

ISSUES OF MILITARY NECESSITY AND HUMANITARIAN CONSEQUENCES IN THE RUSSIA- UKRAINE ARMED CONFLICT: UNCOVERING THE IMPLEMENTATION GAPS

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Abstract

This paper assessed the regulatory regime governing the application of military necessity in an international armed conflict. It critically analyzed the main factors behind the application of military necessity by the Russian Federated and the increased claims for its application in the ongoing Ukraine war. The humanitarian consequences of its application will be analyzed. In doing so, the paper advanced several conceptual and theoretical arguments to support its opinion. It also argued that a wrongful application of military necessity in an international armed conflict may result to humanitarian consequences on the civilian populations who are not parties to the armed conflict. The paper further argued that the problem associated with such applications is not as a result of lack of existing international law rules, but the implementation of relevant international humanitarian law and international human rights law which forms a complementary frameworks governing the issue of application of military necessity in the Ukraine armed conflict. Against the backdrop of the different manifestations of humanitarian disasters observed in the Russian-Ukraine armed conflict, the paper addressed two core questions that are particularly relevant in the application of military necessity: (1) How is the application of military necessity regulated? (2) What determines the justifications of the application by the Russian Federated? This approach reveals that States rarely apply the international humanitarian law understanding of “military necessity” and predominantly exceeded international humanitarian law standard of application. The paper adopted analytical and qualitative approach and builds its arguments on current literatures, legislations and policies on international humanitarian law which is achieved by a synthesis of ideas. Nevertheless, the paper concludes with some recommendations as to how the United Nations can play a role in ensuring accountability for failures within its ambit.

Keywords: Military Necessity, Justification, Humanitarian, Russian, Ukraine, Armed Conflict.

1.1 Introduction

The focus of this paper is to assess the regulatory regime governing the applications of military necessity in an international armed conflict. The paper critically analyzed the applications of

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military necessity by the Russian Federated in the ongoing Ukraine armed conflict, notwithstanding the complex nature of this principle. Furthermore, the paper looks at the key definitions in relation to military necessity. However, the terms associated with military necessity are State obligations to protect and failure to prevent. Recognizing that the States are obliged to ensure that there is maximum compliance with international standard on the necessary respect for and protection of the Ukraine nationals, other entities such as the humanitarian respondents and vulnerable persons, these terms is made in a bid to understand the meanings and controversies that have arisen in their relations with military necessity.

Furthermore, this paper examines the direct and indirect effects of the application of military necessity on the Ukrainian territory that have resulted to hostilities, long-term physical disabilities, mental health problems and or insufficient health care services for displaced Ukrainians. These humanitarian consequences are associated with a complete breakdown of health-care systems and the destruction of essential infrastructures as a result of the armed conflict. Moreso, an analysis of the application of military necessity from the perspectives of international humanitarian law shows that the principle of military necessity emanates from two different point of view, such as justification for normative deviation, and as an element of the *lex-scripta*. However, from the above two perspectives, the first which borders on the circumstances surrounding the application of military necessity as a basis for not respecting the rules of international humanitarian law is clearly stated, while the second perspective on the application of military necessity in respect appeared as a particular element and as well a general notable principle. In this sense, it must be emphasized that there is a complementarity between military necessity and principle of humanity under international humanitarian law. That said, this inter-relationship suggests the directions, and the levels of operations of international humanitarian law. Moreso, it determines the manner of its application in an armed conflict situation.

Therefore, against the backdrop of the above, this paper is structured into five main parts. The first part begins with a brief overview of the subject matter, while the second part defined some of the key terms. The third part focused on the regulatory regimes governing the application of military necessity in the Ukrainian territory considering the consequences of its applications. The fourth part considers the Complimentarity between military necessity, principle of humanity and other principles of international humanitarian law with regards to the protections of the civilian population in light of relevant international frameworks. The fifth part is the conclusion. Ultimately, the paper argued that wrongful application of military necessity in an international armed conflict may result to humanitarian consequences on the civilian populations who are not parties to the armed conflict.

