Chapter 1
Fighting by the Principles: Principles as a Source of International Humanitarian Law

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Abstract The rules of international humanitarian law of armed conflict are codified in a rather extensive body of treaty law. In addition, extensive research has been conducted into the rules of customary international humanitarian law. The author of this contribution will argue that there is another important source of positive international humanitarian law: principles of international humanitarian law. In this chapter, the role of the principles of international humanitarian law, the functions they perform and their legal significance as a source of international humanitarian law will be assessed. With general public international law as its starting point, the chapter discusses the sources of international humanitarian law. It explains the important role of the Martens Clause and provides examples of how the principles of international humanitarian law may be applied in contemporary armed conflicts.

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Upon my face I've got to put on a smile,
make up my mind just to walk more miles
Because I know that it is not an easy road.
(from the 'Not an easy road', by Buju Banton)

I met and worked with Avril McDonald when she was Head of the International Humanitarian Law and International Criminal Department of the Asser Institute. Avril was an inspirational woman with a lively personality. I am thankful for having known her also on a personal level. She was an important inspiration for me personally, and also for this chapter.

1.1 Introduction

In the spirit of the title of this book, this chapter will deal with a topic that is very significant for the search for a human face of international law, both during armed conflict and in peacetime. It concerns the rules concerning the protection provided by international humanitarian law. There are detailed rules for the protection of those who do not, or no longer participate in hostilities, such as civilians, wounded and sick military personnel and persons who are deprived of their freedom in connection with a conflict. In addition, international humanitarian law limits the weapons and methods of warfare that may be used during armed conflict. These rules aim to preserve a sense of humanity in armed conflict, while recognising that there is a need for the members of the armed forces to use armed force in order to defeat their enemy.[1]

[1] Kalshoven and Zegveld hold that: "the 'limits' of the law of war may be distinguished into principles and rules. Overriding principles are military necessity and humanity. The first principle tells us that for an act of war to be at all justifiable requires that it is militarily necessary: a practical consideration; and the other, that the act cannot be justified if it goes beyond what can be tolerated from a humanitarian point of view: a moral component. Obviously these are extremely broad principles: over time, they have been elaborated into ever more detailed principles and rules". Kalshoven and Zegveld 2011, p. 2.

The rules of international humanitarian law are codified in a rather extensive body of treaty law.[2] In addition, extensive research has been conducted into the rules of customary international law, notably by the ICRC.[3] In practice, however, it is not the detailed set of rules of the Geneva Conventions and the other treaties of international humanitarian law that are normally taught to and applied by the weapons bearers, but the principles.[4] Soldiers will apply these principles of international humanitarian law to any situation they are confronted with, mixed with their own considerations of common sense and the orders they have received.[5] Even though compliance with international humanitarian law is measured on the basis of the question whether specific rules of international humanitarian law have been violated, the rules that soldiers apply are directly extracted from a very restricted amount of principles. Soldiers are comfortable with these principles because these are the main focus in their military training and exercises, together with a limited set of basic rules. Even on the operational level at higher headquarters, when planning military operations, most of the time the specific rules cannot be applied in the conduct of an armed conflict, since the distance to the battlefield is too large and the operations are still in their planning phase.[6] It is for example not yet possible to determine what the status is of persons that may be encountered during the operation: are they civilians or members of the opposing force? Are they perhaps civilians who lose their protection against direct attack because they are participating directly in the hostilities? Therefore, the operation plans will refer more generally to the principle of distinction.

These examples underline the importance of the principles of international humanitarian law as a source of positive international humanitarian law. It seems that the role of these principles is sometimes underestimated by international and military lawyers in their desire to formulate detailed rules for the parties to a conflict. As will be argued below, the role of the principles is crucial in the legal framework that governs armed hostilities. But the relevant questions are the following: which are these principles, and how can they be identified? What is the legal value of these principles? Can they, and if so, how do they, translate from abstract and broad principles of international law into more detailed rules of conduct on a battlefield? And how do they relate to the rules that can be found in the traditionally dominant sources of treaty law and customary international humanitarian law?

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[2] The ICRC IHL treaty database lists 102 IHL treaties and documents. See: http://www.icrc.org/eng/resources/ihl-databases/index.jsp.

[3] Henckaerts and Doswald-Beck 2005a, Vol I-II.

[4] This is reflected in the various contributions to the W. Hays Parks: Teaching the Law of War Symposium, published in the IDF Law Review, issue 3, (2007–2008); Particularly Turns 2007–2008, p. 31; Adler 2007–2008, p. 38; Sénéchaud 2007–2008, p. 52.

[5] See generally the ICRC Study on the Roots of Behavior in War, Muñoz-Rojas and Frésard 2004.

[6] This applies particularly for ground operations. The planning process of preplanned airstrikes against specific military targets will normally allow the planners at a higher headquarters to apply the detailed rules on targeting in full.

This chapter will discuss the place, function and relevance of the principles of international humanitarian law. To this end, the contribution will provide a short overview of the role of principles in general public international law, in relation to the other traditional main sources of international law. Subsequently, the concept of principles of international humanitarian law will be explored, in particular the role they may play and in which situation they are relevant. In this respect, the significance of the Martens Clause will also be discussed.

1.2 Principles in General Public International Law

The first question to be answered is which role principles play in international law. The prominent place of principles of international law as one of the three major sources of international law[7] has paradoxically not led to a general acceptance of its place, function and relevance in international law.[8]

The principles of international law may be defined as the more general notions behind specific rules. This means that they are the inspiration for the rules and may also be used as a means to interpret specific rules. As such, "principles have a wider scope of application and also more far-reaching consequences than rules. In other words, principles lay down broad generic normative obligations. Conversely, the existence of specific rules confirms the existing legal value of the principles from which they derive. Principles constitute a more important or fundamental standard than rules".[9] Dworkin draws a distinction between three different types of norms: policies, legal principles and legal rules. He characterises policies as norms that describe an objective that needs to be attained. As such, policies are not legally binding, but they provide a normative quality in political and moral terms.[10] Legal principles and legal rules both provide direction for legal obligations in particular circumstances, but the character of their direction is different. Rules apply in an "all-or-nothing fashion".[11] In other words: if the rule applies, the answer it provides must be accepted. Principles carry more weight than rules: they must be followed by decision makers, if relevant, "as a consideration

[7] Article 38 of the Statute of the International Court of Justice (ICJ) refers to "the general principles of law recognised by civilised nations" as one of the three major sources of international law. The Statute of the International Court of Justice, San Francisco, 26 June 1945, Trb. 1971, No. 55, http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0.

[8] See for example Degan 1992, p. 1, stating that "[n]o other source of law raises so many doctrinal controversies as the general principles of law 'recognized by civilized nations' (…) Writers disagree on the substance and content of general principles of law, as well as their legal scope and relationship with the other main sources, namely treaties and customary law"; See also Shaw 2008, p. 99; Mosler 1995, p. 517; Henkin 1989, p. 61; Lammers 1980, p. 53.

[9] Van Hoof 1983, p. 149; See also Petersen 2008, p. 287.

[10] Dworkin 1977, p. 22.

