

EXAMINING THE PRACTICABILITY OF THE PRINCIPLE PROPORTIONALITY IN A MODERN WARFARE

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Abstract

The principle of proportionality in International Humanitarian Law (IHL), prohibits attacks 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 during the conduct of hostilities. Given that direct attacks against civilians and civilian objects are already prohibited, the proportionality evaluation is relevant only when attacks are directed against lawful targets. The key term to be examined in the proportionality equation is excessive. While the requirement of proportionality is absolute, the standard of excessiveness is relative. IHL does not establish an objective threshold above which the infliction of incidental harm would always be excessive. In principle, targets with a comparatively high military value will justify greater incidental harm than targets with a comparatively low military value. Thus, the infliction of incidental harm on protected persons or objects can only be justified by advantages of a military nature, and not by political, economic or other consideration. More so, the anticipated military advantage must be “concrete” and “direct” and not of a merely hypothetical, speculative or indirect nature. This paper examines the principle of proportionality in modern warfare and explores the applicability of IHL rules in the concurrent emerging issues which constitutes a bottleneck to the law of war. The paper argues that the notion of ‘just cause’, ‘reasonableness’, and ‘excessiveness’ and the requirement of last resort are all within the proportionality principle of IHL. This paper concludes that with the introduction of modern technologies in to the present modern warfare, the damages cause by these technologies have a direct or reverberating consequences on these conflicts by considering the costs casualties, against their military objectives.

Keywords: Belligerent, Civilians, International Humanitarian Law, Military, War.

Introduction

Modern warfare is warfare that is in notable contrast with previously military concepts, methods and technology, emphasizing how combatants must modernize to preserve their battle worthiness. As such, it is an evolving subject, seen differently in different times and places. In its narrowest sense, it is merely a synonym for contemporary warfare.

In this paper I shall be examining the practicability of the principle of proportionality in the modern contemporary war situation.

Contemporary warfare is the warfare that is in notable contrast with previous military concepts, methods, and technology, emphasizing how combatants must modernize to preserve their battle worthiness. As such, it is an evolving subject, seen differently in different times and places.

War is a topic of considerable depth and complexity that cannot be condensed to a single phenomenon.¹ It can be said, however, that the process of decolonization set in motion a gradual move away from classical interstate warfare (symmetric warfare) towards the so called asymmetric warfare, a novel type of conflict defined by the significant inequality in relative power of belligerents.² The latter typically involves a superior party e.g. a professional army opposed by a weaker party e.g. insurgents, militants, or terrorist cells. The inherent unevenness of such 'new warfare' has resulted in the inferior party employing tactics of unconventional warfare to compensate for deficiencies in quality or quantity of resources, technology and man-power.³

The aim of classical symmetric warfare to achieve military victory over another State or territory has given way to the desire to fight for freedom, security, independence and identity.⁴ This transcendent character underpinning modern warfare has unglued the traditional distinction between war and peace, between armed conflict and law-enforcement operations, between international humanitarian law and international human rights law.⁵

International Humanitarian Law old method of warfare has metamorphosed with the adoption of the Additional Protocol II to the Geneva Conventions which provides for non-international armed conflicts. Furthermore, with the rise of international criminal law and the need to apply IHL in non-international armed conflict situation, the impetus was given for the development of customary rules of IHL,⁶ and the assimilation of International armed conflicts and non-international armed conflicts.⁷ In the context of IHL, proportionality assessment has been sport lighted as an instance of irresolvable norm conflict.⁸ Proportionality, as balancing act in relation to military conduct during operations is described as a basic standard which must be complied with. The principle of proportionality is generally understood as a balancing act between competing legal interests. In the use of force in the broad sense, one may distinguish between as much as three different interpretations of proportionality. First, the law regulating the resort to armed forces, jus ad bellum, which requires proportionality in self defence against armed attack. Secondly International Human rights law considerations and thirdly, IHL rule of proportionality which prohibits attack expected to lead to incidental harm that is excessive to the military advantage anticipated.⁹ However,

¹ David Kennedy, *Principles of War and Law* (PUP 2006) 1

² Terry -Gill, R. H., and Robin, G. 'The Conduct of Hostilities and IHL: Challenges of the 21st Century Warfare' [2014] ILA London Study Group Interim Report 1-2

³ Ibid.

⁴ Ibid.