1.2. The Term “Military Necessity”

In defining military necessity, this paper only offers a broad overview in order to provide the necessary understanding of the term with regards to the topic at hand and as well in the context of it's applications. Basically, in order to gain full understanding of the concept of military necessity, it may be argued that given the nature of military necessity, wrongful application of this principle in an armed conflict situations may give rise to a general abuse or neglect on the

binding effects of the Law of Armed Conflict.¹ In a similar note, question may be asked whether the application of military necessity in a situation of armed conflict justified actions like reprisal killings of civilian populations in an armed conflict?² In this context, it has to be noted that the above question may be construed otherwise which suggests that military necessity permits the armed forces who are actively engaged in an armed conflict to apply any reasonable amount of force to subdue its enemy at the battlefield without any collateral damage to the civilian populations or civilian properties. Moreover, it allows the destructions of the lives of the armed enemies as well as other individuals whose destruction is incidentally unavoidable by the armed conflicts. That said, it may be argued that these perceptions and attitudinal dispositions towards the application of military necessity does not allow the destructions of the civilian populations for a mere purpose of launching an attack against the hostile State, or justify the abuse or disrespect to the laws in existence.³ Evidently, in the evaluations of the above reasons on the applications of military necessity, and attempting to address the structural inequalities as justifications for its application in the hostile State, the paper then asked, is there any way that its application will not lead to mass injury and or destructions of the civilian populations, abuse of the principles of humanity or proportionality? In this sense, States are required to ensure that the scope and severity of a limitation is proportionate to its desired objectives.⁴

In other words, military necessity may be understood from the perspective that States insist that legal norms cannot unreasonably deny them of their freedoms of action on the battlefield in a manner that will affect national interest, then the basis of this argument is that principle of military necessity constitutes the international humanitarian law mechanisms for safeguarding this purpose, and moreover, recognized the reason for the consideration of military factors necessary in setting the guiding rules of the armed conflict.⁵ Also, given that these applications are issues of debates amongst scholars and military experts, it is imperative to emphasize that the mere absence of an express international humanitarian law rule on ground does not reasonably suggest or justify an action on the basis of military necessity, and by implications, actions in an armed conflict must practically show a high degree of respect for humanity. That being the case, it is very important to note that military necessity means that armed forces can do whatever is necessary provided that it is not otherwise unlawful under international humanitarian law in order to achieve their legitimate military objectives in warfare.

Arguably, a more restrictive approach to the doctrine however, shows that it always placed restrictions on military actions, in the sense that no such actions may be undertaken regardless of its justifiable reasons, otherwise under the law of armed conflict, unless it is deemed just and fair from the perspective of military conditions. Furthermore, it has been argued that the lawfulness of an attack against property depends primarily on whether the property constitutes a military objective. To be fair, it can thus be assumed that under Article 52 (2) of the Additional

¹ L. Oppenheim, *International Law: A Treatise* 7th ed: Volume 2 Disputes, War and Neutrality Hersch Lauterpacht 1952.

² *United States v. List (The Hostage Case)*, Case No. 7, February 19, 1948.

³ *Ibid.*, p. 1253-56.

⁴ P. Alston and G. Quinn, *The Nature and Scope of States Parties' Obligations Under The International Covenant on Economic, Social and Cultural Rights* (1987) 9 *Human Rights Quarterly* 217.

⁵ M.N. Schmitt, *Green War: "An Assessment of the Environmental Law of International Conflict"* (1997) 22 *Yale Journal of International Law* 1, 54.

Protocol 1, Property in this sense, constitutes military objectives only when by its nature, location, purpose or use, have immensely contributed to armed attacks.⁶ Also, when it constitutes total or partial destruction which gives rise to a definite military advantage.⁷ However, it is useful to highlight that military necessity justifies the property's destruction, whereas the property's status as a military objective justifies attacks being directed against it.