[11] Ibid., p. 24.

inclining in one direction or another".[12] The larger weight that is attached to principles does not, however, automatically lead to a conclusion that principles of international law would be superior to rules in the sense that they would be able to supersede or correct rules.[13] Principles function as a basis for specific rules, assist in the interpretation of those rules and fill gaps where necessary.

Principles of international law, as now incorporated in Article 38 (1) (c) of the ICJ Statute, should be regarded as an independent source of international law.[14] Unfortunately, international courts normally refrain from revealing the methodology that is used to identify principles of international law.[15] Nonetheless, it is clear that the existence of a principle may be based on a variety of factors, such as the other main sources of international law, other multilateral sources and the conduct of states and other actors in the international sphere. This includes what may be loosely described as 'soft law' sources, as produced by states and the organs of international organisations.[16]

It seems to be unnecessary to draw a distinction between the legal significance of the principles of general international law and the principles of its sub-branches.[17] Some principles are relevant to the entire corpus of international law (such as *pacta sunt servanda*), and some are only directly relevant to one or more subdivisions of international law (such as the principle of distinction in international humanitarian law). In international law, principles may be characterised as "general legal standards overarching a whole body of law governing a specific area".[18]

The prominence of conventional law, as a source of strong obligations for states and non-state actors[19] during armed conflict, is without debate. In addition, the importance of customary law as a source of international humanitarian law is evident.[20] International judicial bodies prefer to use those sources of law that most prominently express the consent of states to that rule, in order to maximise the acceptance of their rulings by states.[21] Therefore, it is useful to review the practice of these courts with respect to the link between customary law, treaty law and principles. However, neither the ICJ, nor its predecessor, the Permanent Court of International Justice (PCIJ), has referred expressly to the principles of international

[12] Ibid., p. 26.

[13] Lammers 1980, p. 69.

[14] Contra, for example Cheng 1953; For an overview, see Lammers 1980, p. 57.

[15] Bantekas 2006, p. 126.

[16] Shelton refers to soft law as "any international instrument other than a treaty that contains principles, norms, standards, or other statements of expected behaviour". See Shelton 2006, pp. 631, 632.

[17] Simma and Alston 1992, p. 102.

[18] Cassese 2005, note 3 on p. 189. See also Chetail 2003, p. 252.

[19] Zegveld 2002, pp. 18–26; Pejic 2011, p. 197.

[20] See for example Meron 2005, p. 835; Cassese 2005, p. 160.

[21] Friedmann 1963, p. 20.

law as a source.[22] Nonetheless, the principles of international law did play a role in a number of cases.[23]

One of the functions of principles in international law in relation to treaty law and customary law is that of filling the gaps that are left by the other two sources of international law, as the ICJ apparently did in the Anglo-Norwegian Fisheries case.[24] This function is not disputed.[25] It was the main incentive to include the principles as a source of international law in the statute of the PCIJ, because they would assist in preventing the situation which the PCIJ, and later the ICJ, would have to conclude to a *non liquet*.[26]

Secondly, principles of international law may also be used as an interpretative tool. The principles of international law may be invoked to provide guidance in one direction or another in the event that there is already a rule of treaty or customary international law in place, but its interpretation in a given situation is not clear.[27] Principles that are applied to fulfil this function come close to being policies as defined by Dworkin and therefore it could be questionable whether it still concerns legally binding norms.

Finally, the existence of a corrective function for principles of international law is strongly disputed. The idea that principles of international law could supersede, and set aside, rules of treaty or customary law, in order to correct the consequences of applying that rule to a given situation does not seem favourable at first sight. As an example, one could think of invoking the principle of military necessity to set aside the absolute prohibition of torture. The applicable treaty rules leave no doubt whatsoever that this is unacceptable at all times.[28] But for a rule that is less

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[22] Degan 1992, p. 41.

[23] For the PCIJ, see for example the *Chorzow Case* (The Factory at Chorzow (Claim for Indemnity), Germany v. Poland), Merits, Judgment No. 13, 13 September 1928, PCIJ Series A, No. 17 (1928), pp. 47–53, http://www.icj-cij.org/pcij/serie_A/A_17/54_Usine_de_Chorzow_Fond_Arret.pdf, and the *Lotus Case* (The Case of the S.S. 'Lotus'), Judgment No. 9, 7 September 1927, PCIJ Series A, No. 10 (1927), p. 31, http://www.icj-cij.org/pcij/serie_A/A_10/30_Lotus_Arret.pdf; The ICJ has applied principles of international law in many cases. As an example, the ICJ stated in the *Anglo-Norwegian Fisheries Case*: "it does not at all follow that in the absence of rules having the technically precise character alleged by the United Kingdom Government [concerning the course and length of straight base lines], the delimitation undertaken by the Norwegian Government in 1935 is not subject to certain principles which make it possible to judge as to its validity under international law". See the *Anglo-Norwegian Fisheries Case* (Fisheries Case, United Kingdom v. Norway), Judgment No. 5, 18 December 1951, I.C.J. Reports 1951, p. 132, http://www.icj-cij.org/docket/files/5/1809.pdf; For a thorough survey of the practice of the PJIC and the ICJ, see Degan 1992, pp. 41–53.

[24] See *supra* note 23.

[25] Bassiouni 1990, pp. 778, 779.

[26] Lammers 1980, p. 64; See also Shaw 2008, p. 98.

[27] Lammers 1980, pp. 64, 65.

[28] Torture is prohibited in both international and non-international armed conflicts; See Common Article 3 (1) (a) to the Geneva Conventions, Geneva, 12 August 1949, United Nations Treaty Series, Volume Number 75; Article 12, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GCI), Geneva, 12 August 1949, United

absolute, the situation may be different. If a rule would blatantly violate the interests of one party to a dispute, it may seem to be fair to apply a more overarching and important principle in order to correct an otherwise inequitable outcome. It seems that this is what the ICJ did in the Corfu Channel Case where it applied 'elementary considerations of humanity' as a legal basis to set aside other rules of international law.[29] However, it must be stressed that this should only be possible where the underlying policies, which in themselves are not legally binding, would point in the same direction as the principle does. The invocation of the principle of military necessity in international humanitarian law to supersede the specific treaty rule of the prohibition of torture can serve as an example. As the overarching goal (i.e. the policy) of international humanitarian law is to protect those who do not, or no longer take part in armed hostilities, the principle of military necessity cannot be invoked to set this aside. Not only because it would be contrary to the humanitarian policy, but also because torture is militarily unnecessary.[30] Military necessity is integrated into the specific rules of international humanitarian law and does not function as a general excuse to set its rules aside.[31] Today, the prevailing view of legal doctrine in international humanitarian law is that military necessity may only be invoked if it has been expressly mentioned in the rule itself as a reason to set aside the rationale of that rule.[32]

The conclusion is therefore that although the prominence of conventional and customary international law is a fact, there is still a relevant role to play for the

(Footnote 28 continued)
Nations Treaty Series, Volume Number 75, http://treaties.un.org/doc/Publication/UNTS/Volume%2075/volume-75-I-970-English.pdf; Article 32, Geneva Convention relative to the Protection of Civilian Persons in Time of War (GCIV), Geneva, 12 August 1949, United Nations Treaty Series, Volume Number 75, http://treaties.un.org/doc/Publication/UNTS/Volume%2075/volume-75-I-973-English.pdf; Article 75 (2) (a) (ii), Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (API), Geneva, 8 June 1977, United Nations Treaty Series, Volume Number 1125, http://treaties.un.org/doc/Publication/UNTS/Volume%201125/volume-1125-I-17512-English.pdf ; See also Article 2 (2) of the United Nations Convention against Torture (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), New York, 10 December 1984, General Assembly of the United Nations, General Assembly Resolution 39/46, United Nations Treaty Series, Volume 1465, p. 85.