⁵ Helen, D. *The War on Terror and the Framework of International Law* (CUP 2015) 388-405

⁶ Jean-Marie Henchaert, and Louise Doswald, *Customary International Law* (1st edn ICRC 2005)

⁷ Dan Saxon, *International Humanitarian Law and the Changing Technology of War* (Nijhoff Publication 2013) 23

⁸ William Schabas, 'Lex Specialist Belt and Suspender: The Operation of Human Rights Law and the Law of Armed Conflicts and the Conundrum of Jus ad Bellum' [2007] (40) *Israel Law Review*; 254

⁹ Art 51 (5) (b) of Additional Protocol I to Geneva Convention

in modern warfare these principles are been kept in abeyance most especially by the belligerent forces due to some obvious reasons which we shall be examining in this paper shortly. This paper will conclude that the harm and destruction caused by the modern warfare outweighs the benefits that military actions has achieved.

Proportionality

The principle of proportionality prohibits attacks ‘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’.¹⁰ Given that direct attacks against civilians and civilian objects are already prohibited, the proportionality evaluation is relevant only when attacks are directed against lawful targets.

The key term to be examined in the proportionality equation is ‘excessive’. While the requirement of proportionality is absolute, the standard of ‘excessiveness’ is relative. IHL does not establish an objective threshold above which the infliction of incidental harm would always be excessive. In principle, targets with a comparatively high military value will justify greater incidental harm than targets with a comparatively low military value.¹¹

Although the proportionality assessment necessarily contains subjective elements. Thus, the infliction of incidental harm on protected persons or objects can only be justified by advantages of a ‘military’ nature, and not by political, economic or other non-military benefits. Moreover, the anticipated military advantage must be ‘concrete’ and not of a merely hypothetical, speculative or indirect nature. It must also be expected to result from a specific attack or operation, and not from a military campaign as a whole. Therefore, the overarching intention of ‘winning the war’ cannot, as such, serve to justify the infliction of incidental harm on persons and objects protected against direct attacks.¹²

When assessing the excessiveness of incidental harm, the foreseeable second and third-order effects of an attack must be taken into account. For instance, attacks against dual use infrastructure, such as electrical grids or telecommunication networks, may not only have the immediate purposes and exposing the civilian population to short-term shortages. They may well have a crippling effect on the medium and long-term ability of the civilian authorities and medical services concerned, and of the general civilian population, to cope with the everyday consequences of war.¹³

There are numerous conditions and characteristics of proportionality. However, this paper is only concerned with the three main conditions which are as follows:

¹⁰ Art 51 (5) (b) Additional Protocol I to the Geneva Conventions.

¹¹ Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction* (ICRC Publication 2016) 101

¹² *Ibid.*

¹³ *Ibid.*

a. Collateral Damage

It is worthy of note that the Geneva Convention provides for the prohibition of unintentional collateral damage to civilian and property under the proportionality.¹⁴ Intentional damage to civilians and property is otherwise forbidden under the principle of distinction.¹⁵ The proportionality principle forbids ‘incidental’ collateral damage against civilians and property that exceed the direct military advantage.¹⁶ However, it does allow the death of civilians as collateral damage if the direct military advantage is bigger than the damage caused.¹⁷ For instance, the principle of proportionality allows the death of few civilians in a bomb attack on a building occupied by terrorists, if it would avoid the death of hundreds of civilian at the mercy of the terrorist target. However, it would not allow the targeting and killing of civilians in a military action against a single terrorist, the military goal in this instance is so trivial as compared to the excessive damage triggered by this action.

b. Reasonable hope of Success

The actual reasonable hope of success are those conditions during the conduct of hostilities which limits the excess of war against vague military objective, in other words, which seems to have no limits whatsoever. So, the military campaign to execute this objective can cause excessive destruction and unnecessary deaths without achieving substantial goals. In the modern warfare, the war is fought against all terrorists.¹⁸ However, there is no authoritative person who can sign a peace treaty or surrender to end the war against terrorism which is the modern warfare.¹⁹ This means that the modern warfare which is a war against terrorism have no end on sight, because the goals are so vague.²⁰ Therefore, the modern warfare does not satisfy the reasonable hope of success condition and cannot be considered a just war under the contemplation of the proportionality principle.

c. Last Resort

The proportionality principle further entails the necessity requirement, which is a condition of last resort.²¹ For instance, this is a consideration which presupposes that certain military actions achieve military objectives that could have been equally achievable by diplomatic obligations. Under this condition, the destruction caused by the military during the conduct of hostilities may be proportionate to the military objectives, but may not be proportionate in the light of diplomatic measures that could have been taken instead of the military action.²² The destruction in this context is caused unnecessarily and in excess to what could have been reasonably achieved diplomatically. In international legal parlance, the principle of proportionality and the doctrine of necessity are coterminous because, a war or an attack cannot be

¹⁴ Art 48 Additional Protocol II to the Geneva Convention

¹⁵ Ibid.

