand, are legally binding and act as an in-between category. They are not as specific as rules, but have a broader function than rules. Principles of IHL may be seen as the skeleton of the entire branch of IHL. They are the basis of the most specific category of norms: rules. In international law, rules are found in either treaty texts or customary law. As such, their legally binding character is clear. IHL rules are the most specific type of norms regulating the conduct of hostilities and contain specific prohibitions and obligations. Principles are broader, yet many of them have been codified in treaty texts nonetheless.

As a result of these distinct roles, it is important to look at the characteristics of the norms when identifying IHL principles. It does not make sense to address all types of norms as “IHL principles,” because each category of norm must be applied differently. There are also functional reasons to assess which norms should be included in a list of IHL principles. Foundations are important for helping military forces understand the rules and principles of IHL. The rules are the norms that ultimately must be followed by the soldiers, because violations of the rules may lead to prosecution. But soldiers are not lawyers. They may not be expected to consult their copy of the Geneva Conventions in the midst of a firefight. Therefore, principles play a crucial intermediate role. This role will be further discussed when I introduce a new list of IHL principles in my next post.

IHL Foundations: Military Necessity, Humanity, and Chivalry

There is no doubt that military necessity, humanity, and chivalry play a crucial role in IHL. Military necessity and humanity have been built into the legally binding framework of IHL principles and rules. It is the careful balance between military necessity and humanitarian considerations that results in the principles and rules of IHL. And, certain rules have clear roots in chivalrous traditions, such as the prohibition of perfidy.

However, it is generally agreed that these notions in and of themselves provide no legal obligations. For example, Dinstein refers to humanity and military necessity as merely “impulses” in his first edition of *The Conduct of Hostilities under the International Law of Armed Conflict*. Indeed, an overriding character of these notions—setting aside rules of IHL—must be forcefully rejected. This means that specific rules, such as the prohibition of torture, cannot be set aside in the name of military necessity, unless the rule itself has incorporated such an exception. The same is true for chivalry. Even if one considers it is not chivalrous to shoot an opponent in the back or while sleeping, IHL contains no legally binding norm prohibiting such behavior. In other words, based on the definitions above, military necessity, humanity, and chivalry do not qualify as principles of IHL because they lack the required legally binding character.

Despite not qualifying as rules or principles, these and other foundations are critical for understanding IHL as a legal framework. Other foundations with a similar role may be the notion that the parties to an armed conflict do not have an unlimited right to choose methods

or means of warfare; the equality of belligerents; the sharp divide between *ius in bello* and *ius ad bellum*; and, perhaps, the Martens Clause. Reference to the IHL foundations is often found in the non-binding part of IHL instruments, namely in preambles. Some foundations have nonetheless been codified in treaty texts, but their character as such makes it clear that they do not work as legally binding norms.

IHL Proportionality is a Rule, not a Principle

Proportionality is often referred to as an IHL principle. It refers to the obligation to refrain from planned attacks, or cancel ongoing ones, in which the expected incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, would be excessive in relation to the concrete and direct military advantage anticipated.

My conclusion (which I developed in [my Ph.D. dissertation](#) on this subject) is that this norm is a rule, not a principle, because it is very specific and lacks breadth in its application. The IHL proportionality rule only applies in situations of attacks against military objectives when collateral damage is expected from that attack. That means that the rule is not relevant in military operations other than attacks. Nor is it applicable during attacks when no collateral damage is expected. It is in fact quite remarkable that the IHL proportionality rule is often referred to as a principle, since it was not codified until the adoption of the 1977 Additional Protocol I to the Geneva Conventions (API). Although it is only one of the rules that needs to be taken into account in the planning and execution of attacks, it is generally seen as an important IHL rule. That may be the reason it is often labelled as an IHL principle. Or, it could be because the rule leaves military commanders wide discretion in applying it in practice.

It may be argued that the IHL proportionality rule is only one manifestation of a broader principle that also includes precautionary measures. However, the fact that the IHL proportionality rule was drafted and incorporated in the API article on precautions in attack would make the reverse more logical. I would argue that the IHL proportionality rule should be seen as part of a broader precautionary norm. In any case, given the specific nature of the norm, proportionality should not be on our list of principles of IHL.

To conclude, IHL principles are a tool for educating and training military forces and for guiding military forces in planning and executing military operations in accordance with their IHL obligations. The notions of humanity, military necessity, and chivalry are IHL foundations, not principles. Foundations are also important for gaining overall understanding of IHL. But they do not qualify as IHL principles. After placing military necessity, humanity, chivalry, and proportionality in another category, the question arises which IHL principles remain. I will introduce my proposed list of IHL principles in my next post.

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