

## Nexus among Principles of Military Necessity, Proportionality and Collateral Damage in International Humanitarian Law: A Study to Analyse Precarious Balance



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**Abstract:** *This research essay delves into the fundamental principles of military necessity, collateral damage, and proportionality within the realm of international humanitarian law (IHL). These principles provide guidance and directions for the conduct of military operation in order to maintain balance between achieving military objectives and protecting civilian lives and infrastructure. Military necessity legitimizes essential actions aimed at securing a legitimate military objective. Whereas, collateral damage refers to unintended harm to civilians and civilian objects, which, while often inevitable, must be moderate, marginal and minimized. In order to comply with the principles of proportionality, the anticipated military advantage of an attack should balance against potential civilian harm. By examining the legal foundations, historical evolution, and practical applications of these principles through case studies and legal precedents, this essay highlights their enduring significance in maintaining the moral and legal integrity of warfare. Through legal-academic discourse, this article is an attempt to highlight the importance of the ongoing need for rigorous application and adaptation of these principles in contemporary armed conflicts.*

**Keywords:** Law of Armed Conflict, International Humanitarian Law (IHL), Civilian Protection, Proportionality, Precautions in Attack, Reasonable Military Commander, Doctrine of Double Effect, Collateral Damage, Geneva Conventions

### Introduction

International humanitarian law (IHL) is aimed at regulating military operations and guarantees the protection of civilians during armed conflicts. It is based on the trinity of military necessity, collateral damage, and the principle of proportionality. These ideas are essential for assessing the morality and legality of war, which necessitates a sophisticated comprehension that strikes a balance between military goals and humanitarian concerns.

The concept of military necessity allows actions that are essential to ensure enemy's defeat. As

long as the acts are not against international law, they legalize all the necessary actions to accomplish and justifiable military objective. This principle emphasizes the necessity that every military operation should focus on a specific and direct military advantage in order to refrain from unnecessary sufferings and destructions as a consequence of war.

The term "collateral damage" describes the unintentional harm that military actions cause to civilians and civilian property. Although collateral damage is not illegal under the light of the principles of international law however its acceptance depends on strict respect to the

norms of international humanitarian law, which demand that all reasonable measures should be made to limit such harm. In order to ensure that the military benefit obtained is not outweighed by unintentional injury, it is necessary to carefully balance the acknowledgment of collateral damage.

The principle of proportionality is a significant safeguard which ensures that the possible harm to civilians and civilian infrastructure should not be exceeded while achieving the necessary military targets. According to this principle the authorities responsible to command during armed conflict must make tough decisions by balancing possible collateral damage against military necessities and objectives in order to ensure that any harm to civilians is not disproportionate to the military advantages sought.

This research paper will explore the legal foundations, practical applications and the status of the above mentioned principles in the contemporary laws of armed conflict. It will also look at how these ideas have been used in the past and how they could affect the idea of war in the contemporary world, under the light of laws of armed conflict. The article aims to advance the current debate on balancing humanitarian considerations and military necessities in the context of international humanitarian law by examining case studies and legal precedents.

### **Military Necessity and Laws of Armed Conflict**

The concept of military necessity is a legal concept yet most misrepresented and misunderstood topic in the international law of armed conflict. It is defined by the Alan Dershowitz “the most lawless of legal doctrine...” (Dershowitz, 1989).

In past, it has been supplicated to justify the repulsive and violent actions as well as to enforce impractical restrictions on combatant by the military operators during armed conflict. The concept of taking violent measures under the umbrella of military necessity to vindicate the collateral damage is refused by human rights groups, organisations and several critiques of law of armed conflict. They believe that the idea

gives free hand to military authorities to use force in a manner, which would be otherwise inadmissible.

Military necessity permits the use of force only to the extent, which is not otherwise prohibited by the law of armed conflict and the necessity cannot be an excuse to escape from law. The purpose must be legitimate in order to win the war. The use of force does not mean to do whatever it takes, since military necessity involves human sufferings and physical destruction (Carnahan, 1998).

### **The Legal Foundations of the Concept**

The idea of military necessity was defined as “those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war” (Carnahan, Essential Civil War Curriculum: The Liber Code and the law of war in the Civil War, 1983) earlier in 1863 in the Lieber Code. Later on, in the Preamble to the St. Petersburg Declaration 1868 it was summarized as “*the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy*” and that “*for this purpose it is sufficient to disable the greatest possible number of men*”

In 1899 and 1907, it was noted in Hague Regulations “the rights of belligerents to adopt means of defeat the enemy are not unlimited.” (Article 22). Therefore, there must be no unnecessary suffering as a consequence of such actions.