[29] ICJ, *Corfu Channel Case* (United Kingdom of Great Britain and Northern Ireland v. Albania), Judgment No. 1, 9 April 1949, I.C.J. Reports 1949, http://www.icj-cij.org/docket/files/1/1645.pdf, p. 22.

[30] The Lieber Code of 1863 already stated in Article 16 that "Military necessity does not admit of cruelty - that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions". Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863, as published in Schindler and Toman 2004, pp. 3–20.

[31] The doctrine of *Kriegsraison geht vor Kriegsmanier* that would allow for military necessity to set aside any other protective rule of international humanitarian law never became part of international law for exactly that reason; Garraway 2010b, p. 215.

[32] Dörmann 2002, p. 250.

principles of international humanitarian law. The most prominent role, that of filling the gaps, will be discussed first.

1.3 Gaps Left by the Treaties on International Humanitarian Law

It seems that the rules of international humanitarian law have been codified very comprehensively in treaty law. Are there still gaps remaining where the principles can play a gap-filling function? A first gap that may exist is the situation that one state is a party to a treaty containing rules of international humanitarian law, while its opponent or ally is not. Secondly, the nature of a certain conflict may cause significant problems. Thirdly, problems may arise if third armed actors, like multinational troops or peace forces are also present in a certain conflict zone.

Rules of treaty law only apply to those states that are a party to the relevant treaties.[33] The good news is that the Geneva Conventions I–IV of 1949 have attained universal ratification. Therefore, the rules on the protection of wounded, sick and shipwrecked soldiers, prisoners of war and civilians in international armed conflicts and the basic protection for Common Article 3 situations apply universally. These rules apply on the territory of any state and to any party to an armed conflict. But not all conventions in the field of international humanitarian law have achieved such an impressive level of ratification. Most importantly, the Additional Protocols to the Geneva Conventions lack the ratification of a number of states. The level of ratification is even worse for a number of other conventions in the field of means and methods of warfare.[34] Thus, for example, in joint operations interoperability problems may arise when some forces are allowed to use certain weapons, whereas other states are not, because the contributing state is a party to a treaty. These problems may arise with regard to the conventions of Ottawa or Oslo, prohibiting the use of anti-personnel landmines and cluster munitions respectively. This leads to different legal obligations for the states concerned, because some are unable to refer to applicable specific rules.[35]

Secondly, an applicable rule of treaty law may be lacking because of the nature of a conflict. The reason for the lack of applicable treaty rules can be caused by (1) a strict interpretation of the applicability clauses of the treaties, (2) the rather artificial division found in international law between international and non-international armed conflict.

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[33] See Articles 26 and 34 of the 1969 Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, United Nations Treaty Series, Volume 1155, p. 331.

[34] See the ICRC IHL treaty database: http://www.icrc.org/eng/resources/ihl-databases/index.jsp.

[35] The interoperability issue is however addressed specifically in Article 21 of the Oslo Convention on Cluster Munitions, Oslo, 30 May 2008. For the text of the treaty, see http://www.icrc.org/ihl.nsf/FULL/620?OpenDocument.

With regard to the applicability clauses, reference must be made to Common Articles 2 and 3 of the Geneva Conventions, and Article 1 of both Additional Protocols I and II. Some armed conflicts have a very international character, but do not take place between two states. The conditions of Common Article 2 of the Geneva Conventions and Article 1 of Additional Protocol I cannot be said to be fulfilled, for example, in the type of conflict between a state and a non-state armed group, or a 'terrorist' armed group, on the territory of different states. Gaps may then exist because in some situations an armed conflict is neither an international armed conflict in the classical sense, nor an internal armed conflict (or civil war). This may be because one of the parties to the conflict is not a state, and the hostilities in the conflict do not (only) take place within the territory of the state that is a party to that conflict. This gap became most evident when the Bush administration embarked on its Global War on Terror,[36] invoking authority to use armed force without also accepting the constraints of the rules of international humanitarian law.[37] The 'seam' that was exploited here concerned the applicability mechanisms of the major treaties, as contained in Common Articles 2 and 3 of the 1949 Geneva Conventions. The Global War on Terror, that was the response of the US to the terrible 9/11 attacks, took a legal wrong turn when the type of conflict between the terrorist network of Al-Queda and the US and its allies (Operation Enduring Freedom) would not fit neatly into one of the categories of armed conflicts referred to in the applicability clauses.[38] The result was a policy-driven approach that invoked the authority to use armed force but failed to acknowledge the conclusion that the protective provisions are also part and parcel of the decision to use armed force.[39] As a result, it was concluded that the rules did not apply.[40] Another example that is difficult to fit into the applicability clauses is the war between Israel and Hezbollah in 2006.[41]

It has now convincingly been argued that if an armed conflict is not of an international character, it must therefore be of a non-international character, and

[36] Also, API, *supra* note 28, does not apply because the United States is not a party to it; See Hays Parks 2010, and compare Corn 2009, pp. 4–9; See also the ICRC IHL report for the 2011 Red Cross Conference: 'Report on IHL and the challenges of contemporary armed conflicts', pp. 48–53, available on: http://www.rcrcconference.org/docs_upl/en/31IC_IHL_challenges_report._EN.pdf.

[37] See for a clear analysis: Corn 2009, pp. 4–9.

[38] Obviously, the armed conflict in Afghanistan, starting in 2001, that led to the fall of the Taliban regime from power, was an international armed conflict until the Karzai government took office; See Ducheine and Pouw 2012.

[39] Corn and Talbot Jensen 2008, p. 789.

[40] Although the lack of applicable law was caused by a misinterpretation of the law rather than by a genuine gap, the result is the same.

[41] Ducheine and Pouw 2009, p. 76; Ducheine and Pouw argue that the armed conflict was also, from the side of Israel, aimed at Lebanon. Therefore, there would simultaneously be a classic international armed conflict between the two states.

common Article 3 of the Geneva Convention applies as a minimum.[42] There are, however, very little treaty rules for non-international armed conflicts, when compared to the rules for international armed conflicts. Also, international humanitarian law contains, for some situations, different rules for international armed conflicts and non-international armed conflicts.[43] Therefore, the division in international humanitarian law between rules for international armed conflicts and for non-international armed conflicts leads to problems. The only fact that one of the parties to those conflicts is not a state but a non-state actor would in a strict sense render the treaty rules of the Geneva Conventions and Additional Protocol I with regard to international armed conflicts inapplicable. The conflict would then only be regulated by the treaty rules of Common Article 3 of the Geneva Conventions.[44] Given the fact that international borders are crossed, and the conflict is certainly not of an internal character, it seems odd that only the few basic rules of common Article 3 would apply, and treaty rules on targeting would almost be non-existent.[45] An example could be the armed conflict in Lebanon in 2006 mentioned above or the armed conflict between the Turkish government and the Kurds that hide in Northern Iraq. The substantive difference between the amount of applicable treaty rules of international humanitarian law for non-international armed

[42] See for instance Pejic 2011, pp. 203, 204, arguing that there is no gap as far as the applicability of Common Article 3 is concerned; For Operation Enduring Freedom, the US Supreme Court came to a similar conclusion in its *Hamdan v. Rumsfeld* decision. See Supreme Court of the United States, Hamdan v. Rumsfeld, Secretary of Defence, et al., No. 05-184, 29 June 2006, United States Reports, Vol. 548. See http://www.supremecourt.gov/opinions/boundvolumes/548bv.pdf.