¹⁶ Art 51 (5) (b) Protocol I Additional to Geneva Conventions

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¹⁸ War on Terrorism Global <https://www.globalpolicy.org/waronterrorism.html> Accessed 6 December 2020.

¹⁹ William, J.C., Transnational Organised Crime [2012] (58) FASG;12

²⁰ Ibid

²¹ Thomas Hurka, Proportionality in the Morality of war [2011] (238) DMEET; 241

²² Harry vander Linden, Just War Theory and US Military Harmony (Henry van der Linden et al eds 2012) 53.

proportional if it is unnecessary.²³ Under the doctrine of necessity, proportionality requires that only the least amount of force necessary for self-defence can be used to counter an attack by the aggressors.²⁴

In contrast, the proportionality consideration is calculated based on good versus evil produced by a war, from the baseline of doing nothing or continuing a war without justification.²⁵ This produces a result for whether the outcome of war has achieved more good or more evil compared to its alternatives.²⁶ Within this analysis, the just war conditions of “necessity” “just cause” “excessiveness” and “reasonable hope of success” are compared to the net effects of the war and its alternatives.²⁷ By virtue of the last resort principle under the proportionality principle, the killing of innocent persons in war can be legally justified only if done either accidentally or unintentionally. For instance, under unforeseen circumstances or unintended situations.

But even at that, it is licit only when there is no alternative means.²⁸

However, this consideration is subjected to the subjective and objective test of proportionality. For instance, it is possible that war is disproportionate because of its evil excesses and the little relevant benefit achieved, while the actions of a military person may be proportional to the facts at hand. The opposite is also possible.²⁹ But in all calculation, if the harm done by the war is not proportionate to the good cause by it, then it is deemed to be disproportionate.³⁰

This however raises the questions which seek for answers as follows: what is considered as “direct military advantage” in war situation? What is considered as the “harm caused”? And thirdly, how can military advantage be outweighed by “excessive damage” or the proportionality of war?

Direct Military Advantage

Under the principle of IHL, it is considered to be disproportionate if the evil caused by war or military actions is greater than the good caused by it.³¹ Therefore, for a war to be proportional, it is crucial that the relevant good for going into the conduct of hostilities outweighs the harm caused by the armed conflict.³² It is also necessary that a war is for a just cause to be proportional. This means that a proportionate war, where the relevant good has outweighed the harm caused, can still be disproportionate if it is fought without legal basis or without just cause. Because, the military objective achieved in an unjust war must be aggressive and unjust in nature, it cannot be measured as a benefit but only as an evil.³³

Therefore, for a war to be relevant before the eyes of the law under the proportionality principle, it must have a direct military advantage. Therefore, all the just causes and aims for the war must be for a relevant good that cannot be achieved through a war, whereas all the indirect advantages such as the economic

²³ Islamic Republic of Iran v USA, (Adversary opinion and Orders of the ICJ 2003) No.90/76/77/ November 6.

²⁴ Jimmy Gurule, Principles of Counter-Terrorism Law (1st edn young Publishing 2011)67-70.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Coasdy, C.A.J., Bombing and the Morality of War (Yuki Tanaka and Marilyn edns 2009) 42.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ Ibid.

benefits of a war cannot be considered a relevant good. However, economic harm can be considered a relevant harm or relevant evil in a war. For instance, in a war against terrorism, since the just cause and military advantage were to eliminate terrorism, the defeat of terrorists in this circumstances is a relevant good. Similarly, resisting aggression, and disarming the enemy are also just cause and therefore can be considered relevant good in warfare.³⁴ However, it is pertinent to note that, if the causation or the aim of a war is not aligned with IHL, then the cause cannot be just.³⁵ Therefore, it cannot be considered a relevant good to use force or retaliatory force against non-state actors.

The only circumstances when the use of force is permissible is under self-defence and with the United Nations Security Council authorization.³⁶ Therefore, any actions taken against the international law of using force will be regarded as disproportionate regardless of its aims.

