

**I don't want the expression "military necessity" to hide laxity or indifference - it is often used in situations in which it would be more correct to speak of "military convenience" or even "personal convenience",  
( General Eisenhower, 1944 )**

### **Military necessity**

**authorises only such destruction / violence / force / means as is necessary, relevant and proportionate to accomplish the military mission and is not otherwise prohibited by the laws of war.**

**( Teaching teams, San Remo 1985 )**

## MILITARY NECESSITY IN CONVENTIONS AND STUDY LITERATURE

A list with comments to the Swedish Defence College course in LOAC, 1998 - 99

### Gen Orders no 100, Lieber Code, Instructions for the Government of Armies of the US in the field

... Prescribed among other things that military necessity does not admit of cruelty - that is, the infliction of suffering for the sake of suffering or for revenge..., Green p 27

Dr Francis Lieber defined military necessity as long ago as 1863 as " those measures which are indispensable for securing the ends of war, and which are lawful according to the modern laws and usage's of war", Rogers, p 4

### Declaration, St. Petersburg, 1868

*Passage:...*should have the effect of alleviating as much as possible the calamities of war; *The military necessity is also expressed in: ... the only legitimate purpose which states should endeavour to accomplish during war is to weaken the military forces of the enemy; Bring p 56*

### Hague Conventions 1907

*Preamble to H IV says:* These provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct,...

*The Hague conventions hold a great deal of exceptions for military necessity. This is also a way to make the conventions credible, i.e. to be aware that in certain extreme situations it can be impossible to apply the rules in a strict manner. Bring takes up some historical cases when military necessity has been alleged as an excuse, p 74-76.*

*" The law of armed conflict has its origin in both customary and conventional law. The customary law has developed and the conventional law drafted in the light of military needs, and, generally speaking, may only be disregarded in the light of military necessity when expressly permitted by the particular rule itself. The mere plea of military necessity,... is not sufficient to evade compliance with the laws of war. Otherwise, the concept of military necessity would reduce the entire body of the laws of war to a code of military convenience, having no further sanction than the sense of honour of the individual commander. ... Green p 118*

### H I V R

Art 15: Relief societies for prisoners of war, ... shall receive... every facility for the efficient performance of their humane task within the bounds imposed by military necessities and administrative regulations. ...

Art 23: In addition to the prohibitions ... it is especially forbidden-

(g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;

Art 49: If, in addition to the taxes mentioned in the above article, the occupant levies other money contributions in the occupied territory, this shall only be for the needs of the army or of the administrations of the territory in question.

Art 54: Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in the case of absolute necessity...

*Likewise they must be restored after the war. Bring p 150.*

## **H V**

Art 19: Railway material coming from the territory of neutral Powers, ... shall not be requisitioned or utilised by the belligerent except where and to the extent that it is absolutely necessary.

## **H VIII**

Art 3: When anchored automatic contact mines are employed ... to notify the danger zones as soon as military exigencies permit ...

*In the beginning of the Second World War Great Britain declared the whole Northern Coast of Germany a dangerous zone because of the mines. This was not in accordance with LOW, Bring p 173*

Art 6: The Contracting Powers which do not at present own perfected mines of the pattern contemplated in the present Convention, ..., undertake to convert the material of their mines as soon as possible, ...

## **H IX**

Chapter I - The Bombardment of undefended Ports, Towns, Villages, Dwellings, or Buildings

Art 2: ... if for military reasons immediate action is necessary, and no delay can be allowed the enemy, it is understood ... and that the commander shall take all due measures in order that the town may suffer as little harm as possible.

Chapter II - Final provisions

Art 5: In bombardments by naval forces all the necessary measures must be taken by the commander to spare as far as possible sacred edifices, buildings used for artistic, scientific, or ... on the understanding that they are not used at the same time for military purposes.

Art 6: If the military situation permits, the commander of the attacking naval force, before commencing the bombardment, must do his utmost to warn the authorities.

## **H XI**

Art 2: The inviolability of postal correspondence does not exempt a neutral mail ship from the laws and customs of maritime war ... The ship, however, may not be searched except when absolutely necessary, and then only with as much consideration and expedition as possible.

