



**THE DOCTRINE OF MILITARY NECESSITY AND THE PRESERVATION OF HUMANITY IN WARFARE: THE SUSTAINABILITY OF THE DELICATE BALANCE**

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**Abstract**

*The nature of battle and the participants' ideals were key considerations in the growth and development of the laws of armed conflict. The doctrine of military necessity is predicated on the idea that the overriding factor in deciding how to wage war is the achievement of the ultimate goal of direct and concrete military advantage and the annihilation of the enemy combatant. It has its roots in the fundamental premise that in times of war, necessity takes precedence over strategy. However, in order to lessen the backlash of war, the value of humanity upheld by international humanitarian law sets restrictions on the means and methods of conflict that result in needless suffering and pointless harm. The balance between military need and humanitarian consideration dictates greatly influences how the law of armed conflict is applied. The studies and rulings of the war crime courts clearly established that in times of armed conflict, military necessity cannot be used to override humanitarian considerations. Therefore, the research evaluates the viability of the delicate balance between the ideology of military necessity and the protection of humanity in conflict utilizing doctrinal methodology. The study discovers that codifying the laws of war, a key component of international humanitarian law, effectively defines the use of military necessity by outlining the means and strategies for conducting war. These regulations, however, appear to be a thing of the past as they are now seen as a rationale rather than a restriction. Furthermore, it appears that in the present day, the justifications for military necessity, self-defense, and maintenance of global peace and security have been abandoned in favor of unjustified, unilateral declarations of war for territorial expansion and fictitious political interests. The standards of proportionality and distinguishing between military objectives and civilian objects are equally observed in violation as they are in compliance. The paper suggests a revision of the United Nations Security Council's roles by giving it the authority to take swift and severe action(s) against violators/aggressors as a means of addressing the issues. A change in the way the veto is used, military operations, and penalties might all be part of this assessment.*

**Keywords:** Military- Necessity, Humanity, Warfare.

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## Introduction

The foundation of the entire body of international humanitarian law is the duality of military necessity and the preservation of humanity.<sup>1</sup> As a result, each specific provision of international humanitarian law is an illustration of the delicate balancing act that states have developed to accommodate both their legitimate need to conduct hostilities on the battlefield and their willingness to prevent needless suffering of combatants and civilians.<sup>2</sup> In addition, placing a cap on the means and tactics of conflict, today's international humanitarian law regulations protect individuals who are not or are no longer participating in hostilities, such as injured troops, civilians, and military doctors.<sup>3</sup> This emphasizes how important the handling of captured soldiers in a humane manner was. As a result, in 1949, nations from all over the world gathered in Geneva to approve and adopt the four Geneva Conventions, which uphold the rules of behavior in combat and limit its effects on people who are not or are no longer engaging in hostilities.<sup>4</sup> Due to the fact that it currently serves as a point of agreement amongst human cultures and religions, the worldwide commitment to limiting the frequency and intensity of armed conflict has survived even in the most trying circumstances.<sup>5</sup> Consensus that human rights and the idea of humanity have affected armed conflict to the extent that the international community saw it as significant enough to ensure compliance commitment was a prerequisite for the codification of customary international law standards.<sup>6</sup> Through the years, there was an evolution from total arbitrary use of force, which was the sovereign's fundamental right, to the limited use of force permitted under the United Nations charter.<sup>7</sup>

Sadly, one of the primary ways to settle international issues has been and continues to be war. This international dispute frequently transforms into full-fledged warfare, whether it takes the form of

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<sup>1</sup> R. M. Coupland, *Humanity, What Is It and How Does It Influence International Law*, International Review of the Red Cross, no. 844 (2001)

<sup>2</sup> Ibid.

<sup>3</sup> A D'amato, *The Concept of Custom in International Law* (Ithaco: Cornell University Press, 1971), 31-32

<sup>4</sup> P. Spoerri, *The Geneva Conventions of 1949: Origins and Current Significance*, Paper given at the 60<sup>th</sup> Anniversary of the Geneva Conventions (Geneva, August 12, 2009)

<sup>5</sup> H. Slim, *Sharing a Universal Ethic: The Principle of Humanity in War*, 2 The International Journal of Human Rights, no. 4, (1998), 28-48

<sup>6</sup> T. Meron, *The Humanization of Humanitarian Law*, 94 The American Journal of International Law, no. 2 (2000), 238-278

<sup>7</sup> Ibid

an international armed conflict or a non-international armed conflict, as is now happening in the Russia-Ukraine war.<sup>8</sup>

The conflict between Russia and Ukraine, however, seems to have relegated these acceptable military conduct guidelines to the distant past. Military necessity in the current conflict is no longer to carry out a legal military objective that is permitted by international humanitarian law. Additionally, the fundamental notions of military operation proportionality and the separation between military aims and civilian objects that underpinned military necessity have been abandoned. For example, the widely mocked justification for Russia's invasion of Ukraine on the pretext of self-defense has been shown to be a lie, as their action has been defined as "a calculated, cold-blooded, and long planned invasion, "unprovoked," and "unjustified."<sup>9</sup> Additionally, Russia's assault on civilians and civilian infrastructure, which has resulted in over 3,153 civilian deaths since the invasion's start in February 2022, cannot be justified in accordance with international humanitarian law.<sup>10</sup>

One would have assumed that the slaughter seen at the beginning of the 20th century, which prompted the global attempts to impose these regulations in an effort to minimize the suffering caused by war, would serve as a lesson for adherence to the rules to prevent a repeat human catastrophe. Sadly, based on what we are seeing in the ongoing battle in Ukraine, it hasn't. When they observed that past codifications of the law of war included military necessity within its purview as opposed to today, where it appears to give military necessity a privilege at the expense of humanitarian ideals, Jochnick and Normand seemed to have accurately stated the level of adherence to these norms.<sup>11</sup> However, the preservation of humanity and the requirement of restricting the scope of conflict in contemporary times for safety, security, and health are equally crucial in our day as they were in the recent past, necessitating adherence to the long-standing

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<sup>8</sup> The current Russia-Ukraine war constitute a classic example of states opting to resolve international dispute through warfare.