Precautions against the effects of Attacks

During all phases of an attack, IHL provides that the principle of precautions in attack must be applied in conjunction with but not limited to the independent of the proportionality principle. In other words, even if the expected incidental loss of civilian life, injury to civilian and damage to civilian objects is not excessive in relation to the concrete and direct military advantage anticipated in the attack, the attacking party must take in to account all feasible precautions to choose means and methods of warfare that will avoid a much incidental harm to civilian population as possible.

This does not only applies to the attacker, but, IHL requires that the party affected by the enemy's attack is also requires to take precautionary measures. Thus, belligerent parties must take all feasible precautions to protect the civilian population and civilian objects under their control against all possible dangers resulting from military operations.³⁷

This obligation means that belligerents have a duty, to the maximum extent feasible, to avoid locating military objectives within or near densely populated areas,³⁸ and to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives.³⁹ In addition, in order to protect the civilian population and civilian objects under their control, belligerent parties may, for instance, establish shelters, trenches and safe places, distribute information, warnings and directions to traffic, evacuate civilians, guard civilian property and mobilize civil defence organizations.⁴⁰

Definition of 'feasibility'

Feasibility within the contemplation of proportionality principle in IHL are those precautionary measures which are practicable or practically possible taking in to account all circumstances ruling at the time, including humanitarian and military considerations.⁴¹ Therefore, the feasibility of precautionary measures

³⁴ Jef McMahan, Just Cause for War (2005)(19) EIA; 1-4

³⁵ Ibid.

³⁶ Art 2, 4, 39-42 and 51 of UN Charter 1947

³⁷ Art 58 Additional Protocol I to the Geneva Convention

³⁸ Art 58 (b) Additional protocol I

³⁹ Art 58(a) Additional protocol I

⁴⁰ Ibid.

⁴¹ Art 3 (4) Protocol III to the Convention on Certain Conventional Weapons 1980

will depend on a multitude of factors, such as the available intelligence, the level of territorial control, the precision of available weapons, the urgency of military action and the costs and risks associated with additional precautionary measures. For instance, higher level of precaution can and must be expected from a sniper actively searching for targets so also the artillery, than an ambushed infantry patrol reacting to unexpected fire. Also, while armed forces can and must be expected not to position anti-aircraft batteries inside civilian population centres, it would hardly be possible to separate dual use installations such as bridges, railway stations, and airports from the civilian surroundings they are designed to serve. In practice, commanders ultimately will have to decide on the feasibility of precautions on the basis of their own assessment of the information at their disposal at the time of taking decisions.

Harm Caused

Material harm under proportionality is the loss of civilian lives, injury to civilians, or damage to civilian objects in excess of the direct military advantage.⁴² Harm to civilian objects considers dysfunctional civilian objects and environmental damage.⁴³ Injury to civilians also includes illnesses and people's mental illnesses.⁴⁴ The principle of distinction forbids the direct and indiscriminate targeting of civilians and their property, and allows the pursuit of only military objectives.⁴⁵ This law requires some level of likelihood to hit the target.⁴⁶ For instance, random or blind firing without precisely targeting any military objects in a populated areas.⁴⁷

In addition, direct damage to civilians, economic loss and instability in the region is also within the contemplation of this provision.⁴⁸ All incidental harm and normal harm of war come under the purview of proportionality.⁴⁹ For example, damage to infrastructure, loss to the economy, death toll of civilians, damage to civilian property,⁵⁰ instability in governance, the rise of rebellions, the rise of terrorism or violence, damage to the environment,⁵¹ decline of health care, refugees and migration crises, famine, and sanctions can be considered incidental harms. If any of these harms are incidentally caused by a war, they can be considered incidental harm under the principle of proportionality.⁵² In this regard, Norway has expressed its support of the inclusion of the long-term effects of war within proportionality.⁵³ The report on the UK's intervention in Iraq has also suggested the same, in addition to the direct damage to civilians and their property, the indirect economic and health cost must also be calculated within proportionality.

⁴² Isabel Robinson, and Ellen Nohle, *Proportionality and Precautions in Attack: The Reverberating Effects of Using Explosive Weapons in Populated Areas* (ICRC 2016),98

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Art 51 (4) (b) Additional Protocol I to the Geneva Convention

⁴⁶ Ibid.

⁴⁷ Yoram Dinsten, *The Conduct of Hostilities under the Law of International Armed Conflict* [2014] ILJ 18-19

⁴⁸ Ibid.

