

MILITARY NECESSITY AND THE RESTRICTION ON METHODS AND MEANS OF WARFARE

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ABSTRACT

Laws of war provide it with moral equality that distinguishes it from domestic crimes in that in warfare, some restraint should be observed. Disproportionate destruction of life and property are not permitted and civilian life and civilian property must not be subjected to military force. The need that some restraint should be observed during armed conflict has been recognized since the earliest times in many cultures and religions. Modern international law as stipulated by Article 22 of The Hague Regulations and Article 1 of the Additional Protocol 1 the Geneva Conventions restrict the rights of parties to the conflict to their choice of the methods and means of warfare. In warfare, the employment of weapons and methods of warfare that cause superfluous injury and suffering are not permitted. The same principle applies to the environment. The destruction of environment that exceeds the need to achieve military objectives are not permitted - a development that demonstrates the extent in which environmental issues in warfare has grown in importance. The laws of war also require that civilians and civilian objects be distinguished from the military and be protected from harm. Parties to the conflict are severally responsible to ensure that this rule is observed. In determining the extent of damage and destruction allowed in war, the principle of proportionality should be applied. The main difficulty however lies in how proportionality is interpreted by parties to the conflict.

Keywords: *Laws of War, means and methods of warfare, superfluous injury and superfluous damage.*

BACKGROUND

In protesting the manner the Boer War was conducted Sir Henry Campbell-Bannerman, one of the leaders of the Liberal Party during the war, was quoted as saying that, “war is not a war” when “it is fought with barbarism” (Walzer, 1977: 25). Rules of war provide combat with the moral equality that distinguishes it from domestic crimes (ibid: 128). Lackey (1989: 58-60) proposed that there are three leading ideas that governed the rules of war. The first idea is that the destruction of life and property is inherently bad and military forces should not cause more destruction than necessary to achieve their objectives. The second idea is that the amount of destruction permitted in pursuit of a military objective must be proportionate to the importance of the objective. The third idea concerned the principle of non-combatant immunity, that civilian life and property should not be subjected to military force.

The need that some restraint should be observed during armed conflict has been recognised since the earliest times in many cultures and religions. Instances of limitations ordained by God were evident in the Old Testament. In Deuteronomy, the Israelites were told that they were allowed to eat the fruits from captured orchard but not allowed to destroy the trees. In the Book of Kings, prophet Elisha when asked whether the prisoners of war ought to be slain, advised the king against it and instead instructed that they be given food and water and be allowed to return home (quoted in Green, 1993: 18).

In the Hindu tradition, the Mahabharata prohibits the killing of women, children, old men and those who suffered from any natural, physical or mental incapacity. The use of “wicked weapons” such as poisoned arrows was prohibited in the Code of Manu (ibid: 19). In the Chinese tradition, Sun Tzu in “The Art of War” elucidated that only when the enemy cannot be overcome by other means that force should be resorted to but it must be done with the infliction upon them “the fewest possible casualties” (translation by Griffith, 1963: 39). In the Islamic tradition, Prophet Mohammed instructed the Muslim soldiers instruction to “inflict the enemy the lightest losses compatible with the aims of war, not to kill by treachery or ruse, not to mutilate combatants, to leave their mortal remains intact and not to take reprisals on those who are guilty of such degrading or inhuman practices” (Bedjaoui, in Dekker, 1992: 290).

The tradition continued into the medieval era, where chivalrous virtues presented the ideal of the virtuous knight; courageous in battle, fair with the enemies and compassionate toward the weak (Lackey, 1989: 65). The modern war however made the application of the chivalry concept difficult. With the use of aircraft, tanks and artillery the idea of “courage in equal combat” is largely absent. Enemies may now be killed with little or no risk being exposed to the combatants, making the knightly standards irrelevant (ibid: 66). This however does not mean that the modern laws of war are less civilised, but rather the basis of their application has shifted from chivalrous consideration to a more realistic humanitarian consideration consistent with the evolution of the means and methods of warfare.

GENERAL LIMITATIONS ON THE CONDUCT OF WAR

The limitation that seeks to limit the means of warfare is stipulated in the Article 22 of the Hague Regulations, which states that “The rights of belligerents to adopt the means of injuring the enemy are not unlimited”. The limitation on the methods of warfare is stipulated in Article 35, paragraph 1 of the Additional Protocol 1, which restricts “the right of the Parties to the conflict to choose the methods or means of warfare”.