<sup>9</sup> This was part of the speech of the Secretary- General of NATO, Jens Stoltenberg< <https://crsreports.congress.gov>> accessed on 14/09/2023.

<sup>10</sup> Forbes, Over 3,000 civilians killed in Ukrain since Russia invaded< <https://www.forbes.com/sites> accessed 14/09/23.

<sup>11</sup> C. Jochnick & R. Normand, "The Legitimation of Violence: A Critical History of the Laws of War, 35 HARV INT'L L. J. (1994) 50.



philosophy of military necessity.<sup>12</sup> Therefore, the world should strongly condemn the use of weapons of mass destruction, superior US M142 HIMARS missiles, and German Leopard 2 tanks in the ongoing Russia-Ukraine conflict.

Despite the foregoing, military necessity, which aims to limit the morally acceptable and justified use of force in conflict and one that develops in accordance with human rights and humanitarian values, must be supported and its principles adhered to strictly for the sake of a secure and safe human race and the universe.<sup>13</sup> In order to achieve the sustainability of the delicate balance between the concept of military need and the preservation of humanity in battle, the paper employs doctrinal methodology.

### **The Doctrine of Military Necessity**

Military need must be truly necessary to achieve a legitimate military aim that is not banned by international humanitarian law because it typically goes opposed to humanitarian imperatives.<sup>14</sup> Not every military assault meets the definition of "military necessity."<sup>15</sup> To qualify as such, an attack must have a military purpose, be carried out in support of a military goal, and cause damage to people or civilian property that is reasonable and proportionate to the attack's concrete and direct military target.<sup>16</sup>

The term "military objectives" in this context refers to only those objects whose nature, positioning, function, or use effectively support military action and whose partial or complete destruction or neutralization, depending on the situation at the time, provides a clear military advantage.<sup>17</sup> In times of conflict, military necessity is frequently corrupted to justify the use of

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<sup>12</sup> Coupland (2001), supra note 1

<sup>13</sup> K. Kowalczywska, *Humanity in Modern Warfare: Empathy and Jus in Bello*, Security Dimension, 12 International and National Studies, (2014), 189-200.

<sup>14</sup> G. J. S. Forrest, "The Doctrine of Military Necessity and the Protection of Cultural Property during Armed Conflicts", California Western International Law Journal (Vol.37 Issue 2 2007) 177-219.

<sup>15</sup> For example, the current Russia invasion of Ukraine on February 24, 2022, which was unilateral and unprovoked cannot qualify as military necessity.

<sup>16</sup> The invasion of Ukraine by Russia was under the guise of toppling the government of Ukraine, to annex Kharkiv in the North-east and Kherson in the South. Other reasons was liberation of Donbas, Ukrain two industrial regions in the east of Luharrst and Donetsk see John T.Mearsheimer, "The Causes and Consequences of the Ukraine War"<<https://www.russiamatters.org>>accessed 13/09/2023.

<sup>17</sup> Ibid. The advantage or gain that a party to the conflict anticipates from an attack must be military in nature. This cannot be said of Russia in their invasion of Ukraine. The advantage anticipated by Russia is for political reason to

violence. A military goal must be the driving force behind any such act of violence or devastation, and it must also not be banned by the law of armed conflict.<sup>18</sup> The use of force can only be justified if it aims to achieve certain military goals and stays within the bounds of the proportionality principle. The idea of military necessity should normally act as a restraint rather than a green light for hostilities. The ideas of proportionality and minimal harm to civilians should serve as its guiding principles. In other words, there shouldn't be any violence or devastation:

- (a) superfluous, such as when the target or victims are unrelated to a particular military goal;
- (b) disproportionate—when a military benefit does not match the collateral cost to civilians;
- (c) indiscriminate—where the attack does not differentiate between military targets and things belonging to civilians;
- (d) intended to instil dread among civilians.<sup>19</sup>

International humanitarian law came to the rescue in order to further restrict the use of armed force. By explicitly forbidding attack on non-combatants, limiting attack on combatants to only legal means, requiring the parties to an armed conflict to treat people who are under their control humanely, and requiring them to protect the victims, international humanitarian law seeks to reduce the destruction and suffering brought on by armed conflict.<sup>20</sup> Essentially, international humanitarian law promotes the values of discrimination, proportionality, safety, and forbidding unnecessary harm or suffering.<sup>21</sup> Both Jus ad bellum and the conduct of hostilities when constraints on the use of force fail Jus bello are instances where nations may employ force, and military necessity applies in both cases. It will be important to talk about how the concept is applied under jus ad bellum and jus in bello in order to better understand the doctrine of military necessity.

### **Evolution of the Doctrine of Military Necessity in International Humanitarian Law**

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annex some cities of Ukraine and undermine the Sovereignty of Ukraine as Putin viewed Russians and Ukrainians as 'one people' with a common history. See (n.16).

<sup>18</sup> Ibid.

<sup>19</sup> The Practical Guide to Humanitarian Law ><https://guide-humanitarian-law.org>

<sup>20</sup> The 4 Principles of IHL ><https://www.unodc.org/terroism/core> principles-of-IHL counter-Terrorism module 6 key issues' core principles of IHL > accessed April 22, 2022. Regrettably, this has been abused especially under the current Russia-Ukraine war where over 3, 153 civilians have so far been killed by Russia since their invasion of Ukraine on February 24, 2022 and over 13 million of the 40 million population of Ukrainian population have either fled their country or been internally displaced within their country, see Mearsheimer (n. 16).

<sup>21</sup> Forrest (n.14).