[43] Examples are the fact that there can be no situation of occupation in a non-international armed conflict, and the fact that the concept of prisoners of war is non-existent in non-international armed conflicts.

[44] For the applicability of Additional Protocol II to a non-international armed conflict, additional requirements must be met. See Article 1 of Additional Protocol II, Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (APII), Geneva, 8 June 1977, United Nations Treaty Series, Volume Number 1125, http://treaties.un.org/doc/Publication/UNTS/Volume%201125/volume-1125-I-17513-English.pdf.

[45] Some rules of the Protocols to the 1980 Conventional Weapons Convention could still be applicable during non-international armed conflicts for states that have also ratified the extension of the applicability of the Amendment of the Convention of 2001, for example Article 2 of Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons; 1980 Conventional Weapons Convention (Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (with Protocols I, II and III)), Geneva, 10 October 1980, United Nations Treaty Series, Volume 1342, p. 137; Amendment to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, Geneva, 21 December 2001, United Nations Treaty Series, Volume 2260, p. 82.

conflicts, compared to the rules applicable during international armed conflicts, may thus also lead to gaps in the applicable rules of treaty law.[46]

Thirdly, also the fact that an internationally mandated multinational armed force, such as a United Nations intervention force, is present in a certain context, does not automatically lead to the applicability of the treaty rules of international law to those forces. Of course, the troops will remain under obligations arising out of the treaties to which their state of origin is a party, but if it is accepted that a multinational force, under the leadership of an international organisation, may become a party to the conflict itself, this does not fit neatly in the definitions of the treaty law of international humanitarian law. In addition, some obligations cannot be attributed to the organisation. As an example, an international organisation would not be able to prosecute its troops who have violated the rules of international humanitarian law.[47] In some conflicts, the multinational troops are not a party to the conflict, but they may nonetheless play a role that involves the use of armed force beyond that of law enforcement. This is because their mandate allows them to operate in a way that amounts to armed conflict, albeit usually only for a limited time. Here again, the applicability of the treaties of international humanitarian law seems to leave a gap.

It is of course very common in general international law to turn to customary international law for guidance if treaty rules are lacking. This is no different in international humanitarian law. However, as will be explained next, there remain a number of reasons why this does not settle the issue, and gaps may still be left by customary international humanitarian law.

1.4 Gaps Left by Customary International Humanitarian Law

The gaps left by customary international humanitarian law are mainly of a procedural character. They are caused by the fact that the existence of rules of customary international humanitarian law is sometimes hard to prove. This is because there is no unanimity about the methodology to identify rules of customary international law. This lack of agreement on the methodology to identify rules of customary international law also exists in general international law.[48] What is the required level and character of the state practice and *opinio juris*? In some cases, there has just never been sufficient state practice with regard to a

[46] For a general discussion on the applicability of treaty and customary rules on non-state armed groups, see Clapham 2010.

[47] Van Hegelsom 2010, p. 110.

[48] See for example Shaw 2008, pp. 72–93 and the accompanying notes.

specific rule, rendering the existence of that rule impossible to prove. Does that mean that the rule simply does not exist?[49]

The ICRC Study on customary international humanitarian law is an impressive piece of work, yet its methodology has received both criticism as well as acclaim. The experience of its drafting process illustrates the difficulties that are encountered in the identification of customary rules.[50] The methodology which the International Tribunal for the former Yugoslavia has used to identify rules of customary international law was similarly heavily criticised.[51] The specific character of international humanitarian law makes the methodological problems even more prominent. International humanitarian law is a preventive framework, meant to regulate the hostilities as soon as they begin. The rules of international humanitarian law are the user's manual for the use of the arms that the parties to the conflict deploy in their operations, as well as for the methods they may use. The problem in terms of the creation of state practice is that it is difficult to get access to the practice during the operations for reasons of operational security. Also, in terms of the creation of *opinio juris*, there is no reason to pay attention to those instances when just nothing happens since an attack has been cancelled. Therefore, states will normally only express their opinions if something has gone wrong. The state that is under attack, however, for propaganda reasons, will be likely to declare an attack during which there has been damage to civilian objects or death or injury to civilians as grossly disproportionate.

The state practice one would therefore typically search for in order to identify a rule of customary law is the battlefield practice, such as the actual targeting behaviour of states during armed conflict.[52] This behaviour could, for example, be derived from action reports containing the deliberations of the military

[49] See Kirgis 1987 for an appreciation of the way the ICJ dealt with this situation in the *Nicaragua Case* (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)), Merits, General List No. 70, 27 June 1986, I.C.J. Reports 1986, p. 14, http://www.icj-cij.org/docket/files/70/6503.pdf.

[50] See Henckaerts & Doswald-Beck 2005a, vol I, p. XXXI-XLV, the contributions of Bethlehem, Scobie and Hampson to the book by Wilmshurst and Breau 2007, Bellinger and Haynes 2007, and Henckaerts 2007 for a discussion on the various aspects of the methodology used in the ICRC Customary International Humanitarian Law Study.

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

[52] See for example Bellinger and Haynes 2007, p. 445; Maxwell and Meyer 2007, pp. 10, 11; Fellmeth 2010, p. 4.

commanders demonstrating their argumentation before the attack, including both the reasons for proceeding with and cancelling an attack. The perfect inquiry into customary international humanitarian law would therefore draw from a large collection of these types of reports from various states and conflicts, providing proof as to how various factors were weighed in the decision-making process and the subsequent behaviour of operational planners and commanders.

Unfortunately, in practice, these assessments are not always publicly available, if they are made in written form at all.[53] There are a number of reasons for this,[54] the most important reason being that those who would be best placed to conduct a thorough assessment of targeting decisions are not among those with a particular interest in the outcomes of the assessment.[55] The principle of proportionality can serve as an example here. It has been suggested that in the event that civilian casualties occur as a result of a specific attack, an inquiry into the possible disproportionate use of force should always be conducted. This does not seem to be an obligation which would be welcomed by the parties to an armed conflict.[56] In addition, parties to an armed conflict are generally reluctant to "expose the decision process to public view [because] it could enable current or future adversaries to predict the military organization's strategy and tactics, undermining its effectiveness and exposing its personnel to danger".[57] For this reason other indications of state practice have been used to determine the customary character of rules of international humanitarian law, for example military manuals.[58] Of course, how states instruct their military is certainly relevant for the practice in the context of the conducting of hostilities in armed conflict. It seems to be more logical, however, to classify the way states have phrased the obligations for their militaries in their military manuals as an expression of *opinio juris* rather than state

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

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

[55] Shamash 2005, p. 146.

[56] See Cohen 2010, pp. 29–36.

[57] Fellmeth 2010, p. 3.

