

Proportionality

Definition

- One of the fundamental principles of IHL.
- Parties to a conflict must ensure that a military operation does not cause excessive civilian loss of life, injury, or damage to civilian objects, when compared to the concrete and direct military advantage anticipated from the military operation planned.
- Article 51(5)(b) - prohibition of disproportionate attacks
 - an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.
- Disproportionate attacks are also war crimes punishable under the Rome Statute.

Relation with other principles

- Distinction - must first be able to distinguish between civilians and combatants, and civilian objects and military objectives, before carrying out proportionality assessment.
- Precaution - take all means to warn civilians to minimise harm to them and civilian objects from attack.
- Humanity - ensure minimal civilian suffering and damage to civilian infrastructure

Proportionality Assessments

- What is the military objective that is being sought by a particular operation?
- What is the anticipated collateral damage to civilians and civilian objects if an attack is conducted?
- Are there alternative means of attack, such as alternative weapons or military tactics, that can be used to achieve the same military advantage while reducing collateral damage?
- Also, what kinds of precautionary measures need to be taken before commencing with the attack to allow as many civilians to move out of harm's way?

Case Law

- ICJ Advisory Opinion on the Legality of the Use of Nuclear Weapons
 - if nuclear weapons can be used in a manner that avoids excessive civilian casualties when targeting military objectives they may be considered legal under IHL.
 - Reinforced the prohibition of “weapons, projectiles, material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.
- Prosecutor vs Kupreskic (ICTY)
 - Disproportionate attacks planned on the basis of willfully spreading terror in the population constitute a war crime.
- Public Committee Against Torture in Israel versus the Government of Israel
 - Proportionality is a values based test aiming to balance the military advantage gained and the civilian damage caused thereby reinforcing the principle of proportionality under IHL.
- NATO's Operation Allied Force in Yugoslavia
 - NATO forces used indiscriminate bombs during the Kosovo conflict causing significant civilian deaths and injuries, as well as significant damage to civilian objects and infrastructure. This was done without adequate precaution and warning to limit civilian harm.

Modern Challenges with Proportionality

- Increasing urbanisation of conflicts
 - Combatants and military objectives being placed in very close proximity or sometimes embedded within civilian infrastructure and civilian populations.
 - Use of traditional weapons, such as bombs or missiles in heavily densely populated areas/
- Lethal autonomous weapons systems
 - Malfunctioning of these weapon systems can undermine proportionality. Pre-configured to conduct proportionality assessments on their own, with such functionalities pre-programmed into their algorithms.
 - Many argue for the retention of a minimal degree of human judgment to prevent potentially disproportionate attacks.