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Military necessity

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Summary

This thesis develops a theory of military necessity that systematically probes the notion's normative characteristics and explains its various contexts. In so doing, it is guided by two research questions. First, what does it mean to say that international humanitarian law "accounts for" military necessity? Second, to what normative consequences does the law "accounting for" military necessity give rise?

In its material context, military necessity is an element of belligerent conduct which separates fighting that is effective and conducive to success from fighting that is neither. The notion merely entails the truism that it is in each belligerent's strictly strategic self-interest to maximise his or her abilities, and that it is similarly in each belligerent's strictly strategic self-interest to avoid failures.

So understood, material military necessity does not involve any requirement of *sine qua non* causation. It is a relational concept, because the degree to which a given course of action is militarily necessary changes depending on the availability of alternative courses of action, military ends and sets of circumstances. It is also an evaluative notion, since the material military necessity of this or that act is susceptible to reasonable assessment given enough facts – though not all reasonable assessors of comparable experience or competence may come to the same conclusion on the matter. Furthermore, it is situation-specific insofar as no military necessity assessment of particular conduct can be meaningfully generalised.

Just as acts can constitute material military necessities, they can constitute non-necessities. Examples of the latter include futility, purposelessness, wastefulness, excessiveness, and impertinence.

Military necessity can be construed in its strictly material – i.e., *amoral* – context. That is so, although there may be something moral about a particular belligerent act being vocationally competent or incompetent. The same is true notwithstanding the fact that it can indeed be the ethical duty of a soldier to fight competently by doing his or her best to pursue material military necessities and avoid non-necessities. It may be that only ethically competent fighting counts as truly vocationally competent fighting, all things considered. Even such a holistic understanding of military competence includes elements that are strictly material, however, and it is meaningful to discuss these elements when trying to understand what military necessity encompasses.

In its normative context, military necessity is indifferently permissive. It prompts the framers of international humanitarian law (IHL) to leave the belligerent at liberty not only to pursue what is materially necessary to succeed and avoid what is unnecessary, but also to imperil itself by forgoing the former and encumbering itself with the latter. Conversely, IHL framers have no reason to obligate acts on account of their military necessity, or to prohibit those on account of their non-necessity.

The mere fact that a given belligerent act lacks material military necessity *vis-à-vis* its legitimate military purpose does not mean that the act becomes illegitimate *for that reason alone*. In IHL norm-creation, material military necessity or non-necessity is indeed an element in the legitimacy modification of an act that is deemed evil. It is, however, not an element in the legitimacy modification of *any* belligerent act, much less an act that is not considered evil in the first place. Plainly, although international humanitarian law endeavours to accommodate the pursuit of military necessities, the law does not make it its business to save incompetent belligerents from themselves. If a warring party misses opportunities and commits blunders, it has only itself to blame. This is not to say that international humanitarian law completely ignores evil that is exclusively self-inflicted. In some circumstances, the law does mandate action with a view to reducing such evil.

This thesis refutes a predominant normative theory according to which military necessity and humanity are fundamentally irreconcilable with each other. The said theory advances six erroneous assertions. First, what is militarily necessary is always inhumane, and what is humane is always militarily unnecessary. Second, both military necessity and humanitarian considerations generate imperatives. Third, compliance with military necessity imperatives precludes compliance with humanitarian imperatives, and *vice versa*. Fourth, "accounting for" military necessity and humanity entails preempting conflicting considerations of military necessity and humanity from leading to the adoption

of conflicting IHL rules. Fifth, every positive IHL rule embodies a compromise between irreconcilable demands of military necessity and humanity. Sixth, neither *de novo* military necessity pleas nor *de novo* humanity pleas are admissible *vis-à-vis* unqualified IHL rules.

This thesis shows, first, that some belligerent acts are both militarily necessary and humane, or both militarily unnecessary and inhumane. This is consistent with the fact that the kind of belligerent behaviour that is IHL-compliant (and, arguably, consistent with humanity) tends to be disciplinarily sound (and, arguably, consistent with military necessity).

Second, all military necessity considerations are normatively indifferent. In the context of IHL norm-creation, military necessity not only permits belligerents to perform materially necessary acts and avoid unnecessary acts but also permits them to forgo necessities and endure non-necessities. In other words, it neither obligates, restricts nor prohibits. Some humanitarian considerations are also normatively indifferent. Humanity praises rather than demands some acts that are deemed humane. It also tolerates rather than condemns some deemed inhumane.

Third, whenever military necessity permits what humanity demands, or whenever the former tolerates what the latter condemns – i.e., whenever the two considerations align themselves – , it always remains open to the belligerent to act in a manner that satisfies both simultaneously. Even where military necessity permits yet humanity condemns the same conduct, or where a given act is tolerated by military necessity yet demanded by humanity – i.e., when the two considerations contradict one another – , the belligerent can still satisfy both considerations by acting in accordance with humanitarian imperatives.