In Article 23(g) of the Hague Regulations 1899 and 1907, it was clearly mentioned that it is not allowed to demolish the enemy’s property. Such actions can only be made if there is no other option and it is required by the necessities of war. According to Article 6(b) of the 1945 IMT Charter (Nuremberg), deliberate destruction and devastation of cities, villages or town, which has no legitimate military purpose is considered as war crime and cannot be justified as military necessity. Article 57(3) of Additional Protocol I (1977) states that during the armed conflict the risk of damaging the civilian population and their property must be low in degree as far as possible in order to achieve the military

advantages.

Therefore, the following principles can abstain from violent actions by the armed forces, which would be otherwise inadmissible in contemporary law of armed conflict:

1. The use of force is being controlled or can be controlled by some superior command
2. If the purpose is legitimate and necessary to achieve, it should be done as quickly as possible in order to make complete or partial submission of enemy (The Law of Land Warfare, 1956).
3. The military actions must be targeted and intended towards the armed forces of the enemy, they must not cause any damage to civilians or civilian object. If the attacks are made towards the civilians of the country, they cannot be justified under the ambit of military necessity.
4. The goals of military actions should not have any political element in it.

Therefore, the advocates of the concept of military necessity argue that, this principle is completely practicable and allows the use of force only to the level which is lawful and reasonable and such actions can be easily justified in order to make your enemy submit in an armed conflict. The idea protects the good command of military to carry out their legitimate actions which are necessary and intends to target the military objectives of the enemy which also grants them power to achieve their goals by making it sure that all their actions are within the principles of law of armed conflict specially those of proportionality and distinction (ICRC, 2002).

However, the roots of the idea of escaping from the strict rules of international law of armed conflict can be found in *Kriegsraison geht vor Kriegsmanier* meaning thereby necessity in war overrides the manners of fighting a combat. That is quite contrastive in order to operate the principles of armed conflict in contemporary world (Best, 1983). It puts away restrictions on the military action during the warfare. The modern concepts of law of armed conflict require heedful discrimination between civilian

targets and military objects.

Whereas, Chief Prosecutor, [Luis Moreno-Ocampo](#), at the International Criminal Court defined the actions under military necessity in his open later that Rome Statue under International Humanitarian Law enable belligerents to take actions against military objectives. The loss of lives of civilians and property regardless of seriousness of the consequences does not constitute a war crime because during the armed conflict between military forces, the loss of lives and destruction of property is unavoidable. A war crime cannot be constituted if there is an absence of intention to make attacks directly towards civilians.

The majority numbers of judges in the International Court of Justice, in the Advisory Opinion on the Legality of Use of Nuclear Weapons said that, when there are serious threats to the very survival of the state, the use of nuclear weapon could be justified under the military necessity (Burroughs, 1998). US military force justifies their actions under military necessity when the Operation Desert Storm (17 January 1991 – 28 February 1991) was carried out while targeting Iraqi Army, air force and Iraqi SCUD missile batteries. The military of Iraq was defeated and the attacks by US military achieved the air superiority (ICRC, 2002).

The NATO forces bombing campaign on Balkan is regarded as military necessity by the authorities of NATO to stop Serbian genocide against Kosovers in which a great number of civilians died as result of military actions (Schmitt, 1999). Military necessity is also applicable to the development and acquisition of new weapons. Article 35 of Protocol Additional to the Geneva Conventions 1949 requires the legal review and inspection of weapons, system and its method of use to refrain from the violation of international obligations of law of armed conflict. The illegal employment of nuclear weapons during atomic attacks on Hiroshima and Nagasaki was questioned and held illegal in the case of Ryuichi Shimoda vs The State (Ryuichi Shimoda v The State, 1963).

It can be said that, the concept of military

necessity allows the loss of human lives of armed enemies and the people included whose annihilation cannot be avoided otherwise during the armed conflicts. It also permits the incarceration of armed enemies, people with peculiar danger who are associated to the enemy groups. But the doctrine strictly forbids the killing of innocent citizens just for sake of vengeance or a lust to kill. The destruction of property of enemy state can only be deemed as lawful if it is required by necessities of warfare. Property similar to private home or church can be targeted during military operations, only if that is being used by the enemy. Wanton destruction of populated area with innocent inhabitants of the enemy state inadmissible if the purpose is only suffering and revenge (The Hostages Case, 1980).

### **Collateral Damage and Additional Protocol I of the Geneva Conventions 1949**

In the modern era of war, media, general public and human rights organization are becoming less tolerant on the risk of civilian casualties and damage to the property at the cost of necessary military actions. They now use this tool to assess the necessity, morality and effectual elements of intervention by armed forces.