In these specific context, while there may be argument that seek to impugned on the acts of destructions of properties and or attacking properties, it should be noted that in this respect, both acts are conceptually distinct from each other because the notion of military necessity and military objectives are conceptually distinct from each other but somehow interwoven. All of this suggests a very robust sense of the content of the title in such a manner that most instances of destructions of properties would also be another instances of property attack as the case may be. Essentially, the underlying implications is that drawing from the provisions of the Strugar Trial Chambers, it is relevant to mention that there is a confusion in the Court's submissions that military necessity may be used fully for the present purposes with reference to the widely acknowledged definition of military objectives provided in Article 52 of the Additional Protocol 1.⁸

In a similar fashion, the Appeals Chambers in Kordia and Eerkez Case held that no evidence allowed conclusions on whether the attacks of Merdani was reasonable or unreasonably justified by the application of military necessity.⁹ In taking this position, it would appear from the clear terms of the provisions of the Appeal Chambers that the Appeal Chambers has chosen to submit that the relevant questions for the determination of military necessity or otherwise of the properties destroyed in Merdani was whether the said attack of a locality was reasonable or unreasonably justified by military necessity. Having established the positions of the Appeal Chambers in this Case, the paper however submitted that the said attack of a locality is not enough for being militarily reasonable or unreasonable, but rather, it may be enough for being lawful or unlawful, which also depends on whether the locality contains a military objective. On the other hand, it may be argued that as combat related destructions of properties on itself is militarily unnecessary where the underlying offensive is unlawful, then the foregoing demonstrates the fact that the latter's lawfulness does not determined the former's military necessity.

Conversely, as seen above, it may also be argued that the said attack of Medani itself may have been lawful in the sense that not all the destroyed properties during this offensive attacks are militarily necessary. In light of the above position of the Trial Chambers in the aforementioned Case, the question that agitates the mind of the author is: does military necessity justified attacks on the civilian populations or their objects since an attack against the civilian or civilian objects is unlawful whether deliberate or indiscriminate? In order to answer the above question, it is important to emphasized that this question emerges first and foremost as a question which justifies an attack on civilian object or not and is, therefore a question of clarification on the basis

⁶ Additional Protocol 1 1977, Article 52(2).

⁷ Ibid.

⁸ *Prosecutor v. Strugar*, Case No. 17-01-42-T, Trial Judgment, 295 (31 January 2005).

⁹ *Prosecutor v. Kordiae and Eerkez*, Case No. 17-95-14/2-A, Appeal Judgment, 429 (17 December 2004).

that the destructions of the civilian properties in question does not satisfied the requirements of military necessity in such a manner that the measure should be in compliance with international humanitarian law. Also, the basis of this proposition is that an attack launched indiscriminately which destroys civilian's objects or properties, then it is said that the destructions remained without an attachment of military necessity.¹⁰

Reflecting the realities of such an extensive judicial interpretations and conventional approach to military necessity and in an effort to briefly summarize the concept of military necessity, reliance on the 1907 Hague Convention IV¹¹ where the International Court of Justice has recognized as having matured into Customary Law¹² has provided one such example. According to its preamble, the instrument was inspired by the desire to diminish the evils of war, as far as military requirements allows.¹³ Furthermore, while it is clear that within the context and circumstances surrounding the applications of military necessity, it must be emphasized that the mere absence of a clear provisions of the rules of international humanitarian law on a given situations does not necessarily justify an action on the basis of military necessity. This view is buttressed in several treaties or conventions. For purposes of emphasis and clarification, it is important to underlined that the extant treaty law therefore reflects an accepted balance between military necessity and humanity, such that neither independently justifies departure from its provisions, unless otherwise specifically provided for in the law. The above assertion suggests that military necessity as construed by contemporary civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, as well as those that are lawful in line with the contemporary usages or law of armed conflict¹⁴.