'A basic concept of the law of war, so basic, in fact, that without it there could be no law of war at all,' has been said of military necessity.<sup>22</sup> The Saracen code of war, which was based on the Koran, was the first systematic rule of war to be recorded in writing. With the publishing of "Gentilis De iure belli" in 1598, written treaties on jus in bellium can be dated back to that year. Grotius' De iure belli ac pacis comes next. Le Contrat Social by Rousseau followed in 1772, and Unsouvenir de Solferino by Henry Dunant followed in 1862.<sup>23</sup> However, the Lieber code is where a set of systematic codified principles of war may be found.

### **The Lieber Code**

The Lieber Code, a set of instructions for the government armies of the United States in the field, was the first attempt to codify the laws of war."<sup>24</sup> The Lieber code was the first official set of guidelines established by a state regarding how to treat both its own and its adversaries' troops. The development of the humanitarian law notion that the conduct of war is subject to the idea of military necessity is one of its lasting legacies.<sup>25</sup>

Article 14 of the Code states:

Military necessity, as understood by modern civilized nations consists in the necessity of 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.

Here, the term "military necessity" is used in a jus ad bellum sense. Burris M. Carnahan claims that Abraham Lincoln, the president at the time of this draft, may have been motivated by a desire to ensure that he acted within the bounds of the president's constitutional war powers and that all actions be restricted to those that achieve a military rather than political goal.<sup>26</sup> Prior to World War 1, Germany established the Kriegs Raison Geht Vor Kriegsmanier in addition to the United States

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<sup>22</sup> V.O 'Brien, The Meaning of Military Necessity in Internatioanal Law (World Polity 109, 113 1957)110.

<sup>23</sup> H. M Coubrey, International Humanitarian Law: Modern Development in the Limitation of Warfare ( 2<sup>nd</sup> ed. 2004) 8-17.

<sup>24</sup> Instructions for the Government of Armies of the United States in the Field, US War Dept. General Orders No.100 (April 24, 1863).

<sup>25</sup> Richard Hartigan, Lieber's Code and the Law of War Precedent (1995) 2

<sup>26</sup> B. M. Carnahan, "Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity 92 AM J. Int'l L. (1998) 220.

of America, but this book prioritized military need over humanitarian law.<sup>27</sup> We won't spend much time on this since it only relates to Germany. Instead, we'll go on to the 1868 Declaration of St. Petersburg regulations, which state that the necessity of war must give way to the needs of humanity, especially when using projectiles.

### **Declaration of St. Petersburg (1868)**

This statement resulted from the understanding that the growing "arms race" and accompanying technological advancement in weapons and ammunition could inflict soldiers' great agony. The proclamation acknowledges that the only legitimate goal that governments should pursue during a war is to degrade the enemy's military, and that in order to do this, it is acceptable to disable the greatest number of personnel.<sup>28</sup> The proclamation further emphasizes that when it comes to the employment of specific small-caliber explosive projectiles, the necessities of war must give way to the needs of humanity. The proclamation warned against its use as it would be against the laws of humanity, anticipated the affliction of mankind caused by the use of projectiles, notably its propensity to needlessly worsen the agony and rate of death of warriors.<sup>29</sup>

It appears that the term "military necessity" is used in a restrictive manner to forbid actions that are not necessary for achieving a military goal. But in none of these earlier statements, from the Lieber Code of 1863 through the 1868 convention, did the constraints significantly change how wars were fought; instead, they served to legalize uses that were not then codified.<sup>30</sup>

Reaching a consensus among a wide number of governments with diverse military capabilities is the most challenging part of restricting military necessity. Due to the assumption that strict adherence to these norms would put the military at a disadvantage, a mechanism was developed to give military concerns priority over humanitarian considerations in specific situations.<sup>31</sup> Thus, it would seem that prescriptive conventional norms serve more as a default fulcrum between the poles of humanity and military need because specific military circumstances can call for shifting

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<sup>27</sup> M. G. Cowling, *The Relationship between Military Necessity and the Principle of Superfluous Injury and Unnecessary Suffering in the Law of Armed Conflict* (25 S.AFR Y.P INT'L 2001) 131, 136

<sup>28</sup> Declaration of St. Petersburg, (Nov. 29, 1868, 138 CONSOL T.S.297).

<sup>29</sup> *Ibid.*

<sup>30</sup> Forrest (2007), *supra* note 14

<sup>31</sup> I. Deter, *The Law of War* (2<sup>nd</sup> ed. 2000) 395 cited by Forrest (2007), *supra* note 14



the fulcrum.<sup>32</sup> The Hague Convention of 1899 and 1907 was created as a result of this dilemma and the difficulties in finding a balance between military necessity and humanitarian law.

### **The Hague Conventions of 1899 and 1907**

At first look, The Hague Convention seems to be limited by humanitarian principles. Article 22 of Convention (11) on the Laws and Customs of Land War, for instance, provides that "the rights of belligerents to adopt means of injuring the enemy are not unlimited." The use of "arms projectiles, or material of a nature to cause superfluous injury" is forbidden by Article 23. However, the term "superfluous injury" is not defined, and the restrictions placed on the ways in which war can be fought are those that do not obstruct military requirements.<sup>33</sup> This is a unique circumstance because The Hague Rules generally attempt to protect the property of the enemy.<sup>34</sup>

This reality is further supported by the preamble of Convention (11), which states that the military necessity exception serves the following overriding interests:

In view of the high contracting parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war so far as military necessities permit, are destined to serve as general rules of conduct for belligerents in their relations with each other and with populations.