## **H XIII**

Art 17: In neutral ports ... belligerent warships may only carry out such repairs as are absolutely necessary to render them seaworthy, and ...

## **Declarations concerning the Laws of Naval War, London 1909**

*Today the London Declaration is still partly of current interest, partly of no interest. Consideration shall be taken to civil shipping, but if my own units are endangered all paragraphs are at once overthrown. The laws of war at sea are much slacker than those concerning land warfare.*

*In its report the Swedish committee for LOW has pointed out that attacks may be performed only on those enemy merchant vessels, which can be classified ( Bring p 148 ... by the responsible commanding officer for submarine operations...) as military targets and are contributing to the accomplishment of the military operations and on condition that the sinking or destroying of the vessels lead to definite military advantage.*

Art 29: Likewise the following may not be treated as contraband of war: 1) Articles serving exclusively to aid the sick and wounded. They can however, in case of urgent military necessity and subject to the payment of compensation, be requisitioned, ...

Art 44: A Vessel which has been stopped on the ground that she is carrying contraband, and which is not liable to condemnation, may be destroyed if ...

Art 51: A Captor who has destroyed a neutral vessel must, prior to any decision respecting the validity of the prize, establish that he only acted in the face of an exceptional necessity of the nature contemplated in Article 49. ...

Art 54: The captor has the right to demand the handing over, ... , provided that the circumstances are such as would, under Article 49, justify the destruction of a vessel ...

Art 114: In case of the destruction of a vessel, the captor shall be required to compensate the parties interested, unless he is able to justify the exceptional necessity of the destruction, ...

Art 116: Peace. ... When hostile acts have been committed after the signing of the treaty of peace, the former status must, as far as possible, be restored.

### **Oxford Manual of Naval War, 1913**

*In the Navy warfare, military necessity is a very common concept. This is due especially to navy traditions but also to the exposed positions of ships. Bring p 148.*



## **The Hague 1923, HAW**

Art 37: Members of the crew of a neutral aircraft ... Passengers ... Release may in any case be delayed if the military interests of the belligerent so require. ...

Art 57: Private aircraft which are found upon visit and search to be enemy aircraft may be destroyed if the belligerent commanding officer finds it necessary to do so, provided that all persons on board ...

## **Roerich Pact Washington 1935**

Art 5: The monuments and institutions ... shall cease to enjoy the privileges recognised in the present Treaty in case they are made use of for military purposes.

## **The Geneva Conventions of 1949**

### **G I**

Art 8: ... The representatives or delegates of the Protecting Powers shall not in any case exceed their mission under the present Convention. ... Their activities shall only be restricted as an exceptional and temporary measure when this is rendered necessary by imperative military necessities.

Art 10: The High Contracting Parties may at any time agree to entrust to an organisation ... the duties incumbent on the Protecting Powers ... No derogation from the preceding provisions shall be made by special agreements between Powers one of which is restricted ... in its freedom to negotiate with the other Power ... by reason of military events.

Art 12: Members of the armed forces and others ..., who are wounded or sick, shall be respected and protected in all circumstances. ... The Party to the conflict which is compelled to abandon wounded or sick to the enemy shall, as far as military considerations permit, leave with them a part of its medical personnel ...

Art 15: At all time, and particularly after an engagement, Parties to the conflict shall ... Whenever circumstances permit, an armistice or a suspension of fire shall be arranged, ...

Art 17: Parties to the conflict shall ensure that burial or cremation of the dead, carried out individually as far as circumstances permit, ...

Art 19: Fixed establishments and mobile medical units ... are, as far as possible, situated in such a manner that attacks against military objectives cannot imperil their safety.

Art 30: Personnel whose retention is not indispensable ... shall be returned to the Party to the conflict to whom they belong, as soon as the road is open for their return and military requirements permit.

Art 32: Persons ... who have fallen into the hands to the adverse Party may not be detained. ... they shall have permission to return to their country ... as soon as a route for their return is open and military considerations permit.

Art 33: ... fixed medical establishments ... may not be diverted from that purpose as long as they are required for the care of wounded and sick. Nevertheless, the commanders of forces in the field may make use of them, in case of urgent military necessity, provided that they make previous arrangements for the welfare of the wounded ...