1.3. The Regulatory Regimes Governing the Application of Military Necessity under International Humanitarian Law

Generally speaking, under international humanitarian law, there are two major categories of regulatory regimes that regulate the application of use of force, the conduct of hostilities and or protection of war victims. In this respect, the two regulatory regimes are *jus ad bellum* which is the legal rules governing when a Country may resort to the use of force and *jus in bello*, the law governing conduct during the use of force. It must be noted however, that a State is a victim of a *jus ad bellum* violation because it resorted to the use of force without a lawful basis or has not complied with *jus in bello* when conducting military operations in defense of its territory.

Further, in analyzing the *jus ad bellum* regime from the perspectives of the United Nations Charter,¹⁵ It would be argued in this paper that on the one hand Article 2(4) prohibits member States from using or threatening to use force against the other, while on the other hand, there

¹⁰ *Prosecutor v. Broanin*, Case No. 17-99-36-T, Trial Judgment, 626 (1) September, 2004).

¹¹ Hague Convention IV The Laws of War and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907.

¹² Legal Consequences of the Construction of a Wall in The Occupied Palestinian Territory, Advisory Opinion, 2004, ICJ. 136, 172 (July 9), Legality of The Threat or Use of Nuclear Weapons, Advisory Opinion, (1996) ICJ 226, 257 (July 8).

¹³ Hague Convention IV 1907 Para. 5

¹⁴ Leiber Code 24 April 1863, Articles 14, 15 & 16.

¹⁵ United Nations, Charter of the United Nations, 24 October 1945 1 UNTS XVI.

exists an exceptions under Article 51¹⁶ which preserves member State's right to exercised it's right in an individual or collective self-defense in a situation of attack on it's territory. This is exemplified in the provisions of Chapter VII¹⁷ of the United, Nations Charter which permits the United Nations Security Council to authorize military actions capable of to maintaining or restoring international peace, security and order. Therefore, it is argued that the above provisions of the United Nations Charter provide both opportunities and challenges in the applications of military force by the Russian Federated Armed Forces in Ukraine territory.

In same analysis and from the perspective of Russia Federated claims on *jus ad bellum*, and justifications for Ukraine invasion, it must be emphasized that President Putin's assertions and arguments are as follows: First, Russia claimed to be defending itself from an occasioned threat emanating from the United States and other NATO members but orchestrated by the Ukraine government. That said, it could be reasonably argued that as the entire provisions of Article 51 of the United Nations Charter preserves States inherent right of self-defense in a situation of an armed conflict, it goes without saying that the said Article 51 of the Charter does not define the right's threshold. However, having established Russia's justification of the *jus ad bellum* claims, it is impossible to make a watertight submission in light of Russia's claim in view of the fact that the absence of military action in Ukraine that threatened the Russian federated implies that Russia's claim of self-defense is unfounded and of no basis under any standard known by international law.

Drawing from the above claim, it's second claim on reliance on the second leg of *jus ad bellum* bordering on action in collective self-defense of separatist areas in Ukraine's Luhansk and Donetsk regions which Russian government recognized as independent States three days before it's invasion of Ukraine territory. In addition, to give greater focus on the above analysis, it is difficult to agree that the two regions mentioned appeared to satisfy international law's traditional criteria for a legitimate autonomy.¹⁸ In effect, relying on the basic requirements of statehood as provided under the provisions of the Montevideo Convention on the Rights and Duties of States,¹⁹ the two regions aforementioned by Russian Federated are short of the minimum requirements of statehood as provided under the Convention on the basis that the alleged independence was established through the use of force and however, does not exercise control over the whole of their claimed territory and as such the said two regions sustained their existence from Russia with respect to financial, military, economic, and political supports different from what Russia alleged. It may be argued at this juncture that assuming without conceding to the fact that the two regions could be considered as States, that *jus a bellum* principles of necessity and proportionality would in this regard requires that Russia should restrict it's military intervention to actions that protect only these sessionists regions and not a complete invasion of Ukrainian territory.²⁰

¹⁶ United Nations, Charter of the United Nations, 24 October 1945, Article 51.

