

The Principle of Proportionality vis-à-vis Military Necessity

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Abstract

The principle of proportionality (PP) is considered one of the fundamental principles of international humanitarian law (IHL). It serves as the standard for balancing the requirements of humanity with military necessity. Any military advantage achieved must not come at the expense of humanitarian considerations.

Violating this principle causes unjustified harm to humanity and results in suffering that cannot be legally or morally justified. Accordingly, parties to an armed conflict must adhere to the principle of proportionality to ensure that humanitarian considerations take precedence over any military advantage that may be achieved.

Keywords: Principle of Proportionality (PP); Requirements of Humanity; Military Necessity; Armed Conflict.

INTRODUCTION

Human beings have resorted to the use of force since ancient times to assert control, and hostilities have been a persistent social phenomenon throughout history. In these conflicts, the most destructive means and methods have been employed to achieve victory. From the earliest known civilizations, humanity recognized the need to regulate and control the conduct of hostilities. Over time, these rules were codified and became an integral part of international law.

Advances in military technology and the development of the arms industry have reinforced the need to establish legal rules and principles governing the conduct of parties to hostilities. Among these is the principle of proportionality (PP), which requires that the requirements of humanity take precedence over military necessity in order to humanize the conduct of war.

The sole legitimate objective of military operations is to weaken the military capacity of the enemy. Any action that exceeds this objective constitutes a violation of the rules of IHL. Accordingly, the requirements of humanity must prevail over the pursuit of any military advantage.

Although the PP has been codified in treaty law and has become part of customary international law, the reality of contemporary hostilities demonstrates that military necessity often prevails over humanitarian considerations. This reality highlights the need to examine

how the application of military necessity should be constrained by the PP, ensuring that the requirements of humanity are given priority.

Section one: The principle of proportionality as a criterion for balancing military necessity and the requirements of humanity:

The principle of proportionality (PP) occupies a central position in IHL and applies to both international and non-international hostilities. Its significance is reflected in the extensive attention it has received from legal scholars, who emphasize the necessity of its application during the conduct of military operations. This importance is further demonstrated by its recognition in both general and specialized international legal instruments (First Requirement).

The importance of the PP becomes particularly evident when belligerents are confronted with situations in which military necessity appears to justify prioritizing military advantage over humanitarian considerations. In such circumstances, the PP serves to ensure that military operations are conducted in a manner that achieves a legitimate military advantage while minimizing harm and suffering to the greatest extent possible (Second Requirement).

First Requirement: The Principle of Proportionality as Recognized by Legal Scholarship and Codified in International Conventions

The International Court of Justice (ICJ) has affirmed in numerous judgments and advisory opinions that the PP is one of the fundamental principles of IHL. Consequently, the principle has received broad support in international legal scholarship (First Branch) and has been extensively codified in international legal instruments (Second Branch).

First Branch: The Support of International Legal Scholarship for the Principle of Proportionality

The principle of proportionality (PP) is sometimes referred to as the principle of relativity. It aims to ensure a balance between the harm inflicted on the adversary and the military advantage that can be achieved through the use of force during the course of military operations.¹ The PP requires that military force and means of combat not be used excessively or in a manner that is disproportionate to the military situation or the military nature of the intended target.²

Based on this principle, the parties to an armed conflict are obliged, at the time of carrying out a military operation, to take all feasible precautions to achieve a balance between the anticipated military advantage and the expected indirect effects or incidental harm. They

1- Haydar Kazim Abd al-Ali and Zaynab Riyad Jabir, *Mabda' al-Tanasub fi al-Qanun al-Duwali al-Insani* [The Principle of Proportionality in International Humanitarian Law], *Majallat al-Muhaqqiq al-Hilli lil-'Ulum al-Qanuniyyahwa al-Siyasiyyah* [Al-Muhaqqiq Al-Hilli Journal of Legal and Political Sciences], No. 2, 2016, p. 578.