Art 34: The real and personal property of aid societies... The right of requisition ... shall not be exercised except in case of urgent necessity, and only after the welfare of the wounded ...

Art 42: The distinctive flag of the Convention... Parties to the conflict shall take the necessary steps, in so far as military considerations permit, to make the distinctive emblems ... visible ...

*The parties shall strive to attain identification of medical transports, but it is the military commander's decision if the Distinctive emblem should be carried or not, Bring p 187*

#### Chapter IX, Repression of abuses and infractions

Art 50: ...wilful killing, torture or inhuman treatment ... and extensive destruction and appropriation of property, not justified by military necessity  
*The war crimes brought to justice in the Nürnberg trial were murder, torture, and comprehensive destruction which was not justified as military necessity, Bring p 279.*

#### **G II**

Art 8: as G I

Art 10: as G I

Art 18: as art 15 G I

Art 20: as art 17 G I

Art 27: ... small craft ...for coastal rescue operations, shall also be respected and protected, so far as operational requirements permit.

Art 28: as art 33 G I, but for sickbays onboard a warship.  
*Provided he makes proper provision for care of the sick and wounded, Green p 215*

Art 31: ... As far as possible, the Parties to a conflict shall enter the log of the hospital ship, in a language he can understand, the orders they have given the captain of the vessel.

Art 51: as art 50 G I

#### **G III**

*Selfpreservation or military necessity on the part of the captor can never provide an excuse for the murder of prisoners, Green p 198.*

Art 8: as G I

Art 19: Prisoner of war shall be evacuated, as soon as possible after their capture, ...

Art 20: ... their stay in such camps shall be as brief as possible.

Art 22: Except in particular cases which are justified by the interest of the prisoners themselves, they shall not be interred in penitentiaries.

Art 23: Whenever military considerations permit, prisoner of war camps shall be indicated in the daytime by the letters PW or PG, ...

*Bring p 197*

Art 75: Should military operations prevent the Powers concerned from fulfilling their obligation to assure the transport of the shipment referred to in ...

Art 76:... Any prohibition of correspondence ordered by Parties to the conflict, either for military or political reasons, shall be only temporary and its duration shall be as short as possible.

Art 120: ... Whenever possible, deceased prisoners of war who depended on the same Power shall be interred in the same place.

Deceased prisoners of war shall be buried in individual graves unless unavoidable circumstances require the use of collective graves. ...

Art 126: Representatives or delegates of the Protecting Power shall have permission to go to all places... Visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure. ...

Art 130: as art 50 G I

#### **G IV**

*Bring p 138, ... if the attacker has the possibility to choose between several targets and the military advantage is the same, the attack shall be launched at the target, where least danger for civilians and civilian property will occur. Also the defending part is put under an obligations to be prescient and protect civilians in order not to let "military necessity" become a necessity due to bad planning.*

Art 5: ... Where in occupied territory an individual protected person is detained as a spy or saboteur,... such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communications under the present Convention. ...

Art 9: as art 8 G I

Art 11: ... functions performed ... by the Protecting Power... No derogation from the preceding provisions shall be made ... between Powers one of



which is restricted, even temporarily, in its freedom to negotiate with the other Power ... by reason of military events, ...

Art 16: The wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect. As far as military considerations allow, each Party to the conflict shall facilitate ...

Art 18: The Parties to the conflict shall, in so far as military considerations permit, take the necessary steps to make the distinctive emblems indicating civilian hospitals clearly visible ...

Art 23: ... The obligation of the HCP to allow the free passage of the consignments indicated in the preceding paragraph is subject to the condition that this Party is satisfied that there is no serious reason for fearing : c) that a definite advantage may accrue to the military efforts or ....

Art 26: ... enquiries ... provided they are acceptable to it and conform to its security regulations.

Art 30: Protected persons shall have every facility for making application to the Protecting Powers ... These several organisations shall be granted all facilities for that purpose by the authorities, within the bounds set by military or security considerations. ...