¹⁷ See Chapter VII of the United Nations Charter, 24 October 1945.

¹⁸ Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933 and entered into force 26 December 1934), Article 1.

¹⁹ Ibid.

²⁰ M. Milanvic, "What Russia's Legal Justification for Using Force Against Ukraine?" 24 February 2022, available at: <<https://www.ejiltalk.org/what-is-russias-legal-justification-for-using-force-against-ukraine> accessed 27 July 2022.

With regard to the third claim by Russian Federated on it's invasion of Ukraine under *jus ad bellum*, it is important to note that Russian Federated Claimed that it's invasion of Ukrainian territory was aimed at preventing genocide orchestrated by the Kiev regime against Russians and Russian-Speaking Ukrainians. In this sense, it is significant to note that, while some claims may only be acceptable against a particular State, but on the contrary, it does not form the basis for the justification of the application of force in Ukrainian territory.

Against this backdrop, and in order to ascertain the justification of the application of military necessity by the Russian Federated in the Ukrainian territory, the paper looks at another regulatory regime of *jus in bello*. As legal requirements imposed on States several restrictive measures in situations of armed conflict, *jus in bello* regulatory regime should be interpreted strictly in connection with the law governing the conduct during the use of force. As far as *jus in bello* is concerned, the primacy of this regulatory regime as connected to Ukraine armed conflict is traditionally used in situations of armed conflict. A careful examination of the provisions of *jus in bello* regime seems to reveal that it is derived from a collections of treaties and customary international law, while the Hague Convention of 1899 and 1907²¹ and the Four Geneva Conventions of 1949²² forms the foundations of the treaty-based portions of *jus ad bellum*. In this context, the principal constitutional provisions of The Hague Conventions of 1899 and 1907 rightly focused on regulating the means and methods of warfare, while the Geneva Conventions primarily provides protections for those who are not taking part in the hostilities or cannot participate in the armed conflict. That said, as the paper considers the legal position of Ukraine and Russia as State parties to the above notable sets of treaties and not State parties to all of their related Protocols.²³ With this in mind, it must be acknowledged that Russia and Ukraine membership of the above core sets of treaties and not to all of their related Protocols is an issue of great concern which has led to grave breaches of the Geneva Conventions and other serious violations of *jus in bello* that amounted to war crimes in the ongoing Ukraine armed conflict.²⁴

However, at this juncture, it must be stressed that as the paper is much more concerned on the application of military necessity and the humanitarian consequences of such application in the ongoing Russia Ukraine armed conflict, it must be stressed that international humanitarian law only concerns itself on the conduct of war and does not looked into whether the war is legal or not. This is an important starting point and however, implies that it is rooted in principles of military necessity, humanity, proportionality and distinction. Further analysis of this phenomenon shows that aside the general principles associated with *jus in bello*, it also ensure that there is an adequate protections accorded to the vulnerable categories of individuals such as children²⁵ civilian,²⁶ medical personnel,²⁷ and or humanitarian respondents.²⁸ Also, by extension,

²¹ Hague Conventions 1899 and 1907.

²² See The Four Geneva Convention 12 August 1949, 75 UNTS 135.

²³ R. Staff, "Russia's Putin Revokes Geneva Convention Protocol on War Crimes Victims", Reuters World News 17 October 2019, available at: <<https://www.reuters-com/article>.

²⁴ M. Nina, and S.P Mulligan, The Role of International Tribunals in the Response to The Invasion of Ukraine, CRS Legal Sidebar , 15 March, 2022.

²⁵ GC IV 1949, Article 24.

²⁶ Geneva Convention Relative to The Protection of Civilian Persons in Time of War of 12 August 1949.

²⁷ Geneva Convention I for the Amelioration of the Conditions of The Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, Article 24.

