CONTENTS

	eface xi ble of Treaties and Cases xiii
PA	RT I: General Concepts
1.	An Introduction to Proportionality 3 A. General Concepts 3 B. Legal Sources 8 C. The Structure of the Book 9
2.	Ethical and Constitutional Foundations 11 A. The Possible Sources for Proportionality 11 B. A Philosophical and Religious Prism of Proportionality 12 Premodern Views of Proportionality 12 The Philosophical Background 14 C. The Rational Analysis of Proportionality 16 Rational Reciprocal Explanation 16 D. Proportionality as a Mode of Control 18 E. The Constitutional and Administrative Background to Proportionality Analysis 21
3.	 A General Overview of Proportionality in IHL 23 A. The History and Development of IHL Proportionality 23 B. Contemporary IHL and Proportionality 29 C. The Changing Nature of Armed Conflict and Proportionality 33 Applying Proportionality: Examples and Dilemmas 35 Fighting Non-State Actors and the Application of the Principle of Proportionality 39 Parallel Application of IHL and International Human Rights Law 44 The Right to Life during Armed Conflicts 48 Different Balances of IHL/HRL in Different Types of Armed Conflicts? 50 D. Conclusion 55
PA	RT II: The Practical Application of Proportionality
4.	Military Advantage 59 A. What Constitutes a Military Advantage? 60 B. Military Advantage of an Attack 65

viii CONTENTS

5.	Inc	idental Harm and the Analysis of Proportionality 73
	A.	Civilians or All Persons Protected from Attack 73
	В.	What Constitutes Harm? 78
		Harm to the Person 78
		Economic Damage 80
		Civilian Objects 81
		Damage to the Natural Environment 81
		Benefitting from Proportional Harm 83
	C.	Indirect and Reverberating Effects 83
		Foreseeable Harm 84
		Causality 87
	D.	Level of Expectation/Anticipation 88
	E.	A Balancing Act: What Constitutes a Violation? 92
		Different Standards in Different Conflicts? 99
		Excessive vs. Extensive: An Upper Limit to Civilian Harm? 100
	F.	From Whose Perspective Should Proportionality Be Examined? 101
5.		diers vs. Civilians 107
		The Basic Dilemma 107
		The Kasher vs. Walzer Debate 108
		The Lives of Soldiers and Proportionality 110
		The Context of Force Protection 114
	Ŀ.	The Enemy's Soldiers 117
7	Str	ategic and Cultural Considerations 119
•		The Meaning of "Concrete and Direct Military Advantage" 120
		Policy Arguments Regarding Strategic and Cultural Considerations 121
	υ.	The Divide between IHL and Laws on the Use of Force 121
		An Inherent or Tangible Military Advantage? 122
		Uncertainty and Manipulations 123
	C.	Who Bears the Burden of Accommodating a State's Sensitivities? 125
	-	A Matter of Context? 126
		Permitting Less Collateral Damage? 127
	D.	Different Requirements for Different States? 128
		The Futility of Force, Deterrence, and Proportionality 131
8.	Dia	rect Participation in Hostilities and Its Effect on Proportionality 135
	A.	The Concept of Direct Participation in Hostilities 135
	B.	The Definition of Direct Participation in Hostilities 139
9.		man Shields and Proportionality 145
		The Problem of Human Shields 145
	В.	Involuntary Human Shields 147

CONTENTS ix

C. Voluntary Human Shields 149

	D.	Discerning Choice 150			
10.	A.	e Principle of Distinction and Its Relation to Proportionality 155 The Definition of Military Objectives and Its Relation to Proportionality 155 Indiscriminate Attacks 159 Protection of Cultural Property 165			
PA:	RT	III: Understanding Proportionality			
11.	The	e Vagueness of Proportionality 169			
		Experimental Meanings of Proportionality 169			
		The Formula of Proportionality 171			
		Rules of Thumb 174			
	D.	Inherent Vagueness? 175			
12.	Pro	ocedural Aspects of Proportionality 177			
		The Legal Background 178			
	B.	Procedures 179			
	C.	The Suitable Decision-Maker 181			
		Doubts 187			
		How Much Intelligence Is Necessary? 189			
	E.	Warnings 194			
	Е	Roof Knocking 196			
		What Is the Role of Military Legal Advisors? 197 Conclusion 199			
	G.	Creating a Zone of Reasonableness 199			
		Responsibility and Control 199			
		Organization and Culture 200			
13	. Judicial Review and Investigations 201				
		Introduction 201			
		Ex Ante Review 201			
	C.	Ex Post Review: The Problem with the Criminal Approach 203			
		Criminal Investigations 204			
		The Problem with Criminal Investigations 205			
		Should Criminal Prosecutions Be Forsaken? 212			
	D.	Ex Post Assessment: An Alternative to Criminal Trials 214			
		The Non-Exclusive Nature of the Grave Breaches Regime			
	г	under IHL 215			
	E.	The Saleh Shehadeh Targeted Killing 220			

CONTENTS

```
14. The Future of Proportionality 223
A. On the Future of Proportionality 224
Image-Fare 224
Cyber Warfare and Proportionality 225
Autonomous Weapons and Proportionality 226
Conclusion—A Way Forward? 231
Bibliography 233
Index 247
```