2- Nawal Ahmad Basaj, *International Humanitarian Law and the Protection of Civilians and Civilian Objects During Armed Conflicts*, Al-Halabi Legal Publications, Beirut, p. 201.

must also refrain from launching a military operation if the expected incidental losses are excessive in relation to the anticipated military advantage.³

Accordingly, international legal scholarship has supported the idea of subjecting military operations to the PP. However, it has not been able to define the concept precisely, and the principle has therefore remained ambiguous.⁴ The importance of the principle is reflected in the efforts of international legal scholars to eliminate this ambiguity and clarify its meaning.

The jurist Pietro Verri stated: "The PP aims to limit the harm resulting from military operations, so that the effects of the means and methods of warfare employed are proportionate to the intended military advantage".⁵

The legal adviser at the International Committee of the Red Cross, Osama Damaj, attempted to define the PP as follows: "It concerns how to deal with the target intended to be attacked after determining the legality of the attack in accordance with the principle of distinction. It also determines the level of intervention required to achieve a balance between military necessity and humanity. Any failure in the application of this principle constitutes a violation of the law on the grounds of excessive use of force".⁶

The PP is regarded as one of the fundamental principles of IHL because of its role in protecting humanity from the effects of hostilities. It prohibits parties to a conflict from carrying out any military action that is expected to cause excessive harm to civilians or civilian objects that is disproportionate to the anticipated military advantage.⁷

As discussed above, legal scholarship generally agrees on the necessity of balancing the military objective sought through military operations with humanitarian considerations. However, some legal scholars argue that the practical application of the PP is impossible because there is no objective standard for comparing the anticipated military advantage with the harm that may be inflicted on civilians.

The jurist R. Baxter addressed this issue while discussing weapons that cause unnecessary suffering. He stated: "The PP should take into consideration the military advantage that can be gained, and this requires comparing two things for which there is no standard of comparison".⁸

3- Husayn Ali al-Duraydi, *International Humanitarian Law: Its Emergence, Scope, and Sources*, Dar Wael for Publishing, Amman, Jordan, 2012, p. 453.

4- Charles De Bock, "Israel, Summer 2006: Disproportionate Self-Defence or Reprisals? An Analysis of a Shift in Terminology," *Revue québécoise de droit international*, Vol. 20, No. 2, 2007, p. 43.

5- Pietro Verri, *Dictionary of the International Law of Armed Conflicts*, translated from Italian by Inès Mottier and adapted by Antoine A. Bouvier, International Committee of the Red Cross, Geneva, 1988, p. 101.

6- Usama Damj, *Prohibited Weapons in International Humanitarian Law*, in *International Humanitarian Law: Prospects and Challenges*, Vol. II, Al-Halabi Legal Publications, Beirut, 2005, p. 215.

7- Julia Grignon and Thomas Roos, "The European Court of Human Rights and International Humanitarian Law," *Revue québécoise de droit international*, Special Issue, 2020, p. 669.

8- Haydar Kazim Abd al-Ali and Zaynab Riyad Jabir, *op. cit.*, p. 575.

Second Branch: Codification of the Principle of Proportionality

The PP became part of customary international law before it was codified in various international legal instruments.⁹ This was confirmed by the ICJ in several of its judgments and advisory opinions, including its judgment in the *Military and Paramilitary Activities in and against Nicaragua* case,¹⁰ in which the Court affirmed the customary nature of the principle.¹¹

The 1868 St. Petersburg Declaration¹² laid the first foundation for the codification of the PP by establishing a fundamental legal rule, which states: "The only legitimate object which States should endeavor to accomplish during armed conflict is to weaken the military forces of the enemy".¹³

In response to the increasing frequency of hostilities, together with technological advances that led to the development of increasingly destructive weapons, the Brussels Conference of 1874 was convened, resulting in the adoption of the Brussels Declaration of 1874.¹⁴ The Declaration sought to restrict the freedom of the parties to a conflict in choosing the means of harming the enemy.¹⁵ However, it never entered into force because it was not ratified by the participating States.¹⁶

In the early twentieth century, the international community established many treaties governing military operations. One of the most notable was the 1907 Hague Convention (IV) Concerning the Laws and Customs of War on Land, together with the accompanying Regulations.¹⁷ These tools determined that the parties involved in a dispute lack an unfettered power to choose the methods of harming the adversary.¹⁸

The principle of proportionality was explicitly codified in the 1977¹⁹ Additional Protocol I, which forbids assaults likely to result in incidental civilian casualties, injuries to

9- Mahir Jamil Abu Khawat, *Protection of Journalists and Media During Armed Conflicts*, Dar al-Nahda al-Arabiyya, Cairo, 2008, p. 168.