Collateral damage takes place when the attacks are intended to target military objects and cause harm to human life and their property. Mostly, such casualties and destruction occur on a higher level when military operations are conducted nearby towns, villages and the places close to populated areas. Therefore, Article 51 and 57 of the 1977 Additional Protocol I to the 1949 Geneva Conventions are related to the general protection provided to the civilians against loss of lives and destruction. They safeguard innocent people against dangers as a result of military operations. Article 51 clearly states that neither civilian population nor any individual will be the object of direct attacks. In order to comply with the laws of armed conflict it is necessary to refrain from such attacks, if the anticipated collateral damage is disproportionate to military advantages. In addition to above-mentioned articles, Protocol II also prevents from violent activities whose aim is to terrorize the innocent people.

Although Protocol I prevents from causing damage to human life and property disproportionate to “the concrete and direct military advantage anticipated” (Article 51(5)(b), 1949) (Protocol 1, 1977). It is still difficult to evaluate the concrete and direct military advantages. What are the accurate standards to make assessments between collateral damage and concrete or direct military advantages?

During the air strikes on a residential area by the IDF in Gaza (2002), at least thirteen casualties including eight children occurred and more than a hundred civilians were injured while targeting the Hamas military leader (The Hostages Case, 1980). These casualties not only show disproportionate damage to defenceless people but also it demands to take feasible precautions when making such attacks representing concrete and direct military advantages. Such ideas cannot be served as license to kill innocent people in the name of military necessity.

### **The Minimum Standards**

The degree of collateral damage can be measured by the following standards

- Intentionally: when attacker is fully aware of the consequences of his actions while targeting the military objectives.
- Negligently: attacker is unaware of the bad results of his action but a prudent person would have been careful and avoid such act in same circumstances.
- Carelessly: attacker knows about the outcome but acts anyways.
- Unintentionally: when an attacker is unaware of the damage caused (Schwenkenbecher, 2014).

In international law, armed forces are under obligation to take due care to avoid casualties of the people who do not take any part in the hostilities. There can be only one exception to this rule that, there are no other substitute options of military scheme and strategy during the battlefield or it is not feasible to put combatants into risk of danger which could be possibly a reason to the failure of military aim.

The principal of proportionality does not clearly provides the exact degree of care that an attacker should take but it definitely requires him to abstain from launching targets that may anticipate excessive collateral damage and unnecessary suffering (Conway-Lanz, 2006).

### **Doctrine of Double Effect**

There are some arguments, which justify collateral damage such as Doctrine of Double Effect (DDE) by an Italian theologian Thomas Aquinas (Cavanaugh, 2006) that explains the circumstances in which incidental collateral damage may be permitted. It justifies harmful results of an action in the following circumstances

1. When the action in question is neutral and not morally wrong
2. When the expected bad effect is not intended but it can be foreseen.

In the second case, if an air strike is launched by bombardment on a factory, which is producing dangerous chemical weapons in a middle of a small town, the air force can foresee the deaths of a few hundred innocent people in this raid. But also, a military advantage will be achieved by saving the lives of people because employment of such chemical weapons can ultimately cause disaster as innumerable deaths of people.

3. When the bad consequences outweigh the good outcome of an action.
4. When there are possible ways of avoiding the harmful side effects of an attack, which involves less grave destruction, an attacker should choose them before striking even such measures would involve him high cost (Cavanaugh, 2006).

Therefore, under the light of fourth condition, it can be reasoned that, an incidental collateral damage would only be allowed if the attacker has already made sufficient efforts to reduce the harmful effects on innocents. In a military operation, however, the lowest risk of collateral damage must be first preference.

Hence, the DDE theory carries the elements of

morality and determines the distinction between intention and foresightedness of an action causing bad consequences. Deaths of people, which can be foreseen, may be permitted but intended killing of unarmed people during the war cannot be acceptable in any case.

### **The Contemporary Practices**

The invention of modern weaponry is helping to reduce the risk of clearly excessive collateral damage. Now it is more convenient to take feasible measures with the intention of denigrate the destruction. On the stages of planning the war strategy, comparisons can be made between different techniques of conducting military operations, which may help to win least harmful concrete and direct military advantages.

There must be one rule to keep in mind that good purpose must be fulfilled and feasible damage must be minimized as far as possible. Nevertheless, it is true that, soldiers are sometimes under critical condition and make hasty decision on the grounds of inadequate information therefore, as a general rule, they must make efforts to take precautions and make reasonable and careful decision to decrease the loss to non-combatants. They must pursue alternate methods, which are less violent and more likely to spare human lives even at the cost of high expenditures (Natarajan, 2011).