⁴⁹ William Boothby, *The Law of War: A Detailed Assessment of the US Department of Defence Law of War Manual* (2018), 446

⁵⁰ Laurent Gisel, 'Relevant

⁵¹ Jefferson Reynold, 'Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict and the Struggle for Moral High Ground [2004]CJCSM;

⁵² Ibid.

⁵³ Ibid.

Reverberating Consequences

Based on the principle of distinction in general and the prohibition against indiscriminate attacks in particular, IHL prohibits the use of weapons that are by nature indiscriminate,⁵⁴ that is to say, weapons that either cannot be directed at a specific military objective, or the effects of which cannot be limited as required by humanitarian law and, consequently, in each case, are of a nature to strike military objectives and civilians or civilians objects without distinction.⁵⁵ This also includes weapon systems that, has an inherent feature of the technology employed and their intended use may be expected to inflict excessive collateral harm on the civilian population.⁵⁶ Like the prohibition against causing superfluous injury or unnecessary suffering, the prohibition against using indiscriminate weapons not only operates as an independent principle by which all means and methods of warfare have to be measured, it has also spurred the development of a number of distinct treaties regulating specific weapons during armed conflict situation.

IHL also prohibits the use of weapons that are intended, or may be expected to cause, widespread, long-term and severe damage to the natural environment.⁵⁷ Prohibition has a relatively high threshold in IHL, it may be argued that nuclear weapons should be outlawed because they almost inevitably would have to be expected to cause collateral damage which could be widespread, long-term and severe. The ICJ in its adversary opinion in 1996 recognised that important environmental factors had to be taken into account in the implementation of IHL, but did not conclude that the use of nuclear weapons would necessarily be unlawful on this account.⁵⁸ The court held that the use of such weapons would be generally contrary to the rules of IHL.⁵⁹ Reverberating effects are the damages that do not take place immediately after an attack. The ICRC has determined that incidental damage also includes indirect incidental damage, which is also known as “knock-of effects” or indirect effects.⁶⁰ Various military manuals include consequential incidental damage within the rules of precaution and proportionality.⁶¹ Under the proportionality principle and the principle of precaution, Article 51 (5)(b) and 57 (2)(a)(iii) and (b) of Additional protocol I of Geneva Convention include the phrase “may be expected” this is to avoid damages to civilians in terms of incidental damages.⁶² This phrase is not limited by time or space. In 1977, the Diplomatic Conference explicitly maintained that the scope of this phrase cannot be limited to immediate vicinities.⁶³ This means that it includes reverberating consequences. Similarly, Article 54(2) and 56(1) copiously forbid targeting of protected objects,⁶⁴ which are objects that are crucial for the sustenance of the civilian population.⁶⁵

⁵⁴ Art 51 (4) Additional Protocol I

⁵⁵ Ibid.

⁵⁶ Art 51(5) Additional Protocol I

⁵⁷ Art 35 (3) Additional Protocol I

⁵⁸ ICJ Advisory opinion on the use of Nuclear Weapons 8 July 1996 reported in 1996 at para.25

⁵⁹ Ibid.

⁶⁰ Laurent Gisel, Relevant Incidental Harm for the proportionality Principle [2015] (125) BC UW;16

⁶¹ Ibid

⁶² Art 51(5)(a)(iii) and Art 57 (2)(b) of the Protocol I Additional to the Geneva Conventions.

⁶³ Ibid.

⁶⁴ Additional Protocol I

⁶⁵ Ibid

Objectivity Test

In IHL, some commentators are of the views that the foreseeability of incidental harm in respect of military advantage under the proportionality principle is based on the subjective test of the commanding officer. This means that the subjective knowledge of a commander will determine whether or not the damage was foreseeable to him. However, the IRC Commentator is of the view that Article 57 of the Additional Protocol 1 supports the proposition that the test is objective by stating that “the interpretation must all be a question of common sense and good faith for military commanders.”⁶⁶