10- International Court of Justice (ICJ), *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986.

11- See para. 176 of the Judgment.

12- Declaration Renouncing the Use, in Time of War, of Certain Explosive Projectiles, Saint Petersburg, 11 December 1868.

13- See para. 3 of the Preamble to the Saint Petersburg Declaration; see also: Éric J. Pomès, "The Deployment of Robotic Weapon Systems in Light of the Existing Legal Framework," *Revue Défense Nationale*, Special Issue, 2018, p. 148.

14- Project of an International Declaration Concerning the Laws and Customs of War, Brussels, 27 August 1874.

15- See Article 12 of the Brussels Declaration.

16- François Bugnion, "Geneva Law and Hague Law," *Revue internationale de la Croix-Rouge*, Vol. 83, No. 844, 2001, p. 904.

17- Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Respecting the Laws and Customs of War on Land, The Hague, 18 October 1907.

18- Article 22 of the Hague Regulations annexed to Convention (IV) provides as follows: "The right of belligerents to adopt means of injuring the enemy is not unlimited."

19- Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

civilians, damage to civilian property, or a combination thereof, when such harm would be disproportionate to the concrete and direct military advantage expected from the attack.²⁰

In addition, the Protocol addresses the general protection of civilian objects by prohibiting the parties to a conflict from directing military attacks or reprisals against them.²¹

It should be noted that Additional Protocol II²² does not expressly refer to the PP. This omission does not indicate a disregard for the principle. Rather, the principle must be taken into account in the application of the Protocol in accordance with the principle of humanity.

Similarly, the San Remo Manual,²³ concerning international law applicable to hostilities at sea, expressly affirms the obligation to respect the PP in the exercise of the right of individual and collective self-defense.²⁴

The international legal instruments discussed above prohibit belligerents from carrying out military actions that, although lawful in principle, result in excessive incidental harm because of the disproportionate use of force. Accordingly, the PP has become both a codified rule of international law and one of the fundamental principles of IHL.

Second Requirement: Subjecting the Invocation of Military Necessity to the Principle of Proportionality

Belligerents invoke military necessity, in many cases, to justify conduct in war that is contrary to the law. Despite the legal recognition of the state of military necessity, belligerents must be governed by restraints, whether those related to the invocation of the state of military necessity itself, which should arise only when the belligerents find themselves in danger (First Branch), or those related to military action, which must be consistent with the requirements of the PP (Second Branch).

First Branch: The Basis for Invoking Military Necessity on the Ground of Danger

Invoking military necessity depends on the condition that there is a present and imminent danger, such as when a State is threatened, according to its objective assessment of the circumstances, by a present and serious danger that threatens its existence or its system, such that it cannot avoid it except by impairing a legitimate foreign interest.²⁵

The danger may be a threat to the human right to life or a threat to the safety of the body, honor, or reputation. The seriousness of the danger surrounding the person is considered the criterion for determining the lawfulness or unlawfulness of resorting to military necessity.

20- See Article 51(5) of Additional Protocol I; see also Henri Meyrowitz, "What Law of War for NATO?", *Études internationales*, Vol. 17, No. 3, 1986, p. 555.

21- See Article 52(1) of Additional Protocol I; see also Marzuqi Wasilah, *Protection of Civilian Objects During Armed Conflicts*, Master's Thesis, Faculty of Law, University of El Hadj Lakhdar, Batna, 2009, p. 29.

22- Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

23- San Remo Manual on International Law Applicable to Armed Conflicts at Sea, prepared by international legal scholars and naval experts convened by the International Institute of Humanitarian Law, adopted in June 1994.