²⁸ Ibid, Article 24.

Common Article 3 of the Four Geneva Conventions provided a certain level of protections for those who are not covered by the above provisions.²⁹ With the development in technology of warfare, *jus in bello* limits the weapons States can use in situations of armed conflict as well as placed a restrictions on the categories of weapons such as those that can be harmful, Injurious³⁰ or are inherently indiscriminate as well as other weapons like poisonous weapons or gases,³¹ chemical³² and biological weapons.³³ That being said, *jus in bello* also regulates the conduct and methods of warfare by prohibiting pillage,³⁴ limiting destruction and seizure³⁵ of non-military properties that requires free passage of some humanitarian relief materials, and controlling³⁶ the white flag that suggests an end to an armed conflict.

Drawing on the experience of the Ukrainian, the paper argues that some of Russians alleged actions such as the use of ballistic missiles and explosive weapons in an indiscriminate manner³⁷ in densely populated areas and or artillery, airstrikes, and other attacks on civilian populations constituted violations of the law of armed conflict. Also, it must be emphasized that Russian's applications of cluster munitions that destroyed civilian hospitals³⁸ in Ukraine, while both Ukraine and Russia are not parties to the Convention on Cluster Munitions³⁹ remained a worrisome situations, and as well point to the fact that it's applications violates *jus in bello* prohibitions. Importantly, while the paper has condemned Russia's application of cluster munitions in damaging civilian hospitals in Ukraine, it has further queried the reason behind the public display⁴⁰ of captured Russian soldiers by the Ukrainian soldiers which contravened the provisions of the Third Geneva Conventions⁴¹ requirements to treat soldiers humanely and protect them from public ridicule and stigmatization. Despite the significance *jus in bello* to armed conflict as operational tools, there has been little recent articulation of their operational value and limitations in the contemporary armed conflict. Questions are sometimes raised on the issue of identification, gathering of evidence and or proving *jus in bello* violations. This is particularly challenging especially when it comes to evaluation on whether civilian casualties or attacks on civilian populations are deliberate, unlawful or incidental and not excessive and or permitted under the principle of proportionality. It must be admitted however, that the division of

²⁹ Ibid.

³⁰ Geneva Convention II with Respect to The Laws and Customs of War on Land and its Annex: Regulations Concerning The Laws and Customs of War on Land, 1949, Article 23.

³¹ Ibid, Article 23.

³² Optional Protocol on Convention on Weapons of Warfare, Article 1.

³³ Convention on The Prohibitions of the Development, Production and Stockpiling of Bacteriological and Toxin Weapons and on their Destruction(adopted by the UNGA on 16 December 1971, annexed to Resolution 2826(XXVI) entered into force 26 March 1975), Article I.

³⁴ Convention IV on Regulation Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, Article 28.

³⁵ Convention IV Relative to The Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, Article 147.

³⁶ Convention Regulations The Laws and Customs of War on Land, The Hague, 18 October, 1907, Article 23.

³⁷ Amnesty International, "Russian Military Commits Indiscriminate Attacks During The Invasion of Ukraine, 25 February 2022, available at: <<https://www.amnesty.org/en/latest>>

³⁸ Human Rights Watch, Russian Cluster Munitions Hits Hospital in Ukraine Killed Four Civilians and Wounded Ten, 25 February 2022.

³⁹ Human Rights Watch, Meeting The Challenge: Protecting Civilians Through The Convention on Cluster Munitions, 22 November 2010.

⁴⁰ D. Rousseau, Ukraine Parades Russian Troops Captured During Invasion Before Cameras, The Times of Israel 7 March 2022.

⁴¹ Geneva Convention (III) Relative to The Treatment of Prisoners of War Geneva 12 August 1949, Article 13.

this two regulatory regimes of *jus ad bellum* and *jus in bello* in armed conflict situations does not removed or ignored any forms of liabilities that these two regulatory regimes possessed in so far as armed conflicts are concerned.