The Hague Conventions on military necessity sought to restrain uncontrolled warfare as a whole. But it appears that post-1899 regulations have brought back the argument of military necessity to get around the earlier regulations restricting it. Several International Humanitarian Conventions, such as the 1929 Convention on Prisoners of War, demonstrate this new strategy.<sup>35</sup> The 1949 Geneva Conventions are another such treaty that supports military necessity. Several articles in the 1949 Geneva Conventions permit the use of military necessity as a justification for the

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<sup>32</sup> Mc Dougal & F. P. Feliciano (1994), *supra* note 34 at 523.

<sup>33</sup> Dinstein (2004), *supra* note 23 at

<sup>34</sup> Article 23(g) of Convention (11) of 1899

<sup>35</sup> Convention Between the United States of America and Other Powers, Relating to Prisoners of War, July 1929 in Forrest (n. 2)





suspension of express restrictions.<sup>36</sup> The Parties to the Conflict may Take Such Measures of Control and Security in Regard to Protected Persons as May Be Necessary as a Result of War, according to Article 27 of the Geneva Convention (1v), Relative to the Protection of Civilian Persons in Time of War. This section seems to legitimize any potential rule-breaking based on military necessity. Thus, it might be claimed that the conventional regime seemed to forbid those means and ways of waging war that were relatively minor to the military while providing broad exceptions to those means and methods of military importance.<sup>37</sup> Additionally, it might be stated that the 1977 Protocol 1, an amendment to the 1949 Geneva Convention, appears to toy with this line based on the extensive use of military necessity as a defence for breaking the law.<sup>38</sup>

Currently, rather than serving as a universal restriction on the means and tactics of waging war, military necessity assumes a sinister form since it is seen as a principle at odds with humanitarian principles.<sup>39</sup> For instance, under Article 54(2),<sup>40</sup> Agriculture and food supplies may be destroyed even though they may be vital to the survival of the civilian population if it is absolutely necessary for military purposes. As a result, we can state that while earlier Conventional Codifications of the Law of War seem to use military necessity as a limitation on the means and methods of waging war, a more limited conception of necessity has developed in later Conventions to act as a justification rather than a limitation, and which has acted to prioritize military necessity at the expense of humanitarian values.<sup>41</sup>

### **Application of the Doctrine of Military Necessity under *Jus ad Bellum* and *Jus in Bello***

The principles of *Jus ad bellum* and *Jus bello* are based on the notion of military necessity. *Jus bello* refers to establishing restrictions on how conflicts are conducted when prohibitions on the use of force are ineffective, whereas *Jus ad bellum* refers to legal rules that limit the conditions in

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<sup>36</sup> Geneva Convention on the Amelioration of the condition of the wounded and sick in Armed Forces in the Field, Articles 12 & 42, August 12, 1949; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Articles 49 & 83.

<sup>37</sup> W. V. O'Brien, "The Meaning of Military Necessity in International Law", 1 World Polity (1957) 135.

<sup>38</sup> Forrest (2007), *supra*, note 14.

<sup>39</sup> Protocol Additional to the Geneva Convention Art. 54 (5).

<sup>40</sup> Art. 54 (2) Protocol Additional to the Geneva Convention 1977

<sup>41</sup> C. Jochnick & R. Normand, "The Legitimation of Violence: A Critical History of the Laws of War, 35 HARV INT'L L. J. (1994) 50.

which nations can employ force.<sup>42</sup> *No matter who was the aggressor or the grounds for the armed conflict, jus in bello applies to all parties at the outset of hostilities. While Jus ad bellum focuses on state behaviour and the necessity principle to evaluate whether a circumstance justifies the use of force,*<sup>43</sup>

The use of force in self-defence or in compliance with the collective security system recognized by the United Nations Charter, which aspires to maintain international peace and security, appears to be the extent of military need in modern times, as will be seen momentarily.<sup>44</sup> Whether or not the necessity criterion is satisfied in this situation will determine whether or not armed confrontation is necessary. States are not permitted to engage in unlimited combat even when this condition is satisfied.<sup>45</sup> As the forceful response must be proportionate to the legitimate aims of the use of force.<sup>46</sup> For example, if armed force is required as a measure of self-defence, the force used by a state must be the minimum that is required for self-defence.<sup>47</sup> To maintain proportionality is the foundation of this. Here, proportionality entails taking into account levels of combatant losses and collateral civilian damage in addition to the extent of devastation of the enemy's land, infrastructure, and property.<sup>48</sup> These criteria are based on humanitarian considerations that underpin *jus in bello*.<sup>49</sup>

Unlike *jus ad bellum*, *jus in bello*, operates at the level of the individual,<sup>50</sup> and has developed to take the form of the more elusive doctrine of military necessity.<sup>51</sup> The nature and scope of the doctrine has not been very certain over time.<sup>52</sup> More frequently, it has been employed in a way

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<sup>42</sup> J. Gordam, Necessity, Proportionality and the Use of Force by States (2004)1 in Robert Kolb, *Origin of the Twin Terms Jus ad bellum/Jus in bello* 320 INT'L Rev. Red Cross (1997)553.

<sup>43</sup> Ibid.

<sup>44</sup> Y. Dinstein, "The Conduct of Hostilities Under the Law of International Armed Conflict (2004) 2-4

<sup>45</sup> C. Greenwood, Historical Development and legal Basis in the Handbook of Humanitarian Law in Armed Conflict (Dieter Fleck ed., 1995) 30-31.

<sup>46</sup> Gordam (2004), supra note 19, at 553

<sup>47</sup> Greenwood (1995), supra note 22, at 30. Sadly, in the current Russia-Ukraine war, this is not the case, US superior HIMARS missiles and German Leopard 2 tanks used in the current war cannot be said to be a minimum force, the rules seem to be broken in modern warfare see (n. 16).

<sup>48</sup> Gordam (2004), supra note 19, at 16-17.

<sup>49</sup> Ibid.

<sup>50</sup> UK Ministry of Defence, The Manual of the Law of Armed Conflict (2004)2

<sup>51</sup> Gordam (2004), supra, note 19.