24- See Article 3 of the San Remo Manual.

25- Muhammad Abd al-Munim Abd al-Khaliq, *International Crimes: A Foundational Study of Crimes Against Humanity, Crimes Against Peace, and War Crimes*, n.p., 1989, p. 215.

A serious danger is one that results in the inability to remedy the harm that may arise from it.²⁶

It is required that such danger exist during the course of military operations at the moment of armed engagement. Therefore, it is not possible to claim the existence of military necessity in a situation of calm and the cessation of combat operations. This highlights the temporary nature of military necessity. For example, if the justification of military necessity for targeting a civilian facility is the presence of fighters launching attacks from it, then that justification ceases with the end of those attacks, and targeting the facility afterwards is prohibited.²⁷

Accordingly, military necessity is invoked based on the assessment of the person who is in a state of danger resulting from the military action, as that person is the one who experiences the armed engagement at the time it occurs. Thus, armed conflict is the context that creates the danger justifying resort to military necessity.

Therefore, military necessity is the resort by a person who is in a state of danger to the use of violence in order to avoid the harm that may befall him, within the limits of the fundamental rules of international law.²⁸

Second Branch: The Necessity for the Exercise of Military Necessity to Conform with the Requirements of the Principle of Proportionality

The ICJ, in its Advisory Opinion regarding the Legality of the Threat or Use of Nuclear Weapons,²⁹ confirmed that the PP aims to safeguard civilians and civilian objects during hostilities while simultaneously limiting the discretion of belligerents in selecting methods of warfare.³⁰

Consequently, the PP forbids the initiation of indiscriminate assaults. Consequently, the target must qualify as a military goal under International Humanitarian Law (IHL), whereas belligerents are obligated to avoid initiating assaults that are likely to inflict incidental injury disproportionate to the intended military benefit.³¹

Several rules derive from the PP that may not be violated under the pretext of military necessity. Among them is the rule prohibiting the infliction of unnecessary injury and

26- Iyad Muhammad Abu Mustafa, "The Principle of Military Necessity and Violations of the Rules of International Humanitarian Law: An Applied Study of Israel's Violation of the Principle of Military Necessity During the May 2021 War," *Al-Azhar University Journal*, Vol. 23, No. 2, December 2021, p. 345.

27- Anas Jamil al-Lawzi, *The Concept of Military Necessity in International Humanitarian Law*, Master's Thesis, Faculty of Law, Middle East University, 2014, pp. 27–28.

28- Sophie Rondeau, *Les caractéristiquesspéciales du droit international humanitaire*, Joint Doctoral Thesis in Law, Université Laval, Quebec, Canada, and the University of Geneva, Switzerland, 2021, p. 28.

29- International Court of Justice (ICJ), *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, Reports of Judgments, Advisory Opinions and Orders, Doc. No. 0074-4441, 1996, p. 220.

30- See para. 78(1) of the Advisory Opinion.

31- See Article 51 of Additional Protocol I; see also Inas Abu Humayrah, "Collateral Damage in Armed Conflicts under International Humanitarian Law," *Journal of Legal and Sharia Sciences*, No. 6, 2015, p. 115.

suffering,³² which was affirmed by the ICJ in its Advisory Opinion.³³ International legal texts have enshrined this rule because of its importance, as is the case with Additional Protocol I, which provides for the prohibition of the use of weapons and means of warfare capable of causing unnecessary injury and suffering.³⁴

Adhering to the PP necessitates the continual exercise of vigilance during military operations to prevent harm to civilians and civilian structures. Consequently, this principle mandates that the conflicting parties implement all practical precautions prior to launching an attack and undertake all reasonable efforts to confirm that the target is indeed a legitimate military objective.³⁵

Consequently, combatants are obligated to undertake all practicable measures when selecting the means and methods of assault to prevent anticipated collateral damage, and to abort or delay the attack if it becomes evident that the target is not a legitimate military objective or is under specific protection.³⁶

Whether the measures taken in the exercise of military necessity conform to the PP depends on the result of the military action. The military advantage achieved must be acceptable in comparison with the negative effects suffered by persons and civilian objects as a result of the lawful military action. If those effects are excessive, that action is considered a violation of the PP.