The general limitation imposed by these two Articles prohibit the employment of means or methods which are intended or of a nature to cause firstly; superfluous injury or unnecessary suffering (Article 23(e) of the Hague Regulations, and Article 35 paragraph 2 of the Additional Protocol 1), secondly; widespread, long term severe damage to the natural environment (Article 35 paragraph 3 and Article 55 paragraph 1 of the Additional Protocol 1; and ENMOD Convention) and thirdly; injure military objectives, civilians, or civilian objects without distinction (Article 51 paragraphs 4 and 5 Additional Protocol 1) (Fleck, 1995: 111).

“Means of warfare” according to a general definition are “man made objects with destructive effect”, whereas the “methods of warfare” refers to “the way in which the means of warfare are used in a given strategic situation” (Lagoni, in Dekker, 1992: 115). Whilst the definitions for these two terms are relatively clear-cut, the views about “military necessity” tend to vary. McCoubrey (cited in Rogers, 1995: 6) argues that “military necessity is a doctrine within the laws of armed conflict which recognises the potential impracticality of full compliance of the legal norms in certain circumstances and accordingly, may mitigate or expunge culpability for prima facie unlawful action in appropriate cases in armed conflict”. He however qualified his statement with the condition that “the effects in any given case will rest upon the combination of issues and circumstances...” and this effect doctrine is “limited to particular events and circumstances and does not have a general suspensory effect upon the law of armed conflict”.

Although views such as McCoubrey’s appear to suggest that the elastic nature of military necessity may justify the violation of the laws of war, the general view among most experts is best described by Oppenheim who held that, “what may be ignored in case of military necessity are not the laws of war, but only the usages of war” (cited in Rogers, 1995:4). This view was reflected in Article 14 of the Lieber Code, which defined military necessity as “measures which are indispensable for securing the ends of the war *which are lawful according to the modern law and usages of war*”. Almost similar definition was summarised by Holland (cited in Rogers, 1995: 5), which stated that “military necessity justifies a resort to all measures which are indispensable for securing [the submission of the enemy]; *provided that they are not inconsistent with the modern usages of war*” (emphasis in italic added).

Regardless of the precise definition - whether military necessity allows for necessary violations of the rule of war as suggested by McCoubrey, or it ignores the principles of

usage of war as suggested by Oppenheim, the basic guiding criteria is that no action may be taken unless it is militarily necessary. It is up to the belligerents therefore to determine and to weigh whether their action is unavoidably necessary in order to fulfil their military aims and objectives. The most important factor is that they must not lose sight of the need to ensure that the highest priority be given to humanitarian consideration.

SUPERFLUOUS INJURY AND UNNECESSARY SUFFERING

The Declaration of St Petersburg of 1868 was the first declaration that seeks to introduce limitation on the use of weapons of war. It codified the customary principle prohibiting the use of weapons that cause unnecessary suffering. The importance of the declaration is not so much in the specific ban which it introduced (in this case, rifle shells that exploded on impact) but rather the principles on which the ban was based - that it is prohibited to employ weapons or methods of warfare which are likely to cause unnecessary suffering. That principle remains important today, and has become one of the general principles of humanitarian law by which the legality of all weapons and means of warfare are measured (Fleck, 1995: 19).

The prohibition against *maux superflus*, - weapons and material causing excessive suffering continued with the Hague Declaration of 1899 concerning the use of dum-dum bullets, followed by the Geneva Gas Protocol 1925 prohibiting the use of asphyxiating, poisonous or other gases and bacteriological methods of warfare, and the Conventional Weapons Convention of 1980 that set the rules governing the use of mines, booby traps and incendiary weapons.

Despite the strict rules that govern the use of mines and booby traps, there was a strong opinion that felt that the 1980 Convention is still inadequate and that there should be effort made to totally eliminate the use of land mines in warfare. As a result, the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personal Mines and Their Destruction was signed in 1997. The underlying argument pressing for the establishment of this Convention this is based on the fact that land mines unlike other weapons are indiscriminate by nature and no control or guarantee can be made to ensure that its target will be purely military. The number of civilian casualties involved in land mine incidences in Cambodia and Rwanda has further strengthen this claim. The other argument is that, based on the report made by military surgeons, some of these mines inflict far more injuries and deaths than other weapons (ICRC website).