<sup>52</sup> H. Mccoubrey, The Nature of the Modern Doctrine of Military Necessity, (1991)215 – 218.

that calls for striking a balance between the desire to win a war and the demands of mankind.<sup>53</sup> In this way, it resembles a check on unrestrained barbarism.,<sup>54</sup>as it makes use of the principle of proportionality. Proportionality here means that the choice of methods and means of conducting war or armed conflict are not unlimited.<sup>55</sup>

It therefore appears that in theory necessity and proportionality are applied differently in *jus ad bellium* and *jus in bello*, however, in practice it is difficult to satisfactorily distinguish and apply these concepts.<sup>56</sup> This difficulty stems from the challenges of relating military necessity as a restraint on actions to the objectives of those actions. The means and methods of conducting war operates to achieve a particular military objective, which consequently assists in achieving a larger political objective.<sup>57</sup> While necessity might determine the legitimacy of the armed attack, proportionality determines the amount of force that might be used.<sup>58</sup>

International Humanitarian Law (IHL) appears to have come to the rescue of this difficulty by now incorporating the principles of necessity and proportionality into its conventional international law, particularly international humanitarian law. In this regards and to appreciate the journey to this end, this work attempts a brief outline of the evolution of military necessity in international humanitarian law.

### **International Humanitarian Law and Armed Conflict**

The area of international law known as international humanitarian law is dedicated to limiting the suffering and destruction brought on by armed conflict. In light of this, international humanitarian law maintains that belligerents do not have an unrestricted right to use force to harm their

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<sup>53</sup> Gordam (2004), supra note 19.

<sup>54</sup> Forrest (2007), supra note 14, at 177-219

<sup>55</sup> Ibid.

<sup>56</sup> Gordam (2004), supra note 19. The current Russia-Ukraine war, help explained such difficulty as the rules enunciated above seem not to have been taken into consideration, especially as it relates to the reason for the war, the weapon so far deployed and casualties of civilians.

<sup>57</sup> Mc Doucial & F. P. Felliciano, *The International Law of War: Transnational Coercion and World Public Order* (1994) 72.

<sup>58</sup> Ibid.

adversaries.<sup>59</sup> Thus, weakening the enemy's military strength during a conflict is the only legitimate goal governments should pursue.<sup>60</sup>

The maintenance of several generally fundamental principles within the scope of international humanitarian laws, namely the principles of humanity, distinction, proportionality, and military necessity, which are contained in the Geneva Conventions and their Additional Protocol as the core of international humanitarian law, is necessary to reduce the recoils of warfare.<sup>61</sup> International humanitarian law essentially encapsulates the fundamental human rights as succinctly expressed in the Mortens Clause, the distinction between civilians and combatants, as well as between civilian objects and military objectives, and dovetails generally into seeking the prohibition of needless suffering and injury.<sup>62</sup> International humanitarian law essentially encapsulates the fundamental human rights as succinctly expressed in the Mortens Clause, the distinction between civilians and combatants, as well as between civilian objects and military objectives, and dovetails generally into seeking to forbid unnecessary suffering and harm.

The essential tenet of international humanitarian law is that those who are not or are no longer engaged in hostilities must be protected, and that the participants to an armed conflict have a limited right to select the means of their fighting.<sup>63</sup> It considers the obligations of nations and non-state armed groups that are engaged in armed conflict and occupied circumstances.<sup>64</sup> Additionally, the use of force is only permitted under certain circumstances, most notably those of self-defence and with the permission of the UN Security Council. These circumstances are governed by international humanitarian law. As a result, regardless of whether a party's use of force was justified in accordance with the jus ad bellum concept, it applies to all belligerents.<sup>65</sup>

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<sup>59</sup> Article 22 of the Regulations Annexed to The Hague Convention, 1907.

<sup>60</sup> The Declaration of St. Petersburg, 1868.

<sup>61</sup> E Oji, *Responsibility for Crimes Under International Law* (Lagos: Odede Publishers, 2013), 75-76

<sup>62</sup> T. Mero, *The Martens Clause, Principles of Humanity and Dictates of Public Conscience*, 94 *American Journal of International Law*, issue 1, (2000), 78-89.

<sup>63</sup> F. Kalshoven and L. Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (4<sup>th</sup> ed., Geneva; ICRC, 2020). Unfortunately, this is not the case in the current Russia-Ukraine war, where the war is not weighed within the boundaries of International Humanitarian war, civilians in Bucha, near Kyiv were attacked and cities such as Mariupol flattened see Mearsheimer (n. 16).

<sup>64</sup> For instance, Russia's forceful invasion of Georgia and subsequent occupation in 2008. This year Russia captured the town of Solefatar and having hopes of seizing the eastern city of Bakhmut in Ukrain.

<sup>65</sup> "What are Jus ad Bellum and Jus in Bello?" Extract from ICRC Publication, January 22, 2015.

Therefore, in the context of armed conflict, international humanitarian law frequently serves as the crucible for striking a balance between military need and humanitarian concerns. International humanitarian law's foundational principle of humanity stands for the necessity during hostilities of reducing suffering and saving lives while also treating people with dignity and respect. Military necessity is the justification for taking actions required to accomplish a military goal as long as those actions abide by the requirements of international humanitarian law.<sup>66</sup>

By limiting its devastating effects and minimizing human suffering, combat is constrained to control under international humanitarian law.<sup>67</sup> The guiding concept of international humanitarian law principally covers the protection and assistance provided to people impacted by hostilities in accordance with the regulation of the means and techniques of combat.<sup>68</sup> International humanitarian law, which aims to reduce the suffering brought on by armed combat, essentially governs how warfare is conducted. With the ultimate goal of balancing humanitarian concerns and military necessity, it is independent of debates concerning the causes of war or how to prevent it.