[58] Particularly in the ICRC Customary Law Study, see Henckaerts and Doswald-Beck 2005b, Volume II, Practice.

practice. The military manuals indicate how states would like their armed forces to conduct their operations, or what they regard as legal behaviour. But also, a military manual may express no opinion at all, but merely restate the treaty obligations of states. On the other hand, the value that may be attached to a military manual varies greatly. Sometimes, a military manual is only a restatement of the treaty obligations a state has accepted, and should be considered as nothing more than that.[59] This is particularly the case for the military manuals of states that have not been involved in armed conflict for a long time, such as New Zealand.[60] The actual conduct during hostilities would be the state practice, demonstrating the conviction of the military to fight in accordance with the rules. In case of incidents involving (alleged) violations of the rules, the reaction of states to that incident may also be regarded as *opinio juris*.[61] But then many factors are still unclear, such as the question whether the practice of non-state actors should be taken into account.

In the author's view, a variety of indicators and methods may be considered to assess the customary status of a rule of customary international humanitarian law.[62] The rules of customary international humanitarian law are without doubt a crucial part of the framework of international humanitarian law.[63] However, controversy surrounding the methodology that should be used in finding customary law must not lead to the conclusion that no legal framework applies at all. In all instances, national law will obviously remain applicable, but in addition, those military operations that cannot be characterised as law enforcement operations need to be conducted in accordance with the legal framework which is the most fitting for military operations involving the use of force. This is the framework of international humanitarian law. The principles of international humanitarian law have the function to fill a possible gap. In fact, international humanitarian law contains a specific procedural rule that outlines the sources of rights and obligations under international humanitarian law. This rule is the Martens Clause, which is the subject of the following section.

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[59] See for example Schmitt 2007, p. 133.

[60] See for example the reference to this manual in Henckaerts and Doswald-Beck 2005b, Volume II, Part I, p. 27.

[61] Schmitt 2007, pp. 132, 133.

[62] See on the methodology to establish rules of customary international humanitarian law the discussions that were the result of the first edition of the ICRC Customary Law Study: Henckaerts and Doswald-Beck 2005a, vol. I, pp. xxxi–xlv; Henckaerts 2007, pp. 178–184; Meron 2005; Dinstein 2006, pp. 3–8; Bothe 2007, pp. 154–163, the critical remarks of the US Government as voiced by Bellinger and Haynes 2007 and the response by Henckaerts, see Henckaerts 2007; See also generally Penna 1984, pp. 202–209.

[63] See for example the foreword by the ICRC president, Dr. Jakob Kellenberger in Henkaerts and Doswald-Beck 2005a, vol. I, p. x.

1.5 The Role of the Martens Clause

It is common to use the wording of the Martens Clause as it is formulated in Article 1 (2) of Additional Protocol I:

> In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

The Martens Clause first appeared in the preamble to the 1899 Hague Convention II. It was the result of the negotiations led by Friedrich Fromhold Martens, who was part of the Russian Delegation to the Peace Conference in The Hague.[64] The objective of the preamble was to solve a dispute between some smaller states, in particular Belgium, and a number of larger States such as Prussia and Russia on the issue of the status of civilians who took up arms against occupying forces: the so-called 'franc-tireurs'. The discussions in 1899, led by Martens, were the continuation of earlier discussions at the Conference of Brussels in 1874. To solve the deadlock, Martens accepted a Belgian proposal which was subsequently included in the preamble to the Convention and was reformulated in the 1907 Hague Convention.[65] The Martens Clause was thus initially a diplomatic tool to overcome a political dispute between states and not necessarily introduced 'out of humanitarian motivations'.[66] The Martens Clause was however to be repeated in most subsequent codifications of international humanitarian law.[67]

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[64] According to Best, his name was Fedor Fedorivitch Martens, "a jurist in the service of the Tsar, who served as Russia's principal expert in international law from the seventies until his death in 1908". See Best 1980, p. 163.

[65] Kalshoven 2006, pp. 48–52; Ticehurst 1997, p. 125; Greig 1985, pp. 48, 49; Hayashi 2008, p. 136; Meron 2006, pp. 17–19; Kalshoven 1971, pp. 57–62; Cassese 2000, pp. 187–216.

[66] Cassese 2000, p. 216.

[67] See the preamble to the 1925 Gas Protocol (Protocol for the prohibition of the use in war of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare), Geneva, 17 June 1925, United Nations Treaty Series, LON Number 94; Article 63 (4) GCI, *supra* note 28; Article 62 (4) GCII, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GCII), Geneva, 12 August 1949, United Nations Treaty Series, Volume Number 75, http://treaties.un.org/doc/Publication/UNTS/Volume%2075/volume-75-I-971-English.pdf; Article 142 (4) GCIII, Geneva Convention relative to the Treatment of Prisoners of War (GCIII), Geneva, 12 August 1949, Volume Number 75, http://treaties.un.org/doc/Publication/UNTS/Volume%2075/volume-75-I-972-English.pdf; Article 158 (4) GCIV, *supra* note 28; The preamble to the 1980 Certain Conventional Weapons Convention, *supra* note 45; and Article 1 (2) of API, *supra* note 28; Note that the wording as codified in API has changed slightly since its first adoption; As Pustgarov notes: "Reckoning up the comparison, one can assert that Protocol I changed the Martens clause only in one point: it omitted the notion of 'civilized nations'. In other respects, it replaced outdated words with the language of contemporary legal parlance ('basic tenets' with 'principles', 'belligerents' with 'combatants'). The replacement of the term 'population' by 'civilians' did not change the content of the notion. But it has a definite meaning for humanitarian law, which attempts strictly to

It has been previously submitted that the Martens Clause provides the solution to fill any gaps that may exist in international humanitarian law, particularly during the Nuremberg trials. During these trials, the Martens Clause was applied to counter assertions that the Charter of the Tribunal was an example of retroactive penal legislation. In the *Altstötter* case, the Clause served to support the proposition that the deportation of civilians from occupied territories was prohibited under international humanitarian law and constituted a crime that could be prosecuted by the Tribunal.[68] In another case before the Tribunal, *Krupp et al.*, the Nuremberg Tribunal stated: "The Preamble is much more than a pious declaration. It is a general clause, making the usages established among civilized nations, the laws of humanity and the dictates of public conscience into the legal yardstick to be applied if and when the specific provisions of the Convention and the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare".[69]

The Martens Clause was, as noted above, in the first instance included in the preamble to a number of treaties. As such, it served initially as nothing more than an 'exhortation', because a preamble does not possess legally binding power by itself.[70] However, since the Martens Clause has now been included in the main text of treaties, first in the denunciation clauses of the 1949 Geneva Conventions, and later in Additional Protocol I, the Martens Clause should be regarded as legally binding.[71] In addition, the Martens Clause itself is also regarded as a rule of customary international law.[72]

Also, after the conclusion of the Geneva Conventions of 1949, the Martens Clause was reiterated in Resolution XXIII (Sect. 2) of the Tehran Conference on Human Rights of 1968. The Resolution stated that, pending the adaption of new rules, all states should ensure that inhabitants and belligerents are protected in accordance with the principles referred to in the Martens Clause.[73] Its continuing

(Footnote 67 continued)
distinguish the civilian population and individual civilians from combatants with a view to protecting the former from the consequences of military operations. 'The laws of humanity' are synonymous in content with 'the principles of humanity'". See Pustogarov 1999, p. 128.