Section Two: The Legality of Violating the Protection Granted to Persons and Cultural Property on the Ground of Military Necessity

IHL grants general protection to all persons and special protection to certain categories owing to their particular vulnerability, most notably children, the injured, and the sick. Accordingly, parties to an armed conflict are prohibited from directing military attacks against these protected persons under any circumstances. However, both international legal instruments and the realities of armed conflict have demonstrated that military advantage is often prioritized over the right to life afforded to children, the injured, and the sick under this special protection (First Requirement).

In addition, the material dimension of IHL encompasses objects that are afforded general, special, or enhanced protection, such as cultural property. Parties to an armed conflict are prohibited from targeting such property or using it for military purposes in a manner that would make it a military objective. Nevertheless, the relevant international legal instruments permit the protection granted to cultural property to be set aside on the ground of military necessity (Second Requirement).

32- Dominique Turpin, "The Protection of the Civilian Population Against the Effects of Hostilities," *Études internationales*, Vol. 23, No. 4, 1992, p. 799.

33- See para. 78(3) of the Advisory Opinion.

34- See Article 35(2) of Additional Protocol I.

35- See Article 57(2) of Additional Protocol I; see also Isabelle Robinson and Ellen Nohle, "Proportionality and Precautions in Attack: The Reverberating Effects of the Use of Explosive Weapons in Populated Areas," *International Review of the Red Cross*, No. 97, 2016, p. 111.

36- Isabelle Robinson and Ellen Nohle, *op. cit.*, p. 111.

First Requirement: The Priority of Military Advantage over the Right to Life

The right to life falls within the category of fundamental human rights, and it is the most important right granted to human beings. It may not be violated either in time of peace or in time of war. Reality has shown that armed conflict is the appropriate environment for violating the right to life. Among the victims of that violation is the category of children who are involved as combatants in hostilities, which in many cases leads to their killing on the ground of military necessity despite the prohibition against involving them (Branch One), and the category of the injured and the sick who are unable to fight, who must benefit from medical care by force of law. However, international legal texts have permitted leaving them without medical care to die in the name of military necessity (Second Branch).

First Branch: The Child Soldier as a Victim of Military Necessity

Additional Protocol I mandated that the parties involved in the armed conflict implement all practicable measures to prevent minors under the age of fifteen from participating directly in hostilities, including prohibiting their recruitment into armed formations.³⁷

The Protocol established two responsibilities for the conflicting parties. The primary requirement is one of due diligence, as suggested by the phrase "all feasible measures," signifying that all conceivable action must be undertaken to avert the recruitment of minors.³⁸ The second requirement mandates the prohibition of recruiting anyone under the age of fifteen. Consequently, the parties to the war have international responsibility if it is shown that they recruited or engaged minors under the age of fifteen.³⁹

The duty to forbid the enlistment of minors applies to non-international hostilities. Additional Protocol II stipulates that individuals under the age of fifteen must not be recruited into armed formations or organizations, nor will they be allowed to engage in hostilities.⁴⁰

Additional Protocol II imposed an obligation on the parties to a non-international armed conflict not to recruit children into the armed forces, whether such recruitment is voluntary or compulsory, on the one hand, and not to permit children to participate in military operations, whether such participation is direct or indirect,⁴¹ on the other hand.

The reality of hostilities confirms the growing phenomenon of children's participation in combat operations, whether through their recruitment into regular or irregular armed forces, due to the ease with which they can be influenced to commit acts whose seriousness they often do not appreciate. Therefore, international law prohibited the involvement of children in

37- See Article 77(2) of Additional Protocol I.

38- Caroline Jaquier, *The Protection of Child Soldiers under International Law*, Doctoral Thesis in Law, Paul Cézanne University, Aix-Marseille, 2006, p. 148.