<sup>69</sup>

### Classification of Armed Conflict

Armed conflict is divided into two categories under international humanitarian law: international and non-international. This is required to determine the set of regulations that apply to a recognized armed conflict.<sup>70</sup>

The necessity of determining the category of armed conflict becomes inevitable in that where it is ascertained that, it is international armed conflict, the applicable rules are principally found in the Geneva Conventions and Additional Protocols.<sup>71</sup> Again, upon the determination of the armed

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<sup>66</sup> N. Hayashi, *Requirements of Military Necessity in International Humanitarian Law and International Criminal Law*, 28:39 Boston University International Law Journal (2010), 41-42.

<sup>67</sup> This is not being applied in the current Russia-Ukraine war as no restraint is placed on its destructive effect on civilians and civilians 'objects. (n. 16).

<sup>68</sup> H. Haider, Overview of International Humanitarian Law available at :<GSDRC <https://gsdrc.org/topic-guides/international-legal-frameworks-for-humanitarian-action/concepts/overview-of-international-humanitarian-law>>, accessed August 12, 2022

<sup>69</sup> Ibid

<sup>70</sup> Oji (2013), supra note 16, at 77.

<sup>71</sup> Convention (I) for the Amelioration of Conditions of the Wounded and Sick in Armed Forces in the Field, Geneva, August 12, 1949; Convention (II) for the Amelioration of the Conditions of the Wounded, Sick and Ship Wrecked

conflict being non-international, the applicable rule is principally found in Article 3 common to the four Geneva Convention and Additional Protocol II.<sup>72</sup>

### **Implications of the Classification of Armed Conflict**

For international armed conflict, the rules controlling hostilities as well as humanitarian access and aid are primarily specified. One example is the fact that only the laws governing international armed conflict provide information about prisoners of war and combatants.<sup>73</sup> To address the inadequacy of rules of engagement relative to non-international armed conflict, recourse is often made to customary international law which is an embodiment of numerous rules that have crystallized over time to regulate both international armed conflict and non-international armed conflict.<sup>74</sup> Therefore, all cases of declared war or of any other armed conflict that may emerge between two or more governments are subject to the laws of international armed conflict.<sup>75</sup> In essence, only two or more governments can engage in international military war. Contrarily, armed conflict that lacks an international component is referred to as non-international armed conflict. Therefore, when a non-state armed group engages in hostilities, it is categorized as a non-international armed conflict. Examples of this include when a state declares war on a group of armed individuals or when two non-state armed groups engage in hostilities with one another.<sup>76</sup> The non-state armed group must be organized under a responsible command and exercising control over a portion of the territory in such a way that the group is liable to conduct military operations for the principles of international humanitarian law to be activated in this case.<sup>77</sup>

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Members of Armed Forces at Sea, Geneva, August 12, 1949; Convention (III) Relative to the Treatment of Prisoners of War, Geneva, August 12, 1949; Convention (IV) Relative to the Protection of Civilians Persons in Time of War, Geneva, August 12, 1949 and Relating to the Protection of Victims of International Armed Conflict (Protocol I), June 8, 1977; Protocol Additional to the Geneva Conventions of August, 12, 1949 and Relating to the Protection of Victims of Non-International Armed Conflict (Protocol II), June 8, 1977; Protocol Additional to the Geneva Conventions of August 12, 1949 and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III), December 8, 2005.

<sup>72</sup> Article 3 offers an international minimum protection of persons taking no active part in hostilities including members of armed forces in certain circumstances with humane and non-discriminatory treatment.

<sup>73</sup> ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Report of 31<sup>st</sup> International Conference of the Red Cross and Red Crescent (Geneva, 2011).

<sup>74</sup> Ibid

<sup>75</sup> Article 2, Common to the Four Geneva Conventions, 1949

<sup>76</sup> Oji (2013) *supra* note 16, at 77.

<sup>77</sup> Ibid, p. 77.



## **Military Necessity Vis-À-Vis Humanity: The Proportionality Approach and Challenges in Recent Times**

Steps that are required to accomplish a legitimate military goal and are not otherwise banned by international humanitarian law are permissible under the principle of military necessity.<sup>78</sup> Degrading the military strength of the opposing combatants is thus the only justifiable military goal in times of conflict.<sup>79</sup> Humanitarian imperatives are typically overridden by military need. So, the protection of humanity, as embodied in international humanitarian law, aims to find a balance between military need and humanitarian considerations.<sup>80</sup> It has been stated that, as a result, "the modern law of armed conflict with its strongly humanitarian emphasis requires careful distinction between military and civilian targets, it is based on a subtle and often-elusive non-arithmetical equation that seeks to balance the military advantage anticipated from a given operation against the likely civilian casualties or damage to civilian objects."<sup>81</sup>

It must be underlined that military objectives are only those things that, by virtue of their makeup, positioning, or intended uses, significantly advance military action. Additionally, military goals only apply to things whose capture, destruction, or neutralization would result in a definite military advantage under the conditions in effect at the time.<sup>82</sup> The term is specifically employed in the law to describe the concepts of military objective and proportionality, to the point where the expected benefits from the principle of military necessity are disregarded.<sup>83</sup>

The ability and desire to suppress the potential for armed conflict and minimize its negative impacts on safety and health are part of the humane concept. Humanity therefore encompasses humanitarianism, morality, progress, respect for human rights, and safety for all.<sup>84</sup> In order to

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<sup>78</sup> Hayashi (2010), *supra* note 21, at 40-45.

<sup>79</sup> *Ibid*, pp. 40-45.

<sup>80</sup> *Id*.

<sup>81</sup> B. L Brown, *The Proportionality Principle in the Humanitarian Law of Warfare: Recent Efforts at Codification*, 10 *Cornell International Law Journal*, issue 1, (1976), 136.