1.4. Complimentary Role of the Principles of International Humanitarian Law in the Application of Military Necessity during Armed Conflict

In general terms, discussions on the humanitarian consequences in the applications of military necessity in the ongoing Ukraine armed conflict by Russian Federated often takes the form of questions regarding the notion of distinction and proportionality. While it is not automatically synonymous with a reasoned approach to violence, it should be noted that the Department of Defense's Law of War Manual⁴² construed the interactions amongst the principles of international humanitarian Law as follows:

That military necessity permits some acts capable of defeating hostile forces as fast and effectively as it can. In other words, humanity for prohibit certain act that are incapable of achieving the desired results as proportionality requires that even when the actions may be justified by military necessity, such actions must not be unreasonable or excessive, and or Indiscriminate. Distinction underpins the party's responsibility to conduct themselves in such a manner that complied with military necessity, humanity, and proportionality, by requesting that parties to an armed conflict should demonstrate certain legal categories, particularly, the distinction between combatants and non-combatants.

Traditionally, it is worth underlining that in the face of armed conflict there is always Humanitarian consequences from both actors in the armed conflict. This raises the question on whether international humanitarian law is capable of regulating the manner or mode of conducting warfare. In this regard, it should be noted that the application of military necessity in an armed conflict situation could be applicable in two different situations such as in exceptional circumstances and the other implies the justification of certain attacks which otherwise may be considered illegal. Nevertheless, beyond their specific contexts, a distinction must therefore be drawn on the basis that today legal and military experts are of the view that lawful acts may be deemed unlawful when they are devoid of minimum requirements of military necessity.

Indeed, it is important to underlined that certain points may be stressed in order to distinguish military necessity and military convenience.⁴³ In a broader perspective, as the proportionality of the planned actions is considered before allowing or commencing an attack⁴⁴ under the guise of military necessity, it is then argued that Russia's alleged reliance on military necessity for the invasion of Ukrainian territory does not comply with the humanitarian principle of proportionality requirements which suggests that military commanders should ensure that the injury, damage and losses resulting from a military action are not excessive compared to the

⁴² Ibid, Article 13.

⁴³ United States department of Defence, Law of War Manual 12 June 2015, 9 <https://www.archive.defense.gov/pubs/law-ofwar-manual-june-2015.pdf> accessed 30 July 2022.

⁴⁴ W. Ways Parks, Special Forces' Wear of Non-Standard Uniform (2003) 4 Chicago Law journal 494, 545.

expected direct military advantage.⁴⁵ This critical and contextual prism can also be of help in accessing the extent of application of the military actions in the Ukrainian territory.

Most fundamentally, it is often assumed that in trying to achieve the direct military advantage there may be injuries, losses and damage of civilian properties which in the right sense violates the principle of proportionality. Also, with regards to the principle of proportionality, it may be argued that whatever view that is adopted as to the applications of military necessity, it is clear that the United States's interpretations of military advantage in the 2013 United States Joint Targeting Document⁴⁶ suggests a much wider understanding than what can be deduced from the wordings of the Additional Protocol 1. The argument here might be that Additional Protocol 1 is more restrictive, and limits the possible objects of attacks to those which is dependent on a particular characteristics of any further military actions.⁴⁷

At a deeper level, the fact that Russian armed forces had continued to based their claims on military necessity in the Ukrainian territory, it must be emphasized that whatever informed their claims as justification for military actions against Ukraine should be established on the basis of a balance between military actions and humanitarian considerations. Against this backdrop, it is not disputed that humanitarian considerations and the principle of humanity are most times used inter changeably, as both imply respect for human life, physical security, dignity and human rights of persons. Drawing on the balancing of military necessity and humanitarian considerations, it needs to be noted that in addition to the Russia's claims of justification for the applications of military necessity, there are obvious benefits to the complementarity role of military necessity and humanitarian considerations.⁴⁸ Also, it may be construed that the principle of distinction and the prohibition of unnecessary sufferings are considered to be elements of the principle of proportionality. In stressing the relevance of this complementary efforts, it has been notably contended that the basis of complementarity of the principles of international humanitarian law is founded on the interactions amongst the principles of international humanitarian law. In this context, it may be argued that they encouraged the interpretations of positive rules and as well served as guidance when no specific rule or rules exists to regulate certain circumstances.