39- Saratoon Santivasa, *International Protection of Children in Armed Conflicts*, Doctoral Thesis, Panthéon-Assas University (Paris II), 1995, p. 268.

40- See Article 4(3) of Additional Protocol II; see also Dounia Zerrari, *The Rights of the Child in Armed Conflict*, Master's Dissertation in International Law, Faculty of Law and Health, University of Lille, 2006, p. 81.

41- Aïri Arzoumanian and Francesca Pizzutelli, "Victims and Perpetrators: Questions of Responsibility Relating to the Issue of Child Soldiers in Africa," *Revue internationale de la Croix-Rouge*, Vol. 85, No. 852, 2003, p. 834.

hostilities. Even if this occurs, these children, if they fall into the hands of the enemy, remain entitled to the special legal protection established for them.⁴²

Children find themselves recruited into the armed forces despite that prohibition, which in reality leads to the loss of the protection granted to them. The child's participation in combat removes him from the status of a civilian and places him in the status of a military target. His participation creates for the enemy the need to eliminate the danger threatening it and, consequently, grants legitimacy to acts that violate the child's right to special protection as a result of involving him in military operations, all under the pretext of military necessity.⁴³

However, from a legal perspective, the invoked military necessity must be restricted by the requirements of the PP. No matter how important the military advantage achieved may be, it does not prevail over the rights of the child under any circumstances.

Second Branch: The Lawfulness of Leaving the Injured and Sick Without Medical Care on the Ground of Military Necessity

International legal instruments impose an obligation on parties to an armed conflict to search for the wounded and the sick after every armed engagement for the purpose of providing them with the necessary medical care. The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field⁴⁴ prohibits the deliberate abandonment of wounded and sick persons without treatment or medical care and forbids the creation of conditions that expose them to the risk of infection or wound contamination.⁴⁵

Similarly, the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea⁴⁶ accords particular protection to this category of persons. It prohibits parties to the conflict from subjecting them to torture, biological or scientific experimentation, or neglecting their medical condition and the care to which they are entitled.⁴⁷

What these two Conventions provide represents the humanitarian aspect that seeks to limit the brutality of hostilities. The right to medical care remains in force during hostilities

42- Fikri Shahrazad, "Violence Against Children in Wars and Conflicts: A Study of the Situation of Children in Yemen and Syria," *MadaratSiyasiyyah Journal*, Vol. 1, No. 2, September 2017, p. 93.

43- Roushou Khalid, *Military Necessity under International Humanitarian Law*, Doctoral Dissertation, Faculty of Law and Political Science, Abou Bekr Belkaid University, Tlemcen, 2013, p. 266.

44- Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949.

45- See Article 12(2) of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; see also Abd al-Haqq Mersli, "International Responsibility for Breach of the Obligation to Provide Medical Care to the Sick and Wounded in Armed Conflicts," *Al-Ijtihad Journal for Legal and Economic Studies*, No. 7, January 2015, p. 223.

46- Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949.

47- See Article 12(2) of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; see also Jean-Jacques Surbeck and Remi Russbach, "International Humanitarian Law and the Protection of Health," *Revue québécoise de droit international*, No. 2, 1985, p. 175.

for the injured, the sick, and the shipwrecked because they have ceased fighting, which requires the parties to the armed conflict to provide them with medical assistance.⁴⁸

The collection of the sick, the injured, and the shipwrecked in safe places to provide medical care is considered a priority that should prevail over military advantage. The requirements of the PP require the temporary suspension of hostilities in order to reach those persons. Leaving them without treatment may fall within the scope of a failure to provide assistance to a person in danger.