Art 35: All protected persons who may desire to leave the territory at the outset of, or during a conflict, shall be entitled to do so, unless their departure is contrary to the national interest of the State.

Art 39: Protected persons shall ... be granted to find paid employment. That opportunity shall, subject to security considerations ... be equal to that enjoyed by the nationals ...

Art 42 The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessart. ...

Art 49: ...forcible transfers,... Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. ...The Occupying Power shall not detain protected persons in an area particularly exposed ... unless the security of the population or imperative military reasons so demand. ...

*Evacuation must not involve displacement of protected persons outside the occupied territory, except when material reasons make it impossible to avoid this, Green p 229.*

Art 51: ... Every such person shall, so far as possible, be kept in his usual place of employment ...

Art 53: Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, ... is prohibited,

except where such destruction is rendered absolutely necessary by military operations.

Art 55: ... The Protecting Power shall, at any time, be at liberty to verify the state of food and medical supplies in occupied territories, except where temporary restrictions are made necessary by imperative military requirements.

Art 57: The Occupying Power may requisition civilian hospitals only temporarily and only in cases of urgent necessity...

Art 60: ... The Occupying Power shall in no way whatsoever divert relief consignments from the purpose for which they are intended, except in cases of urgent necessity, in the interests of the population ...

Art 64: The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or ...

Art 74: Representatives of the Protecting Power shall have the right to attend the trial of any protected person, unless the hearing has, as an exceptional measure, to be held in camera in interest of the Occupying Power...

Art 78: If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons...

Art 83: ... Whenever military considerations permit, internment camps shall be indicated by the letters IC ...

Art 85: The Detaining Power is bound to take all necessary and possible measures to ensure that protected persons shall, ...

Art 107: Internees shall be allowed to send and receive letters and cards. If the Detaining Power deems it necessary to limit the number ...

Art 108: ... Should military necessity require the quantity of such shipment to be limited, due notice thereof shall be given to...

Art 111: Should military operations prevent the Powers concerned from fulfilling their obligation to ensure the conveyance of the mail ...

Art 112: Any prohibition of correspondence ordered by the Parties to the conflict either for military or political reasons, shall only be temporary ...  
*If absolute military security requires, these persons may be deemed to have lost any rights of communication with the exterior granted by the Convention. However, as soon as the security ..., Green p 221.*

Art 127: The transfers of internees... If, as an exceptional measure, such removals have to be effected on foot, ...

Art 130: As art 17, G I

Art 143: As art 128 G III

Art 147: As art 50 G I

## **Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954**

### **H. CP**

Bring p 130-131

Art 4: Respect for Cultural Property ... 2. The obligation mentioned ... may be waived only in cases where military necessity imperatively requires such a waiver. ...

Art 8: Granting of special protection ... provided they ... b) are not used for military purposes.

Art 11: ... Apart from the case provided in paragraph 1 of the present Article, immunity shall be withdrawn from cultural property under special protection only in exceptional cases of unavoidable military necessity, and only for such time as the necessity continues. Such necessity can be established only by the officer commanding a force the equivalent of a division in size or larger. ...

### **H. CP. R**

Art 8: Granting special protection. ... provided that they ... b) are not used for military purposes.

Art 19: Occupied territory. ... transfers cultural property ..., that such transfer was rendered necessary by circumstances.

## **PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS, 1977**

### **GP I**

*From the Protocol one can understand that in warfare separation between military targets on one hand and the civilian population and civilian property on the other hand, is demanded, the so called principle of distinction, Bring p 60.*

*Attacks on military targets must be limited or avoided, if the importance of the attacks is not in proportion to the danger of civilian population. This is called the principle of proportionality. The big area bombings during the second world war, as Dresden, nowadays are considered contrary to international law. Bring p 61.*

*The Protocol grants three objects - dams, dykes and nuclear power plants - almost total protection. The prohibition of attack is valid but even in this case there is space for exception from the rule due to military necessity. Bring p 135*

Art 10: Protection and care. ... In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care...

Art 54: Protection of objects indispensable to the survival of the civilian population. 5. In recognition of the vital requirements of any Party to the conflict in the defence of its

national territory against invasion, derogation from the prohibitions ... may be made ... where required by imperative military necessity.

