

# I Overview of Law of Armed Conflict<sup>9</sup>

## I 1. Belligerent Right Not an Unlimited Right

Perhaps the first international instrument restricting the rights of belligerents is the 19<sup>th</sup> century St-Petersburg declaration, which states, “*The only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy*”<sup>10</sup>. Consequently, the rights of belligerents are not unlimited<sup>11</sup>. Means and methods of warfare designed to neutralize satellites or their architecture or to deny the use of space itself are subject to this restriction.

## I 2. Military Necessity<sup>12</sup>

Military necessity<sup>13</sup> is a fundamental principle of LOAC circumscribing the use of force<sup>14</sup>. This principle establishes a reasonable connection between destruction and the overcoming of an enemy force. Briefly speaking, military necessity is the obligation for a belligerent to specify the imperative military advantage intended to be gained by an attack. The principle of military necessity is expressly recognised within the codified body of law of armed conflict. Thus the principle must be interpreted and applied within the limits of the law<sup>15</sup>. In other words, the principle cannot be used to justify violations of the law itself. Seen in this light, and stated positively, the principle of military necessity justifies operations, which are not specifically prohibited by LOAC and which are required for the success of the mission. From a practical perspective, recent doctrinal analysis argues that it is important to understand that the principle does not justify the use of force but rather acts as a restraint to the use of force. Perhaps one of the most eloquent expressions of this argument can be found in the writings of Professor Michael N. Schmitt who proffers that “*Military necessity operates within this paradigm to prohibit acts that are not militarily necessary; it is a principle of limitation, not authorization. In its legal sense, military necessity justifies nothing*”.<sup>16</sup>

The corollary of military necessity is the principle of unnecessary suffering. The over-extensive destruction by belligerents in violation of the principle of military necessity is a grave breach to the Geneva Conventions<sup>17</sup>.

## I 3. Distinction

The principle was initially conventionally articulated within the preamble of the St-Petersburg Declaration, asserting that war is to be conducted only against enemy military forces.<sup>18</sup> A recent codified

<sup>9</sup> According to the ICJ, “these principles and rules of humanitarian law are part of *jus cogens* as defined in Article 53 of the Vienna Convention on the Law of Treaties of 23 May 1969” see *Nuclear Weapons Case*, supra note 6 at para.83.

<sup>10</sup> Reprinted in Roberts & Guelff, supra note 5, at 55.

<sup>11</sup> Hague IV Annexed Regulations, Convention Respecting the Laws and Customs of War on Land, Oct 18 1907, reprinted in Roberts & Guelff, (hereinafter referred to as Hague IV) supra note 5; Article 35(1) of the Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflict, June 8, 1977, U.N. Doc. A/32/144, 16 I.L.M. 1391 (Hereinafter referred to as either API, or Protocol Additional I); Preamble of the Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct 10, 1980, 1342 U.N.T.S., 7, 19 I.L.M. 1523. Adam Roberts and Adam Guelff point out that this principle was incorporated in the 1874 Brussels Declaration and in the 1880 Oxford Manual. In supra note 5 at p. 9.

<sup>12</sup> Although these four principles are generally recognized as being the fundamental concepts of LOAC doctrinal works often debates different degrees of relations between them. For example Michael N. Schmitt, a prolific publicist, subordinates distinction to proportionality and argues for chivalry as a distinct principle see Michael N. Schmitt, “Green war; An Assessment of the Environmental Law of International Armed Conflict” 22 (1997) Yale J. Int’l L. at 52. (hereinafter referred to as “Green War”). For an excellent analysis of the origins of the principle see B.M. Camahan, “Lincoln, Lieber and the Laws of War: The Origins and Limits of the principle of Military Necessity” (1998) 92:2 A.J.I.L., at 213.

<sup>13</sup> Expressions such as “necessity of military operations”, “military exigencies, motives and reasons”, reasons of war”, and “security reasons” are synonyms of “military necessity”, see *Dictionary of the International Law of armed Conflict*, Geneva, ICRC, p. 75.

<sup>14</sup> See H. McCouberey, “The Nature of the Modern Doctrine of Military Necessity” (1991) 30 Revue de Droit Militaire et de Droit de la Guerre at 215.

<sup>15</sup> Specific dispositions allowing military necessity to derogate are Hague IV art. 23 supra note 11; GC I art. 33; GC IV art 53, supra note 6; H. CP, 4,11 and AP I arts. 54, 62, supra note 11.

<sup>16</sup> Green War, supra note 12 at 54.

<sup>17</sup> GC IV art 147, supra note 6.

<sup>18</sup> Reprinted in Roberts & Guelff, supra note 5 at 53. “*That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy*”