Some texts permitted leaving the injured and the sick without medical care, thus giving precedence to military necessity over the requirements of the PP, which is contrary to the spirit of that principle. In this regard, the Geneva Convention of 1906,⁴⁹ relating to the Amelioration of the Condition of the Injured and Sick in Armies in the Field, provided that it is permissible to leave the sick and the injured without medical care if there is a military necessity requiring this measure.⁵⁰

Leaving the discretionary power to the parties to the conflict to determine the existence of a situation of military necessity that requires leaving the injured and the sick without medical care constitutes a danger threatening their health that may lead to their death, on the one hand, and exposes them to further injury as a result of the continuation of the armed conflict, on the other hand.⁵¹

The military advantage that the parties to the armed conflict usually seek to achieve consists in gaining territory, or destroying or weakening the military strength of the enemy. However, that advantage must be substantial and direct in comparison with the harm resulting from the military action, as required by the PP.⁵²

Based on that balancing, the parties to the conflict must realize that leaving the injured and the sick without any medical care is in itself an unlawful act because it gives precedence to military advantage over the value of the lives of persons who are unable to fight. This is considered a denial of both the principles of IHL and the rules of international human rights law.

Second Requirement: Priority of Military Advantage over the Protection Prescribed for Cultural Property

IHL paid attention to cultural property, regulated its protection, and granted it general protection, special protection, and enhanced protection due to its importance for humanity (First Branch). However, the same texts expressly provided for the permissibility of violating

48- Jean-Baptiste Jeangène Vilmer, "Human Rights and Armed Conflicts," *Philosophiques*, Vol. 42, No. 2, Autumn 2015, p. 328.

49- Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 6 July 1906.

50- See Article 1(2) of the 1906 Geneva Convention.

51- Roushou Khalid, *op. cit.*, p. 260.

52- Roushou Khalid, "The Principles Governing Military Necessity in International Humanitarian Law," *Journal of Law and Human Sciences*, No. 11, p. 270.

that protection in order to achieve military advantage, all under the pretext of military necessity (Second Branch).

First Branch: The Legal Immunity of Cultural Property from the Dangers of Military Operations

IHL accords special protection to cultural property because of its historical, cultural, and moral significance to peoples, as well as the devastating effects that armed conflicts have historically inflicted upon such property. In response to the widespread destruction of cultural heritage during armed conflicts, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) was adopted.⁵³

Cultural property refers to movable or immovable property of great importance to the cultural heritage of peoples. It includes architectural monuments, objects of historical or religious significance, archaeological sites, as well as museums, libraries, archives, and other institutions dedicated to the preservation and exhibition of cultural heritage.⁵⁴

The 1954 Hague Convention provided comprehensive protection for all cultural property. The Convention mandated the States Parties to protect such property, starting in peacetime, against any harm arising from armed conflict, by implementing measures they consider suitable to avert any violations of such property. Consequently, the sovereign State is accountable for safeguarding the cultural property situated within its jurisdiction or under its authority.⁵⁵

In the occurrence of armed conflict, the territorial State must implement all necessary measures to prevent the utilization of cultural property for military purposes and to relocate it away from military objectives. Concurrently, other parties involved in the conflict are required to abstain from looting, pillaging, and depleting such property, safeguard it from the hazards of military operations, and prohibit any reprisals against it.⁵⁶

Moreover, cultural heritage receives distinct safeguarding whenever the three criteria set forth by the Hague Convention are satisfied. The initial criterion requires that the cultural heritage be situated at a considerable distance from any major industrial hub or significant military target that represents a crucial point. The second criterion stipulates that the cultural heritage must not be utilized for military ends.

The third condition is the registration of the property that the State wishes to confer special protection upon in the International Register of Cultural Property under Special Protection, supervised by UNESCO.⁵⁷

53- Convention for the Protection of Cultural Property in the Event of Armed Conflict, with Regulations for the Execution of the Convention, The Hague, 14 May 1954.

54- See Article 1 of the Hague Convention for the Protection of Cultural Property.

55- See Article 3 of the Hague Convention for the Protection of Cultural Property.

56- Natori Karim, "The Substantive Dimension of International Humanitarian Law," *Academic Journal of Legal Research*, Vol. 17, No. 1, 2018, p. 273; see also Article 4 of the Hague Convention for the Protection of Cultural Property.

57- Natori Karim, *op. cit.*, p. 274; see also Article 8(6) of the Hague Convention and Articles 12 and 15 of the Regulations for the Execution of the Convention.