Art 56: Protection of works and installations containing dangerous forces. 2. The special protection against attack provided by paragraph 1 shall cease: a) for a dam or dyke ... direct support of military operations.  
b) for a nuclear electric generating station... direct support of military operations  
c) for other military objectives located in the vicinity ... direct support of military operations.  
5. ... avoid locating any military objectives in the vicinity of the works ... installations erected for the sole purpose of defending the protected works or installations are permissible and shall not themselves be made the object of attack ...

Art 57: Precautions in attack. 2.c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

See Bring 124-126 on area bombing

Art 62: General protection. 1. Civilian civil defence organisations ... They shall be entitled to perform their civil defence tasks except in case of imperative military necessity.

*Bring p 208*

*... are entitled to carry out their task subject to imperative military necessity, Green p 243. It is difficult to appreciate why the word imperative is used, for "military necessity" is only recognised for disregarding protective provisions in the Conventions and Protocol when this is absolutely necessary. Green footnote ss*

Art 67: Members of the armed forces and military units assigned to civil defence organisations. ... 4. The material and buildings ... may not be diverted from their civil defence purpose ... except in case of imperative military necessity, ...

Art 71: as art 108 G IV

Art 78: Evacuation of children. 1. No Party ... shall arrange for the evacuation ... except for a temporary evacuation where compelling reasons of the health or medical treatment of the children or, ... their safety, so require.

## **GP II**

*Military necessity can only be found in one paragraph in Protocol II, but, as Bring puts it in page 77: " this type of governmental instinct of self-preservation argumentation are overly represented in other ways. Article 3 in Protocol II prescribe that nothing in the Protocol can be referred aiming to influence the sovereignty of a State; neither aiming to influence the responsibility of the Government to, with all legal means preserve or restore law and order in the State..."*

Art 17: The displacement of the civilian population shall not be ordered for reason related to the conflict unless the security of the civilians involved or imperative military reasons so demand. ...

## **Convention on prohibitions or restrictions on the use of certain conventional weapons ... G.CW, 1980**

*Nuclear weapons are not in the conventions more than indirect. Green, p 126 has called attention to this in a excellent way: "While there may be controversy as to the legality or otherwise of nuclear weapons used against cities constituting military objectives, in so far*

*as there may exist smaller weapons of the tactical kind for use in the battlefield and the fallout and longterm effects of which may be controlled, it would appear that there is no doubt as to their legality, provided it could be maintained that the suffering caused to the combatants was not disproportionate in view of the military end to be achieved."*

## **Prot II**

Art 3: General restrictions on the use of mines, booby-traps and other devices. ... Feasible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.

Art 4: ... It is prohibited to use weapons .. unless either: a) they are placed on or in the close vicinity of a military objective belonging to or under the control of an adverse party ...

Art 5: 1. The use of remotely delivered mines is prohibited unless such mines are only used within an area which is itself a military objective or which contains military objectives, ... 2. Effective advance warning shall be given of any delivery or dropping of remotely delivered mines which may effect the civilian population, unless circumstances do not permit, ...

Art 7: 2. The Parties shall endeavour to ensure the recording of the location of all other minefields

Art 9: ...After the cessation of active hostilities, the Parties shall endeavour to reach agreement, ... necessary to remove or otherwise render ineffective minefields, ...

## **Protocol III**

Art 1: Definitions, se art 3, Prot II

Art 2: Protection of civilians and civilian objects... 3. It is further prohibited to make any military objective located within a concentration of civilians the object of attack by means of incendiary weapons other than air-delivered incendiary weapons, ...

*In the first report to US Congress on Conduct of the Persian Gulf War, 1992, it states ... the principle of proportionality prohibits military action in which the negative effects ... such as collateral civilian casualties, ... clearly outweigh the military gain. This balancing may be done on target-to-target basis, ... but also may be weighed in over-all-terms against campaign objectives, Green p 120, footnote*

*The principles of necessity and humanity are complementary, seeking to adjust the means essential to realise the purpose of the conflict with the minimisation of human suffering and physical destruction. Green p 122.*

**Expressions used for military necessity**