Obviously, International laws of armed conflict provide many guidelines to protect the civilians to achieve proportionate legitimate military advantages. However, in the scenario of contemporary conflicts, there are still some questions like what exactly those resources are to prevent excessive collateral damage to civilians? Some may argue that it is unavoidable and impracticable. Because few questions then arise that, does it mean spending a big amount of money on different technological methods or does the cost include lives of soldiers to conduct house-to-house search for the sake of protection of civilians especially during the armed conflict with non-state actors? Who are, nowadays using techniques like suicide bombings? How can these interpretations are operated for the poor states. Rather, advancement of technology is pushing us to wrong directions, where remote

controlled weaponry like drone attacks is keeping the soldiers out of any danger while siting thousands of miles away from the battlefield. Meanwhile, it is creating scenarios that are more problematic for the victims of collateral damage and putting the defenceless civilians of enemy state into the high levels of risks to their lives. General public and military operators both sides have their perceptions to make less sacrifice of their own blood thus making everything justified according to their own interpretation of laws.

There is need to build up a mutual understanding of utilizing the resources available to each party to conflict instead of creating new legal theories. We need to rethink and modify the rules in the new era of war on terror with a least damaging interference as well as a strong commitment to protection of civilians.

### **The Principle of Proportionality and International Humanitarian Law**

The principle of Proportionality is one of the basic principles of law of armed conflict. The basic idea of these principals is to provide protection to innocent civilians and to reduce the incidental damage as a result of military attacks during the armed conflict. It requires that loss must not be excessive or exceed its limits in order to achieve rightful military purposes The concept of proportionality has been defined in two articles of Additional Protocol I of 1977 as following;

Article 51(5) (b)describes the violation of proportionality as;

*“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”* (ICRC, 1949, 1977).

According to Article 57(2)(b)

*“an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack 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”* (ICRC, 1949, 1977).

Additionally, Article 51(5)(b) is associated with the protection of civilians in general by giving an example of an attack which is indiscriminate and thus prohibited in the eyes of law. During the armed conflict, civilians enjoy protection against any danger resulting from military operations. Such attacks should not be targeted directly towards any individual or civilian instead of specific military objectives. Whereas, Article 57(2)(b) deals with the required necessary precautions while attacking the military objects of enemies. It requires military authorities to suspend, cancel or reassess the attacks if there is risk of violating the principle of Proportionality (Solis, 2010).

The rules of proportionality encourage armed forces to lessen the unintended and incidental devastation occurs as result of legitimate military operation. Proportionality requires assessing the balance between expected destruction caused by such operations and military advantages gained by such targets. It clearly abstains from making indiscriminate attacks where casualties would be preponderate legitimate purposes to win the battle. Although, the idea is to limit the disproportionate harm and anticipated loss of human life and property but it shall not be taken into account under the articles of Additional Protocol I of 1977 if any civilian later on take part in the activities of combativeness (Shamash, 2005-2006).

Israel’s operation in Gaza 2008 shows that Israeli military authorities followed the principle of proportionality while planning the operation. According to news reports, the Israel Defence Forces (IDF) required commanders to consider the international humanitarian law while planning the operation. Many legal experts were involved to give advice. Consequently, incidental damage to human lives was limited overall (Cohen, 2011).

However, the principal of proportionality requires a reasonable balance between two contradictory standards, achievements of military advantages and protection of human

life, at the same time. For instance, destruction of an ammunition factory situated in a populated area would be a legitimate military objective to achieve but the question arises that, would the incidental casualties of large number of people working and living nearby be justified under the scope of proportionality or military necessity? Alternatively, what if the enemies like non-state actors interiorise that his opponent is determined to the protections of civilians? In that case, they can use innocent people as human shield to protect themselves from targeted operations or they can deliberately conduct their activities within the area of civilians.

In international law, direct attacks on civilians are prohibited (Article 49, 1949) so the question then arises that, what are the appropriate measures that a state should take when risking the human life and property is the only resort to fight with the enemy. In battle of Mogadishu October 1993, a large number of women and children were used as shield during the operation and more than thousands of civilian casualties were reported as a result (PBC, 1998). In that scenario, how can one determine the balance between the dangers to the life of soldiers and excessiveness of civilian casualties?