It should be noted that a new system of protection was introduced under the term "enhanced protection" by virtue of the Second Protocol to the Hague Convention of 1999,⁵⁸ which established this type of protection for cultural property of the greatest importance to humanity.⁵⁹

Second Branch: Violation of the Protection Prescribed for Cultural Property under the Pretext of Military Necessity

The Hague Convention of 1954 provided for the possibility that cultural property may lose the protection prescribed for it in the event of military necessity,⁶⁰ which is completely inconsistent with the requirements of the PP.

That Convention did not define what is meant by the military necessity that requires the violation of the protection prescribed for cultural property. Rather, this was undertaken by its Second Protocol, which defined a military objective as anything that contributes to military action and whose total or partial destruction would provide a military advantage.⁶¹

The military necessity that calls for the violation of the protection prescribed for cultural property can be divided into two cases. The first case consists in the absence of a practical alternative for achieving the intended military advantage,⁶² which expressly reflects the superiority of military advantage over the protection prescribed for cultural property.

The decision to direct a military attack against cultural property is required to be made by the commander of military forces equal in size to or larger than a battalion, or by the commander of a smaller force if the circumstances do not allow otherwise, on the one hand, and the attack must be carried out on the basis of a prior warning whenever the circumstances allow, on the other hand.⁶³

The second case is imperative military necessity. The assessment of whether it exists depends on the decision of the military commander who, if he determines that it exists, has the authority to lift the protection from cultural property and direct military attacks against it throughout the period during which the imperative military necessity continues to exist⁶⁴.

58- Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999.

59- See Article 10 of the Second Protocol to the Hague Convention.

60- Rémi Fuhrmann, *The Protection of Cultural Property in the Event of Armed Conflict and the Bipolarity of International Law*, LL.M. Dissertation, Université du Québec à Montréal, 2020, p. 32; see also Article 4(2).

61- Article 1(9) of the Second Protocol to the Hague Convention provides as follows: "Military objective" means an object which, by its nature, location, purpose, or use, makes an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

62- See Article 6(1) of the Second Protocol to the Hague Convention; see also Natori Karim, *op. cit.*, p. 276.

63- Roushou Khalid, "Loss of Protection of Cultural Property under International Humanitarian Law," *Insaniyah Journal for Research and Studies*, No. 8, 2013, p. 140.

64- Roushou Khalid, "Loss of Protection of Cultural Property under International Humanitarian Law," *op. cit.*, p. 140. Article 11(2) of the Hague Convention provides as follows: "Apart from the case provided for in the first paragraph of the present Article, the immunity of cultural property under special protection may be withdrawn only in exceptional cases of unavoidable military necessity, and only for such time as that necessity continues. Such necessity can be established only by the officer commanding a force the equivalent of a division in size or

Both of the two cases referred to above give precedence to military requirements over humanitarian considerations. Despite the general protection, the special protection, and the enhanced protection granted to cultural property, the same legal provisions that established that protection allow belligerents to violate it in order to achieve military advantages.

CONCLUSION

The failure of belligerents to comply with the PP in various hostilities has enabled them to achieve military objectives, but at a significant humanitarian cost. Violations of the principle have resulted in catastrophic consequences for civilian populations and have undermined the humanitarian values that IHL seeks to protect.

The codification of the PP is of great importance because it provides a legal framework for the protection of humanity. However, codification alone is insufficient to ensure that humanitarian considerations take precedence over military necessity. Violations of the principle may constitute war crimes falling within the jurisdiction of the permanent International Criminal Court.

The international community continues to face the challenge of impunity due to the inability of the permanent International Criminal Court to fully carry out its mandate of ensuring criminal accountability. This situation is likely to persist until the Court is able to exercise its jurisdiction effectively over individuals responsible for crimes within its jurisdiction.

Until then, international crimes arising from violations of the PP, particularly those committed in the Gaza Strip, will continue to go unpunished. The codification of the principle, without effective mechanisms to deter and hold violators accountable, has allowed military advantage to prevail over humanitarian considerations.

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