[68] Meron 2006, p. 18.

[69] *Krupp et al.*, Case No. 214, Judgment of 31 July 1948, (United States Military Tribunals 1948), reprinted in Lauterpacht 1948, pp. 620, 622.

[70] Kalshoven 2006, p. 51.

[71] Miyazaki 1984, p. 436; The provisions of API, *supra* note 29, are obviously only binding on the states that have ratified it.

[72] Skordas 2003, p. 325.

[73] Greig 1985, p. 66 and Meron 2006, p. 16; For the text of Resolution XXIII of the Tehran Conference on Human Rights of 1968, see Schindler and Toman 2004, pp. 347, 348.

relevance was also proven by the fact that the ICJ referred to it in the Nuclear Weapons Advisory Opinion in 1996,[74] and in a number of cases at the ICTY.[75]

It is submitted here that the Martens Clause is not a substantive rule, but is rather of a procedural nature. The rule explains where substantive guidance must be found in international humanitarian law. This is first in treaty law, but also in customary law, in its principles (phrased here as 'the principles of humanity') and finally in 'dictates of public conscience'. The Martens Clause should thus be taken as a starting point also in the general doctrine of the sources of international humanitarian law: it shows how new developments and situations can be legally handled in an effective and flexible way.[76] The Martens Clause may then play a catalyst role to deliver counterweight to the rather static character of treaty and customary international humanitarian law.[77] Therefore, the Martens Clause recognises the existence of the principles of international humanitarian law as a source of international humanitarian law. In addition, the clause notes "the existence of a moral code as an element of the laws of armed conflict in addition to the positive legal code".[78] The Martens Clause recognises the existence of wider principles behind specific rules of international humanitarian law:

> principles who were in no sense detracted from by the spelling out of the rules in question. Put in another way, it did not follow from the fact that certain conduct was proscribed that all conduct not covered by the proscription was allowed. In other words, many of the proscriptions were but specific applications of more general principles prohibiting inhumane or underhand conduct towards those involved in the conflict.[79]

There is broad agreement that the scope of the Martens Clause has shifted away from its initial purpose to be applied to the status of civilians who are resisting their occupiers. The Martens Clause has come to apply to the complete branch of international humanitarian law.[80] However, unfortunately, there is no accepted

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[74] ICJ, *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, General List No. 95, 8 July 1996, I.C.J. Reports 1996, http://www.icj-cij.org/docket/files/95/7495.pdf, p. 226, para 78 on p. 257 and para 87 on p. 260.

[75] See ICTY, *Prosecutor v. Furundzija*, Trial Chamber, IT-95-17/1-T, 10 December 1998, para 137, see http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf; ICTY, *Procsecutor v. Kupreskic et al.*, Trial Chamber, IT-95-16-T, 14 January 2000, paras 525 and 526, see http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf; ICTY, *Prosecutor v. Martic*, Trial Chamber, IT-95-11-T, 12 June 2007, para 467, see http://www.icty.org/x/cases/martic/tjug/en/070612.pdf; See also Meron 2006, p. 22.

[76] Strebel 1995, p. 327.

[77] As an illustration of this static character, one may refer to the fact that the major codifications of international humanitarian law have always been concluded after major armed conflicts, too late to be meaningful in the preceding war. International humanitarian law then seems less efficient in fulfilling its most important function: to protect people from the horrors of armed conflict.

[78] Ticehurst 1997, p. 128.

[79] Greig 1985, p. 49.

[80] *Nuclear Weapons Advisory Opinion*, *supra* note 75, paras 78 and 87; See also Meron 2006, p. 18.

interpretation of the Martens Clause, and the understandings of the Clause differ widely.[81] One commentator notes that the Martens Clause "imports all sorts of considerations that the law itself never thought of, or, more practically, about which agreement between states turned out hard to find".[82] The Martens Clause may be interpreted in four different senses.[83] When the Martens Clause is understood in a narrow sense, all it means is that in addition to conventional international law, customary international law is also a source of international law obligations.[84] The ICRC Commentary to Additional Protocol I provides a wider interpretation, holding that the Martens Clause means that "something which is not explicitly prohibited by a treaty is not *ipso facto* permitted".[85] The widest possible interpretation is that according to the Martens Clause, in addition to conventional and customary international law, conduct in armed conflicts is also subject to the principles of international humanitarian law.[86] Yet another interpretation holds that the Martens Clause may today be understood as the basis of the premise that when international humanitarian law is not applicable, human rights law will continue to apply as "the sole body of applicable international law rules that cover questions of humanity when IHL is no longer applicable".[87]

It is submitted here that the Martens Clause is basically to international humanitarian law what Article 38 of the ICJ Statute is to international law as a whole (including international humanitarian law). Both provisions enumerate the sources of the legal framework. The Martens Clause enumerates more specifically the sources of international humanitarian law and underlines that as a matter of law, one should not only look for rules of international humanitarian law in treaties and customary international law, but also in its principles that apply as a matter of law. In sum: the Martens Clause is of vital importance for the whole branch of international humanitarian law as it points to the principles of international humanitarian law that fill the gaps left by customary and treaty law. The next issue to be explored is how the principles relate to the treaty rules and the customary rules of international humanitarian law.

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[81] Ticehurst 1997, p. 125; Kolb and Hyde note that "One may regret that in practice, the Martens Clause is not invoked as often as it could and should be". See Kolb and Hyde 2008, p. 64.

[82] Klabbers 2006, p. 73.

[83] See Hayashi 2008, p. 146, for a description of the first three of these functions, Hayashi 2008, pp. 146–150.

[84] See for example Greenwood, who holds that the suggestion that the Martens Clause goes further than customary international law "is impracticable since the 'public conscience' is too vague a concept to be used as the basis for a separate rule of law and has attracted little support". See Greenwood 2008, pp. 34, 35; See also Dinstein 2010, pp. 8, 9.

[85] Sandoz et al. 1987, p. 39.

[86] Ticehurst 1997, p. 125.

[87] Heintze 2004, p. 797; Kolb and Hyde 2008, p. 270.

1.6 Principles of International Humanitarian Law Complementing Treaty and Custom

In case there is a gap in the applicable treaty law, it is an obvious step to turn to customary international humanitarian law.[88] This will provide for many additional rules. But if it also proves to be difficult to identify applicable rules of customary international law, the Martens Clause dictates that the principles of international humanitarian law are to be applied. These principles provide the minimum yardsticks the parties to the conflict will have to apply.

International humanitarian law is generally accepted as only being applicable during armed conflict, except for those rules that are applicable at all times.[89] It does not seem logical, however, to apply only national law and human rights standards when military force is used outside armed conflict. After all, the mere use of military force already implies the applicability of the restraints of international humanitarian law rather than human rights restraints.[90] This is the practice of many peace operations, operated by NATO, or UN troops.[91] It should be noted that the application of international humanitarian law during these operations is usually invoked because of a policy decision. Some states apply the rules of international humanitarian law as a matter of policy to all their military operations. The textbook example is the Department of Defense of the United States. According to Directive 2311.01, "Members of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterised, and in all other military operations".[92] A problem arises, however, if the policy changes. The policy maker will argue that whatever it can give, it can also take away.[93] It is submitted here that the invocation (through a policy decision) of the application of the principles of international humanitarian law is unnecessary, because the principles already apply as a matter of law. Therefore, their applicability cannot simply be denied by a policy decision.[94]

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[88] For a discussion on the hierarchy of sources of international law, see Shaw 2008, pp. 123–127.