Having said the above, would it be possible conceptually or theoretically to ask in light of the ongoing armed conflict in Ukraine, whether international humanitarian law is capable of meeting or addressing several challenges in the Ukrainian case without a compelling need of inventing new terms that have no place in international law? That said, it is argued that the preference for a particular procedural approach may give rise to the consequences of an emerging new technologies of warfare. Also, it may be asked whether States demands for new laws instead of respecting the existing ones currently in place? In other words, following the procedural approach to the above questions, the burden of clarifications rest on the Russian federated to demonstrate why it failed in it's obligations of respecting the rules of international humanitarian law in the ongoing armed conflict in Ukraine.

⁴⁵ O, Mayorga, "Arbitrating war: Military Necessity as a defence to the Breach of investment Treaty Obligations" (2013) Policy Brief Program on Humanitarian Policy and Conflict Research, Harvard University, 4

⁴⁶ Additional Protocol 1 1977, Article 51 5(b).

⁴⁷ Joint Targeting, Joint Publication 3-60, 31 January 2013, A-4 <[http://www.bits.de/NRANEU/Others/\(1\)p-doctrine/jp3-60\)13\)pdf](http://www.bits.de/NRANEU/Others/(1)p-doctrine/jp3-60)13)pdf)> accessed 30 July 2022.

⁴⁸ Additional Protocol 1 1977, Article 55 (2).

1.5. Conclusion

The experience of the Ukrainian populations highlights that the fundamental principles of international humanitarian law are more than an abstract code or ideological commitment. In this sense, when applied systematically, they can have important operational benefits and can help improve the desired respect of the rules of international humanitarian law. As this paper set out to perform two primary tasks: first, to contextualized the military considerations and humanitarian consequences in the Ukrainian territory by the Russian Federated within the legal particulars that informed the armed conflict in Ukraine, and secondly, to find elements of legal reasoning that sustains the legal and humanitarian culture within which it is situated.

With regard to the first the paper identified that the most aspects of *jus ad bellum* is the United Nations Charter founded under Article 2(4) prohibiting member-states from using or threatening to use force against one another, which however, contained some exceptions. The paper puzzled however, as to why Article 51 preserves member States right to act in either individual or collective self-defense in situations of armed conflict, as well as Chapter VII of the Charter that permits the United Nations Security Council to authorize military actions necessary in maintaining or restoring international peace, order and security.

Reasoning on the above provisions is heavily informed by the speech of the Russian President Vladimir Putin's justifications for the armed conflict in Ukraine, and as well as several humanitarian challenges the armed conflict have presented. The paper argued that while it is not clear that international law has had any influence on President Putin's decision-making, he has raised several justifications for his actions using international law and the United Nations Charter's terminologies. This is particularly surprising given its legal theories which centered on three arguments as stated above.

On the second aspect of finding elements of legal reasoning that sustains the legal and humanitarian culture, the paper highlighted that as the war in Ukraine proceeds beyond the initial invasion to a sustained armed conflict, *jus in bello* principles becomes more prominent. The conclusion therefore is that international humanitarian law obligates parties to take all feasible precautionary measure in protecting civilian populations and civilian infrastructures under their control from the adverse effects of armed conflict. Finally, the paper submit that legal safeguards and oversight mechanisms must be in place to ensure that the two regulatory regimes of international humanitarian law are strictly complied with and its disregard by the Russian soldiers does not continue indefinitely as these has led to several destructions of lives and properties in the Ukrainian territory.