<sup>82</sup> H. B. Roberson, *The Principle of Military Objective in the Law of Armed Conflict*, 36 *Journal of Legal Studies* (2016), 1-4

<sup>83</sup> *Ibid*

<sup>84</sup> P. Maurer, *Even Wars Have Limits: Health Care Workers' and Facilities Must be Protected*, speech given at the United Nations Security Council Briefing (New York, May 3, 2016).

comprehend how humanity should be preserved throughout wars, it is important to consider public morality as well as the moral compass of international humanitarian law, which is based on the principle of proportionality.<sup>85</sup>

The events of World War II led to the development of the Geneva Conventions, which further ensured the safety of military troops not actively engaged in hostilities and other people, especially civilians.<sup>86</sup> The 1949 Fourth Geneva Conventions, along with the Hague Law, became recognized as customary international law and today serve as the foundation of traditional international humanitarian law.<sup>87</sup> While giving humanity the spotlight in the law governing combat in the Corfu Channel Case, the International Court of Justice based its ruling on a number of fundamental human rights concepts, which are more exciting in times of peace than in times of war.<sup>88</sup>

The proportionality principle forbids attacks on military targets that are anticipated to result in incidental civilian casualties, civilian injuries, civilian property damage, or a combination of these harms that may be excessive in comparison to the anticipated concrete and direct military advantage.<sup>89</sup> The principle of proportionality basically states that the impact of the means and techniques of warfare used must not be disproportionate to the military advantage desired, hence limiting injuries caused by military operations. In this sense, the fulcrum for balancing military need and the protection of humanity is provided by international humanitarian law through the lens of proportionality. In light of this, it has been said that "if proportionality is the pivot of that equation and humanity is one side of the balance, the military necessity is the other." Fundamentally, and in its broadest sense, military necessity means that armed forces may take whatever action necessary to further their legitimate military objectives in hostilities as long as it does not otherwise violate humanitarian law."<sup>90</sup>

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<sup>85</sup> K. Kowalczywska, *Humanity in Modern Warfare, Empathy and Jus in bello*, Security Dimensions International and National Studies, no. 12 (2014), 189-200.

<sup>86</sup> *Ibid*

<sup>87</sup> Hayashi (2010), *supra* note 21, at 40-50.

<sup>88</sup> ICJ Report, 1949, p.22

<sup>89</sup> Brown (1976), *supra* note 36, 136

<sup>90</sup> Y.Bear, *Revitalizing the Concept of Military Necessity* available at :<https://doi.org/10.1093/050/9180190881146>. Accessed August 12, 2022.



An interesting development in the development of international law was the establishment of the International Criminal Court.<sup>91</sup> As a result, the legislation that established the international criminal court states in part that it was established "mindful that during this century millions of children, women, and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity."<sup>92</sup> The International Criminal Court has jurisdiction over crimes against humanity under the legislation, which accords them a distinctive standing as international crimes.<sup>93</sup> A fundamental and often praised idea that appeals to a common sense of our identities as human beings, with emphasis on the island of humanity in the middle of war, is the preservation of humanity as covered by the requirements of proportionality.<sup>94</sup>

Therefore, as essential principles of international humanitarian law, proportionality and distinction offer a stabilizing anchor between the need for military necessity and humanity. Therefore, it is mandatory for all parties to hostilities to make a distinction between civilians and combatants, as well as between civilian and military objects, at all times. Additionally, an attack may not be launched if it is anticipated to result in incidental civilian casualties, civilian injuries, or civilian property destruction that would be excessive in comparison to the anticipated direct military advantage.<sup>95</sup>

The difficulties in recent years, particularly during the ongoing conflict between Russia and Ukraine, are that the fundamental requirements of military necessity—targeting military objects, distinguishing between them and civilian infrastructure, and using the least amount of force—are now more frequently violated than followed. On February 24, 2022, Russia announced his stated objective, stating that her interest in Ukraine was to "demilitarize" and "denazify" Ukraine, not to seize it by force.<sup>96</sup> However, based on current events and realities, Russia has imperial ambitions and is enslaving Ukraine as well as other nations in order to enlarge itself and resemble the

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<sup>91</sup> ICC, *Understanding International Criminal Court* (The Hague: ICC, 2020).

<sup>92</sup> ICC, "Statement of the Presidency of the International Criminal Court on the occasion of International Justice Day, July 17, 2009.

<sup>93</sup> Article 7(1), Statute of International Criminal Court, 1998

<sup>94</sup> C. Sommanegay, "Humanity: Our Priority Now and Always, Response to Principles, Politics and Humanitarian Action" 13 *Ethics and International Affairs*, (1999), 26

<sup>95</sup> Brown (1976), *supra* note 36, 136

<sup>96</sup> Mearsheimer (n.16).

previous Soviet Union in certain ways. It appears that Russia is carrying out a nefarious long-held objective to obliterate Ukraine from the international map.<sup>97</sup>

Furthermore, the use of maximal force rather than the minimum permitted by humanitarian law has affected individuals and civilian objects in the conflict.<sup>98</sup> Unfortunately, because Russia is a permanent member of the Security Council, it has not suffered quick and severe repercussions for acting aggressively. This has amply illustrated the inadequacies of international law in preventing governments from acting aggressively against one another. The UN's essential concept of territorial sovereignty of independent states is threatened and weakened by this practice of using force unilaterally, as demonstrated by Russia's recent action.<sup>99</sup>

## Conclusion

The Challenge of balancing the interest of the military in armed conflict with the preservation of humanity presents a delicate issue in the grim reality of armed conflict. Hence, the dichotomy in hostilities naturally erupts in a bid to balance the need to successfully execute a military operation and preserving humanity. It follows that international humanitarian law serves as a means to an end in regulating otherwise brutal warfare with the ultimate objective of the preservation of humanity in the face of the reality of war<sup>100</sup> this is because military necessity provides the basis for doing what is necessary to decimate the enemy combatant during armed hostilities. If the following recommendations are adhered to, it is believed that not only will a sustainable balance be achieved, but the world will be at peace and humanity kept in safety and upon the fulcrum of the rule of international humanitarian law.<sup>101</sup>

## Recommendations for the Sustainability of the Delicate Balance

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<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

<sup>99</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States) Merit, ICJ Rep. 14, 98 – 100; M. Shaw International Law (5<sup>th</sup> ed, 2005, Cambridge University Press) 1019; see also Art. 2(4) of the UN Charter.