Objective test includes “the discretionary powers of the commander to make decisions in good faith”.⁶⁷ This means, a theater commander must act reasonably at all times. This position was espoused in the Canadian Manual on the law of Armed Conflicts which provides that the criteria for analysing the incidental damage is an objective one.⁶⁸ In the International Criminal Tribunal for the Former Yugoslavia, the tribunal held that the test is to examine ‘whether a reasonable well-informed person in the circumstances of the actual perpetrator’ have acted accordingly. The tribunal suggested that the test is an objective test of the ‘reasonable Military commander’.⁶⁹ A “reasonable commander test” is a higher objective test for the foreseeability than the test of ‘reasonable man’ because, in an armed conflict situation, during the conduct of hostilities, a reasonable man cannot be implied to possess as intricate knowledge of the affairs of war as a knowledgeable commander.⁷⁰ Some states have supported the higher threshold of a reasonable commander as an objective test for analysing the incidental damage.⁷¹ In view of the above, it is submitted that the foreseeability of incidental harm can be considered to have the standard of a reasonable commander in calculating the reverberating consequences of a military action, using the available information reasonably. The importance of this test is that it is capable of eliminating or precluding the commander from being liable for legal actions in the event of incidental harm caused.

Formula for Weighing Military Advantage against Harm Caused

There is no standard method of calculating incidental harm against military objectives, as it generally based on the proportionality of an act or omission. In doing this, one has to put into consideration all the harm done by war and compare those with the military objectives achieved. If the harm done is in excess of what was achieved by the war, or if the war is producing ineffective or counterproductive result, then such a war can be considered disproportionate.⁷² The Court in this case established that the principle of proportionality

⁶⁶ Marco Sassoli, *Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to be Clarified* (2014) (335) INT’L L Studies;90

⁶⁷ Art 57 Additional Protocol 1 to the Geneva Convention

⁶⁸ Office of the Judge Advocate General (2011)

⁶⁹ Final report to the Prosecutor by the committee established to review the NATO Bombing Campaign against the Federal Republic of Yugoslavia (2008) 50

⁷⁰ Ibid.

⁷¹ State of Israel the (2014) Gaza Conflict 7 July – 26 August 2014.

⁷² This was the Advisory opinion of the ICJ in *Nicaragua v USA* judgement 1986

cannot be justifiable in self-defence if the attack of aggression or the threat of an attack has ceased to exist.⁷³ So also, the court in Oil Platform case established that the principles of proportionality and necessity are interlinked because a war or attack cannot be proportional if it was unnecessary.⁷⁴ The proportionality weighs in the force used by both sides.⁷⁵ In proportionality, the legitimate aim cannot be the complete annihilation of the enemy, rather, it must be weighed against the threat from the other side.⁷⁶ This is however against the advisory decision of the court in the nuclear weapons case where the court held that the use of weapons of mass destruction in self-defence is a legitimate, despite its disproportionate devastating features,⁷⁷ but only if the existence of a nation is under potential threat. This position of the court is further justified under the principle of necessity.

In determining the excessiveness of an action under proportionality, the court in the case of Prosecutor v Galic⁷⁸ used the objective test and held that the military commander had violated the proportionality principle because the attacks he coordinated resulted in the deaths of thousands of civilians.⁷⁹ The court also put into consideration the mens rea requirement of war crimes under Article 83 of Additional Protocol I of the Geneva Convention and conclude that the had a fore knowledge that the attack would cause excessive civilian casualties.⁸⁰

Conclusion

The modern warfare which is a conglomerate of the fight against terrorism, the military objective has been to defeat terrorism. The legality and justification of fighting these wars are subject of debate by different jurist and scholars. The harm caused by these wars include the destruction of civilian infrastructure, the deprivation of basic human needs, such as food, water, electricity, education, and health care, the deaths of millions of innocent civilians, the increase of violence and other social vices, the destabilization of regions and migration crises and displacement of people. The aimed of these conflicts which is to defeat terrorism globally has not be achieved. Rather, these warfare have been proven a counterproductive missions. Therefore, it is submitted that the devastating effects of military actions in these warfare is foreseeable to a reasonable commander, which have caused unparalleled harm to several countries. In view of the foregoing, it could be concluded that the modern warfare have caused more harm which is disproportionate to the direct military advantage of embarking on the war.

⁷³ Military and Paramilitary Activities in and against Nicaragua

⁷⁴ Islamic Republic of Iran v USA ICJ Judgement 161 Nov 6 2003.

⁷⁵ Ibid

⁷⁶ Ibid

⁷⁷ Yorum Dinstein, War of Aggression and Self-Defence (2001) (210) IJIL;12

⁷⁸ In Trial Chamber I Judgement of ICTY 5 December 2003 No. IT-98-29-T

⁷⁹ Ibid.

⁸⁰ Ibid.

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