Beside land mines, another controversial weapon that is regarded as having potential of inflicting superfluous and unnecessary injury are the laser weapons. Laser weapons do not inflict bodily injury or wound that is traditionally associated with the use of other weapons. Instead it caused permanent blindness to the victim. It was based on this fact that prohibition of the use of this weapon is sought (ibid).

The issue of the use of nuclear weapon has now been resolved by the decision of the International Court of Justice advisory opinion which decided that “a threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law”. The decision confirmed the applicability of the Nuremberg Principles to nuclear weapons (Action 2000 website), and more importantly the fact that the massive destructive potential of the weapon is simply too great for it to be regarded as a weapon that can be used without causing unnecessary injury and suffering to the victim and can be discriminatively employed only against military targets.

The concern raised about the employment of land mines and laser weapons and the social effect that injuries caused by these weapons might bring may have added a new dimension to the definition of “superfluous and unnecessary injuries and suffering”. Although the thrust of the argument to seek the prohibition of the use of these weapons is on the social effect - that the disabled victims of these weapons, particularly the civilians are likely to create social burden on the society, the underlying factor remains the same. The injuries caused are permanent. Unlike the injuries sustained from small arms fire or artillery shrapnel, the injury caused by land mines would inevitably in most cases, lead to possible loss of limb. A Laser weapon would cause its victims to become blind. From the military point of view, the injuries created by these weapons are in excess of the basic need to incapacitate the enemy and to neutralise his ability to fight. Injured combatants caused by these weapons by virtue of the nature of the injury are most likely to be permanently taken out of battle. Although his enemy may benefit from this, the action clearly violates the principle of proportionality and military necessity.

DAMAGE TO THE ENVIRONMENT

“Devastation”, according to Vattel in condemning the French devastation of Palatinate in 1674 and 1689, are “savage and horrible excesses when resorted to without necessity” (cited in Best, 1980: 66). Although the laws of war have been mainly concerned with the protection of human life, the various principles of customary law can work towards the protection of the environment (Rogers, 1996: 107). The preamble to the St Petersburg Declaration 1868 states as a matter of principle that military operations are to be directed against enemy armed forces and military objectives. Any damage or destruction caused in war must be dictated by military necessity and not by other motive such as revenge or lust for destruction. There must also be some reasonable connection between the destruction of property and the destruction of the enemy forces. The damage must therefore be proportionate to the military gain sought (ibid).

The impact of the increasing concern towards the environmental problems may have resulted in a more stringent criteria being applied as regards to the principle of proportionality. Bothe (cited in Rogers, 1996: 107) even went on to suggest that the phrase “dictates of public conscience” in the Martens preamble to the Hague Convention

IV of 1907 includes environmental concerns. Concern for the environment is a relatively new phenomenon and generally was not an important factor to consider as regards to military necessity. The devastation of Palatinat as described by Vattel and the indifferent attitude toward the action taken reflected the general attitude during the period, - that the destruction of the environment is permissible even if it goes beyond the need to attain the object of war (ibid: 108).

Even up to the period as late as the end of Indo China War, concern for the environment was still not considered as an important “humanitarian” factor. Military doctrine that tolerates the destruction of the environment was in the books of many armed forces. In Vietnam, napalm was used to destroy suspected Vietcong villages, and defoliant was used to deny the enemy the benefit of forest cover in Southern Laos. At strategic level, carpet- bombing operations were carried out with the aim of destroying the Ho Chi Minh trail that was the main supply line between the North and South Vietnam (*La guerre du Vietnam* website).

The prohibition adopted in the ENMOD Convention, and Articles 35 and 55 of the Additional Protocol 1 now reflect the current emphasis and concern for the environment. ENMOD Convention prohibits parties engaged in military conflicts from employing environmental modification techniques “having widespread, long lasting or severe effects” as a means of destroying, damaging or injuring the other party. This restriction is supplemented by Article 55 of Additional Protocol 1, which prohibits the “use of methods or means of warfare, which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population”. The Article also prohibits “Attacks against natural environment by way of reprisals”. The most significant development perhaps is in the Draft Code of Crimes Against Peace and Security of Mankind, in which the breach of the prohibition is considered as an “exceptionally serious war crimes” (1991, 30 ILM., 1584, Art. 22(2)(d), cited in Green, 1993: 132). This development demonstrates the extend in which environmental issues in warfare has grown in importance over such a short period of time, thus further strengthening the restriction on the means and methods of warfare.