To this end, many states have clearly made their stance on this issue that when it comes to achieving military advantages, the very idea also includes the security and protection of their military force (Henckaerts & Doswald-beck, 2009). It was decided by the committee appointed by the prosecutor of the International Criminal Tribunal for Former Yugoslavia (ICTY) that states are allowed to protect their troopers even if there is risk to the lives of large number of civilians (IRMCT, 2000).

Furthermore, the protocol provides no clear guidance that what kind of “military advantages” should be taken into account. Similarly, the state practices in past battles shows compromise between the desire to protect civilians and the demands of military necessity. Without the element of compromise, the said rule is impracticable. Even though, the idea of proportionality requires a balanced ratio between collateral damage and legitimate military objectives but what is exactly that ratio?

The definite answer is still quite difficult to pin down (Shamash, 2005-2006).

The principal of distinction, as basic rule of law of armed conflict clearly forbids indiscriminate attack and intentional targeting on civilians and the violation of this rule is regarded as war crime under Rome Statue (Articles 48, 51(2) and 52, 1949). This principal prevents from attacking anything or anyone, which does not play any kind of part in the military actions. Similarly, military objectives can be defined as anything whose destruction and abduction would achieve the military advantages. However, the problem arises when the person seems to be civilian but in reality, is a part of military force. For example where a vehicle i.e. ambulance is being used to carry out the military supplies to combatants. In this case, it puts an unreasonable responsibility and burden on the shoulders of attacker to anticipate the idea of collateral damage in the midst of war where everything is uncertain in most of the times.

Therefore, it can be inferred that, such circumstances confuse the principal of proportionality with the principal of distinction. Because an indiscriminate attack or intentional targeting would always be illegal but in the above mentioned situations the idea would be always uncertain that how many innocent people have been killed by a combatant acting in good faith, and conducting the legitimate military operation or how many military objectives have been escaped pretending to be civilians. Despite the fact that there is great danger to the civilians, In air campaign against Serbia 1999 NATO decided to follow the policy of zero risk to its soldiers. A committee was appointed by International Criminal tribunal concluded that, any violation of proportionality has not been established by such policy (Cohen, 2011).

Nevertheless, the burden of proof lies on the attacker state when it claims to achieve legitimate military targets as last resort. It has to provide conclusive proof whose credibility must be factually strong to prove and to make assertions in the court (UN General Assembly, 2009). The principle of proportionality is complicated and problematic and it cannot be applied exclusively in all types of situations. But

it would be wrong saying that, it is completely impracticable and unimportant norm. The principal of proportionality can become a powerful tool in conflict circumstances to safeguard the innocent people if a practicable mechanism is provided by elaborating and expanding the term. If well defined, it can be a guiding key against the non- state actors, terrorist organisation, and the people who take wrong advantages proportionality.

Different arguments and questions over the concepts of military necessity, civilian deaths as collateral damage and principal of proportionality are raised due to the malleability in their characterization. There have been always issues of assessments and evaluation related to these concepts. In addition, military operators and political leaders have been reluctant to gather the necessary data for greater understanding for the purpose of decrease the human sufferings. Political leaders need to be more qualified and educated to define properly core principles of law of armed conflict so that they could provide appropriate guiding principles to the military operators to maintain balance in the battlegrounds.

## Conclusion

*And do not kill the soul which has been forbidden except by right. And whoever is killed unjustly, his heirs have been given authority but let not exceed limits in vengeance, indeed, he has been supported [by the law] (Surah Al-Ahzab, 33:17).*

To sum up, the concepts of proportionality, military necessity, and collateral damage continue to be crucial to understand the norms of international humanitarian law (IHL) and are essential tools for assessing the morality and legality of armed conflicts. These ideas are not just theoretical legal ideas rather they are closely related to the real world issues and moral requirements that legislators and military leaders must deal with during an armed conflict.

The need that every use of force must be strategically justified is emphasized by principle of proportionality, which guarantees that all military operations are focused on achieving a justifiable military goal. This idea is essential for

reducing unnecessary bloodshed which focuses on resolving conflicts in a way that cause least possible harm on human life.

Even though it is an inevitable part of an armed conflict, collateral damage requires careful thought marginal approach and moderation. Tragically, but often, unintentional damage to civilians and civilian infrastructure result from military actions. But it is the strict application of IHL principles that aims to reduce such damage, protecting civilians and maintaining human dignity in the midst of warfare.

Military decision makers are required under the concept of proportionality to weigh possible harm to civilians against military advantage and it should be a mandatory ethical compass. This idea ensures that the pursuit of military goals does not come at an excessive cost to human life and the fabric of society that will eventually foster a feeling of duty and moral accountability among the parties to an armed conflict.

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