[89] Such as Article 36 API, *supra* note 28, mentioned above and the implementation provisions regarding the dissemination of international humanitarian law and the availability of (military) legal advice, see for example Articles 82 and 83 API, *supra* note 28.

[90] As Arne Will Dahl eloquently phrased this question: "when one uses the tools of war, should one also use the rules of war?" Dahl posed this statement during the Conference of the International Society for Military Law and the Laws of War in Tunis, 2010; For the proceedings, see the Military Law and the Law of War Review 2009, vol. 48, no. 4, pp. 473–498.

[91] Garraway 2010a, p. 133.

[92] See DoD Directive 2311.01E of 9 May 2006, DOD Law of War Program, updated 22 February 2011, also available online, see: http://www.dtic.mil/whs/directives/corres/pdf/231101e.pdf.

[93] See Corn 2009, p. 6: "what national policy makers giveth, national policy makers can taketh away".

[94] Corn notes that in the context of the Global War on Terror, even if it would be accepted that the principles should be applied as a matter of policy, they should be applied in full. See Corn 2009, pp. 7–9.

Corn submits that in military operations conducted on the basis of status-based Rules of Engagement (as opposed to conduct-based Rules of Engagement), the principles of international humanitarian law apply.[95] He argues that if the applicable Rules of Engagement authorise troops "to engage opponents based solely on status identification, opponents who ostensibly seek to kill them, they know they are engaged in armed conflict".[96] In Corn's view, this application is not based on policy, but on the applicability of the principles arising from the Rules of Engagement, which lead him to conclude that the applicability is based on law.[97] Although I concur that the principles of international humanitarian law do indeed apply as a matter of law, I submit that the origin of its application is different. In the event that an armed force applies military armed force against an adversary, it has crossed a threshold that may not lead to the applicability of treaty rules, or arguably customary rules, but it does 'start a war', thus the principles of international humanitarian law as a minimum should always apply, already when the first bullet is fired.

The United Nations has been a party to many conflicts around the world. Finally in 1999, it adopted the Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law.[98] This Bulletin is binding within the UN organisation and could apply during different types of UN operations.[99] This is useful, because during classical blue-helmet peacekeeping operations, the factual situation on the ground may be calm, with the presence of the United Nations Security Council mandate.[100] However, what rules apply to these forces if they would wish to conduct military operations in the fulfilment of their mandate, which could amount to force? If the suggestion by Corn is followed, the question whether these troops are still operating under a law-enforcement paradigm, or not, is based on the question whether their Rules of Engagement are conduct-based or, alternatively, status-based. However, as is submitted here, this would be a undesirable mix-up of the legal frameworks of *ius in bello* and *ius ad bellum*. Instead, it is more likely that Rules of Engagement are status-based because the troops are engaged in an armed conflict. The authority to use force on the basis of the applicable Rules of Engagement ultimately follows from the

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[95] It must be noted that Rules of Engagement are not only based on legal obligations, but also on political considerations and other national restrictions; See generally: Cammaert and Klappe 2010 and Klappe 2011.

[96] Corn 2009, p. 33.

[97] Corn 2009, pp. 28, 29.

[98] United Nations Secretary-General (UNSG), Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law, 6 August 1999, ST/SGB/1999/13, available at: http://www.unhcr.org/refworld/docid/451bb5724.html, accessed 28 August 2012; See Roberts and Guelff, p. 725.

[99] Prefatory note, Roberts and Guellf 2000, p. 721.

[100] For a thorough discussion of the obligations arising out of international humanitarian law for United Nations and other international organizations involved in military missions, see Sams 2011, pp. 45–71.

United Nations Security Council Mandate. This authority should be kept separate from the protective and restrictive rules and principles of international humanitarian law that apply as a matter of law because the UN troops use armed force. If they engage in the use of armed force, even if the operation is conducted in accordance with and in the fulfilment of their mandate, the application of international humanitarian law is invoked. If treaty rules are applicable, they must be applied. If, in their absence, customary rules can be identified, the latter must be applied. If these legal frameworks both fail to provide guidance, the principles of international humanitarian law must be applied.[101]

An example may be found in an exchange of letters between Belgium and the UN concerning a number of claims arising from UN operations in the Congo. In response to a letter from the Acting Permanent Representative of the Union of Soviet Socialist Republics, the UN explained why they were liable for the payment of claims for damage to Belgian civilians caused by the UN operations. The UN stated that "in regard to the United Nations activities in the Congo, it is reinforced by the principles set forth in the international conventions concerning the protection of the life and property of civilian population during hostilities as well as by considerations of equity and humanity which the United Nations cannot ignore". The UN also stated that "Claims of damage which were found to be solely due to military operations or military necessity were excluded".[102] Even though the object of the exchange of letters was the payment of compensation, the UN clearly stated that in order to determine whether its troops had committed wrongful acts, it had struck a balance between considerations of humanity and military necessity. The UN thus apparently found that the principles set forth in the international conventions concerning the protection of the life and property of civilians during hostilities applied. In other words, the UN concluded that the conventions themselves (which would be the Geneva Conventions) were not applicable. Therefore, they filled the existing gap through the application of the underlying principles of international humanitarian law. This example proves that especially in parts of international law where there is still discussion on the exact

[101] Corn notes that "While the characterization of the conflict remains significant for the purpose of applying specific treaty obligations, denying applicability of core LOAC principles merely because a *de facto* armed conflict does not fit within the inter/intra-state law-triggering paradigm is operationally counter-intuitive". See Corn 2009, p. 20; Corn's approach does ultimately lead to the identical conclusion that the principles of international humanitarian law apply as a matter of law. In my view, however, the authority that decides on the type of rules of engagement is in essence making a policy decision, and not creating law. For the soldiers who have to apply these principles during their operations, it obviously does not make a difference how the principles have become binding upon them.

[102] Exchange of letters constituting an agreement between the United Nations and Belgium relating to the settlement of claims filed against the United Nations in the Congo by Belgian nationals, New York, 20 February 1965; See UNITED NATIONS JURIDICAL YEARBOOK, 1965, Part One, Legal status of the United Nations and related inter-governmental organizations, Chapter II, Treaty provisions concerning the legal status of the United Nations and related inter-governmental organizations, pp. 39–41.

applicable legal framework (in this case the responsibilities of forces of international bodies during armed conflict) the principles of international law are applied.

In addition, if one reviews the historical development of general international law and also of international humanitarian law, it becomes clear that the distinction between national law systems and the system of international law has not always existed. It was only inserted after World War II.[103] The core principles of international humanitarian law may therefore be deemed to predate the division between the applicability of the rules of international humanitarian law to international armed conflicts or non-international armed conflicts. This division is found in both conventional international humanitarian law, and to an extent also in customary international humanitarian law. On the basis of the historical evolution of international humanitarian law one may conclude that the applicability of some principles of international humanitarian law may not be restricted to either an international or a non-international armed conflict, but that they are applicable in any situation where armed force is deployed to the level of an armed conflict. Therefore, the principles of international humanitarian law fulfil an indispensable role as a gap-filler. As a result, the framework of international humanitarian law consists of a complete system of rules for any situation where military force is applied, and is made up of rules of treaty and customary international law and the principles of international humanitarian law.