MILITARY OBJECTIVES AND PRECAUTIONS AGAINST THE EFFECTS OF MILITARY OPERATIONS ON CIVILIANS

Article 48 of the Additional Protocol 1 provides the basic rule in which parties to the conflict are required at all times to “distinguish between civilian population and combatants and between civilian objects and military objectives”. Accordingly, the belligerents are required to “direct their operations only against military objectives”. Military objectives as defined in Article 52 of the Additional Protocol 1 are “objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage”.

The term “military objective” is a relatively recent addition to the law of war (Rogers, 1996: 27). This partly reflects the degree of attention previously given to the problem of providing civilians with the necessary protection from the effect of military operations. Although it was accepted that direct attacks on civilians were prohibited, the attention was mainly concentrated on regulating the conduct of attackers and very little thought was given on the responsibilities of the authorities or governments involved in ensuring the safety of the civilian population (ibid: 71).

Article 58 of the Additional Protocol 1 requires that parties to a conflict to a maximum extent feasible to remove civilians and civilian objects from the vicinity of military objectives, avoid locating military objectives in densely populated area, and protect civilians and civilian objects from the dangers of military operations. There are obvious difficulties connected with complying with these requirements. Peacetime administrative requirement may dictate that logistics depots or command headquarters be located in or near the cities or populated areas. In war, these installations are likely to be key military targets. Massive evacuation effort may therefore be required to move civilians out of the vicinity of these areas. The difficulty involved is acknowledged by the Protocol and the phrase “maximum extent feasible” suggests that the authorities should endeavour to comply to this obligation only to the point where it is “practicable and practically possible” for them to do so (Fleck, 1995: 221) and (Rogers, 1996: 76-7).

The attackers are also responsible in ensuring that civilian population and objects are protected from the effect of their action. Article 51 of the Additional Protocol 1 requires that attacks on military objects be conducted without causing loss of civilian life, which is excessive in relation to the concrete and direct military advantage anticipated. This is supplemented by Article 57 of the same Protocol, which requires that all feasible precautions be taken to avoid, and to minimise, incidental loss of civilian life, injury to civilians, and damage to civilian objects.

The overlapping responsibilities in which both parties are responsible to ensure that civilians and civilian objects are protected against possible effect of military action could lead to a situation in which parties to a conflict may try shift the responsibility and blame towards each other. As demonstrated during the Gulf War 1990-1 and 2003, Iraq which was alleged to have deliberately placed the lives of its civilian population in danger by deploying its military installations near protected places and residential areas, tried to shift the blame for the collateral damage caused to the coalition air forces. The coalition admitted that their action may have caused some civilian casualties and damage but insisted that they have taken all the necessary measures within their means to minimise the effect of their action on the civilians and civilian objects.

In the case of the Gulf Wars, the problem was caused by the refusal of one party to fulfil its obligation to protect its own civilian population and the other party’s refusal to place the concern over civilian safety over what they perceived as tactical necessity. Article 58 of Additional Protocol 1 operates on the assumption that states are naturally inclined to protect its own citizens. The Iraqi situation can therefore be regarded as rather unique.

It nevertheless demonstrates the difficulty in determining the degree of responsibility for the damage that resulted when both parties claim that they have both acted in the manner that is consistent with the law and custom of war.

CONCLUSION

It is practically difficult to establish a standard value against which the destruction in war can be measured. "Proportionality" according to Sidgwick (cited in Walzer, 1977: 129) is "a difficult criteria to apply" and it would not be fair to condemn soldiers for anything they did in the course of their duty that they honestly believe, and have good reason to believe was necessary. The burden of weighing what is militarily necessary, like the burden of making tactical decisions is very heavily burdened on military commanders shoulders. This burden is made much heavier when the decision has to be made in "the fog of war" - quickly, under pressure, and in most cases with limited and sometimes inaccurate information at his disposal. It is however to a commander's interest that he observe the principle of proportionality and military necessity. The requirement to observe these principles is not inconsistent with the principles of war. The ultimate aim of war is not the total destruction of the enemy but to force him to surrender. Wars therefore, as succinctly put by Sun Tzu (translated by Griffith, 1963: 39), should be conducted "in the shortest possible time, at the least possible cost in lives and effort, and with infliction on the enemy of the fewest possible casualties". The principle of proportionality and military necessity is clearly consistent with this doctrine.

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