<sup>100</sup> Sommanega (1999), *supra* note 50, 26

<sup>101</sup> Melzer (2010), *supra* note 57, 833-850

By assisting in the preservation of essential human values in the face of the reality of war, the legal framework of international humanitarian law serves as an anchor for the sustainability of the precarious balance between humanity and military necessity.<sup>102</sup> This legal framework is significant because it guides actions and choices made on the battlefield, and it's crucial that all participants to an armed conflict are aware of and compliant with them.<sup>103</sup> Therefore, all parties to armed conflict must adhere to their prescribed obligations while applying and interpreting the norm of international humanitarian law.<sup>104</sup> The laws of war are essentially practical; they recognize the reality of armed conflict and permit fighters to target enemy forces in specific circumstances as long as they adhere to specified limitations.<sup>105</sup> The evolution and development of international humanitarian law was in response to how the injured and the captured in armed conflict are to be treated as well as how to protect those who are no longer participants in the armed conflict. Therefore, the activation and application of international humanitarian law serves as a prevention of armed conflicts regenerating into brutality.<sup>106</sup> This humanitarian response undoubtedly acknowledges the need to preserve basic human values. Therefore, achieving this goal depends on the sensitive idea of humanity and military necessity.<sup>107</sup> In one breath, humane constraints on military behaviour are expected, and as a corollary, it is acknowledged that defeating an enemy may result in deaths and collateral damage.<sup>108</sup> These opposing ideas show that although defeating the enemy fighter is the goal, winning at all costs is never acceptable. Therefore, weighing the idea of humanity against the facts of conflict helps to significantly lessen suffering and limit permanent devastation.<sup>109</sup>

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<sup>102</sup> ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflict*, 5<sup>th</sup> Report for the International Conference of the Red Cross and Red Crescent (Geneva, 2019).

<sup>103</sup> Inspector General of Australian Defence Force: *Afghanistan Inquiry Report* (Commonly Called Brereton Report).

<sup>104</sup> The Four Geneva Conventions, 1949 and their Additional Protocols, 1977 and 2005.

<sup>105</sup> S. Watts, *Reciprocity and the Law of War*, 50 *Harvard International Law Journal*, no. 2 (2009), 366-387

<sup>106</sup> A fundamental rule of international humanitarian law is that persons who are *hors de combat* must not be attacked and must be treated humanely.

<sup>107</sup> This delicate balance of humanity and military necessity weaves its way through international humanitarian law and humanitarian action

<sup>108</sup> N. Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct participation in Hostilities*, 42 *International Law and Politics* (2010) 833-856.

<sup>109</sup> *Ibid*

To maintain the delicate balance, rules and regulations that regulate how warriors behave and act must be adopted. This provides the required framework for the widely held conviction that there must be humanity in conflict. Contracting parties are required to observe the Geneva Conventions and their Additional Protocols during times of armed conflict by both their military forces and any individuals or groups they are in charge of.<sup>110</sup>

As a result, belligerents are required to ensure that they do not encourage or assist in the violations of the conventions. They are also required to take proactive measures to put an end to those violations and to restore the respect for the conventions in the minds of erring parties to disputes.<sup>111</sup>

Overall, international humanitarian action guards against the perilous belief that certain people can be treated cruelly or killed without consequence. As a result, international humanitarian law upholds the core human principles required for people, communities, and those engaged in conflict to maintain their humanity and subsequently find common ground and learn to coexist in peace.<sup>112</sup>

The following suggestions for maintaining the delicate balance may be required, nevertheless, given recent events in the world, such as the ongoing Russia-Ukraine war, which have abandoned these centuries-old customs.

1. There is an urgent need for the review and composition of the Security- Council and the need for further strengthening too. The present composition where we have five permanent members is not helping matters, particularly as it relates to their veto votes. One concede that they were there before others joined the United Nations (UN) and they formulated the rules which if it has been kept and held sacrosanct will guarantee world peace and security. However, as can be seen in the recent Russia-Ukraine war, where Russia, a super power and permanent member of the Security- Council unilaterally attacked a weaker member of the UN, the sanctions imposed is not total but selective in nature. Secondly, the Security-Council because of the veto vote of Russia has no immediate and devastating consequences on the aggressor (Russia), this action of Russia, weakens and threatens not just the core principle of territorial

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<sup>110</sup> UNHR, *International Legal Protection of Human Right in Armed Conflict (New York and Geneva, 2011)*.

<sup>111</sup> Common Article 1 to the Four Geneva Conventions, 1949

<sup>112</sup> F. Kunade and H. Johnson, *International Humanitarian Law Programme at Australian Red Cross*.

sovereignty of independent states, but the World Peace generally. As a way out, the veto vote by the five permanent members should be jettisoned and more states admitted into the Security Council with the constitution amended for equal votes of members of the security-council.

2. Secondly, United Nations should have a standing military strike force that can be deployed against an aggressor. Furthermore, such a force should monitor and ensure maximum force and weapon are discouraged in the event of the out- break of war.
3. Thirdly, rather than allowed States to prosecute war crimes and bring such war criminals within their jurisdictions<sup>113</sup>, which is not practicable under the current Russia-Ukraine war, such UN force when operational should be empowered to prosecute war crimes and bring perpetrators to book.

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<sup>113</sup> This is the current position under Art. 146 of the Geneva Convention IV.