1.7 Other Functions

In addition to the function of filling existing gaps as explained in the previous sections, it is also worth taking a closer look at the other functions of principles in general international law. These functions, as mentioned above, are the interpretative and the corrective functions.

It has been argued above that the principles of international humanitarian law are legally binding. The question then arises whether the same notions should also be used as interpretative tools to explain specific rules of international law. It would seem that for interpretation purposes, the underlying notions of international humanitarian law could be suitable. These notions can, in Dworkin's terms, be described as 'policies'. The basic, but often opposing notions of humanity and military necessity would then obviously be the first two notions that would qualify. The application of these two notions would have to remain in balance to bring a solution in cases where the interpretation of specific rules is required. However, it seems that there are more policies than just the two notions of humanity and

[103] Corn 2009, p. 35 and the accompanying notes.

military necessity.[104] Other basic notions of international humanitarian law that do not seem to amount to a legally binding principle include the basic notion that in any armed conflict, the right of the parties to the conflict to choose methods and means of warfare is not unlimited[105]; the notion of equal application of the law of armed conflict[106]; and the notion of chivalry.[107]

The existence of a corrective function of principles of international humanitarian law is problematic, as has been mentioned in Sect. 1.2. Could it be that the legal binding character of principles of international humanitarian law—through the Martens Clause—may in some cases even set aside the rules of conventional and customary international humanitarian law?[108] Those international lawyers who underline the primacy of the consent of states as the only decisive factor to establish legal obligations under international law will oppose this. Their argument will be that this would lead to a situation in which states have completely lost control over the formation of international law. And caution indeed remains necessary: it should be avoided that general principles are used too loosely, in order to justify behaviour that is contrary to customary or conventional law. Still, the principle of military necessity, in my view a policy rather than a principle, has recently been invoked as a separate legal (not policy) restraining factor on the use of force against an adversary.[109] Another conceivable example where the principles of international humanitarian law could perform a corrective function is the following. Suppose, in an international armed conflict, the regular armed forces of a state fight an opposing force that hides in a populated area. The attacking forces' state recently became a party to the Cluster Munitions Convention, thus cluster munitions may not be used, but are nonetheless still available. According to very reliable intelligence, it is possible to attack the headquarters of the opposing force

[104] See for example Kalshoven 2004, p. 156: "That civilians ought to be respected in any situation of armed conflict may be regarded as an application of what the ICJ referred to as long ago as 1949, in the *Corfu Channel case*, as 'elementary considerations of humanity'. To me, the Court's 'considerations of humanity' do not provide yet another source of law: they are, literally, considerations that underlie the principles and rules of IHL. Being no more than that, they are not necessarily decisive in all circumstances. As considerations go, they have to compete among themselves. And in matters of warfare, humanity may be one elementary consideration but military necessity is another."

[105] See the preamble to the St. Petersburg Declaration (Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight), Saint Petersburg, 29 November/11 December 1868, reprinted in Schindler & Toman 2004, p. 91–93 and Article 35 (1) API, *supra* note 28.

[106] See Roberts, explaining that "The 'equal application' principle is that in international armed conflicts, the laws of war apply equally to all who are entitled to participate directly in hostilities, irrespective of the justice of their causes". In other words, this means the need to separate between *ius in bello and ius ad bellum.* See Roberts 2008, p. 932.

[107] See for example the contribution by Terry Gill in this book, Chap. 2, and Liivoja 2010.

[108] Hayashi calls this the dislocating function of the Martens Clause, see Hayashi 2008, p. 149.

[109] This example pertains to the debate on a possible restrictive function of the principle of military necessity, or the obligation to 'capture rather than kill'. See Melzer 2009, p. 82 and Pejic 2011, p. 224.

located in the built-up area, but the expected collateral damage to surrounding civilian and cultural property is rather high. It is known that civilians are absent. Suppose the use of cluster munitions in this attack, it is estimated, would provide a lower rate of collateral damage than a larger bomb would, but the resulting military advantage is expected to be the same: the headquarters will be destroyed. Would this allow for the applicable treaty rule that dictates not to use cluster munitions to be superseded by the proportionality principle of international humanitarian law? Although this is a difficult question, it seems that in this specific case the use of cluster munitions could be the better option. This example is clearly too conditional to conclude that a corrective function of principles of international humanitarian law exists on a general level. However, the two examples may be used by participants in an armed conflict to remind themselves that during the correct application of the rules of international humanitarian law, it remains important to also take the more general principles into account.

1.8 Conclusion

As explained above, situations may arise where the treaty rules and the rules of customary international humanitarian law do not provide solutions for a given situation. The conclusion that no international rules are applicable in a specific situation is not only unacceptable from a legal point of view and inconsistent with the history of IHL,[110] but also incorrect. The notions behind the specific rules that lack applicability for various reasons are always there and the principles of international humanitarian law always apply. They guide and bind armed members of the parties to the conflict and peacekeepers alike. These principles are the safety net that provide a basic level of protection and rules of behaviour. For its practical application it does not make a difference whether a certain rule is part of treaty law, has been established as a customary rule or is a recognised principle of international humanitarian law. These restraints apply as a matter of law. This makes the declaration superfluous that in a certain military operation the principles of international humanitarian law will be applied on the basis of political considerations, because they already apply as a matter of law.

It is outside the scope of this contribution to determine what the principles of international humanitarian law exactly are.[111] But it is clear that there is a need for a more precise methodology to identify principles of international humanitarian law. This methodology should be sufficiently flexible to include the main characteristics the principles must have. They must be legally binding, rather general,

[110] Corn 2009, pp. 32, 33.

[111] Corn and Jensen 2009 suggest that for the category of ́transnational armed conflict ́ the three essential pillars of this regulatory foundation are the principles of military necessity, targeting (object/distinction and proportionality), and humane treatment. See Corn and Jensen 2009, p. 79.

but specific enough to be applied during military operations. Proof of the existence of the principles should be found in a variety of international sources.[112]

The conclusion of this chapter is that the principles of international humanitarian law are more important than they may seem at first sight. Their significance is not limited to the fact that they are the inspiration and basis for the exact rules of international humanitarian law as found in treaty and custom. They have, on the basis of the Martens Clause, a separate legal significance. This significance becomes most prominent in instances where the applicability of the treaty and customary rules is subject to debate. Many of these situations exist. They will remain as long as the dichotomy between the rules that apply during international armed conflicts and during non-international armed conflict prevails, and not all states have ratified all relevant treaties on international humanitarian law. But also in situations where peacekeeping operations are deployed, the applicability of the treaty rules may not be appropriate, or possible, and the customary status of the rules may also be uncertain. In these situations, the only source where military commanders on the spot can turn to for their legal rights and obligations are the principles of international humanitarian law.

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[112] For proposals for a methodology to identify principles of international humanitarian law, see in particular Frits Kalshoven 2006, p. 59; See also Bassiouni 1990, p. 809 and also Corn and Jensen 2009, p. 69.

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