Fourth, “accounting for” military necessity and humanity means that IHL framers fail, decline or elect to obligate behaviour that jointly satisfies these considerations. The framers often posit unqualified IHL obligations to perform what military necessity permits and humanity demands. They also tend to impose unqualified IHL prohibitions against what military necessity tolerates and humanity condemns. The situation is different where inhumane and militarily unnecessary acts are of a nature to involve exclusively self-inflicted evil; where humane and militarily necessary acts are of a nature to involve what humanity praises rather than demands; and where *third* considerations, such as sovereign interests, block the adoption of unqualified IHL rules.

Where military necessity and humanity contradict each other, IHL framers “account for” these considerations by positing an unqualified, principal, indeterminate or exceptional obligation to pursue their joint satisfaction. In some cases, however, positive IHL rules affirmatively authorise the belligerent not to act in a jointly satisfactory manner. Elsewhere, the absence of a positive rule obligating the pursuit of joint satisfaction implies the law’s failure to impose one. Despite suggestions to the contrary, it is doubtful whether the Martens Clause itself creates a general presumption whereby the belligerent is obligated to choose joint satisfaction unless expressly authorised not to do so.

Fifth, not every unqualified rule of positive international humanitarian law embodies the military necessity-humanity interplay. Some involve military necessity but not humanity in the process of their norm-creation. Conversely, there are also unqualified rules whose creation involves humanity but not military necessity.

Sixth, unqualified IHL rules *ipso facto* excludes *de novo* military necessity pleas, but it is not clear whether they also exclude *de novo* pleas emanating from humanitarian imperatives. Positing an unqualified IHL rule logically precludes all *de novo* pleas that emanate from indifferent considerations. It does so, even if these considerations do not specifically appear in the process of that rule’s creation. Since military necessity in its normative context is a set of indifferent considerations, *de novo* military necessity pleas are *ipso facto* inadmissible *vis-à-vis* unqualified IHL rules. This invalidates existing theories, such as those according to which military necessity trumps IHL rules (*Kriegsräson*) and the law illegalises unnecessary acts even if they are otherwise IHL-compliant (counter-*Kriegsräson*).

The same exclusionary effect may not necessarily apply to all humanitarian considerations. Some of them are normatively indifferent and, accordingly, inadmissible as bases for *de novo* pleas *vis-à-vis* unqualified IHL rules. Humanity also demands actions and condemns others, however. Since we have reason to believe that non-indifferent considerations may survive the process of IHL

norm-creation, we also have reason to accept the possibility that they may modify an act's lawfulness over and above unqualified rules of positive international humanitarian law.

In its juridical context, military necessity exempts conduct from certain positive IHL rules that principally prescribe contrary behaviour. Exceptional military necessity modifies the content of the principal rule to which it is attached. It is therefore distinct from the state of necessity as a circumstance precluding the wrongfulness under the international law of state responsibility. Conduct in fulfilment of exceptional military necessity's requirements comports with the principal rule and does not constitute an internationally wrongful act in the first place.

There are four cumulative requirements that an act must satisfy. To begin with, it must be taken primarily for some specific military purpose. In addition, the act must be "required" for the purpose's attainment. In order to be considered "required", the act must be materially relevant to the purpose, constitute the least evil among those options that are materially relevant and reasonably available, and remain within an acceptable injury-benefit ratio. Furthermore, the purpose sought must be in conformity with international humanitarian law. Lastly, the act itself must otherwise be in conformity with that law. It should also be noted that exceptional military necessity pleas based solely on hindsight are inadmissible. Under certain circumstances, a person's reliance on exceptional military necessity may become invalid by virtue of his or her status alone.

Juridical military necessity also manifests itself as a negative element of certain war crimes and crimes against humanity. Offences such as those involving property destruction and forcible population displacement are built on substantive IHL rules that admit military necessity exceptions. The onus rests with the prosecution to show the absence of military necessity in order to prove that these crimes have been committed. When a rule envisages an exception, and when the rule's violation constitutes a crime, it is only logical that the absence of circumstances that satisfy the exception's requirements is itself an element of that crime.

The International Criminal Tribunal for the Yugoslavia (ICTY) has dealt with property destruction in the context of combat, property destruction outside of combat, and deportation as well as forcible transfer, in its voluminous case law. A detailed examination of their findings reveals that, despite some mishaps, ICTY judges have by and large presented a coherent picture of exceptional military necessity as an element of punishable offences. The International Criminal Court (ICC) finds itself at a much earlier stage of its jurisprudential development. ICC rulings on military necessity to date are more limited in content and sophistication as a result. One potential source of contention concerns some of the grounds for excluding individual criminal responsibility that are listed under Article 31 of the ICC Statute. These grounds are vulnerable to abuse as backdoors through which defendants may attempt to introduce *de novo* military necessity pleas as a justification or excuse for their crimes.